IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Susan Doxtator, Arlie Doxtator, and Sarah Wunderlich, as Special Administrators of the Estate of Jonathon C. Tubby,

Plaintiffs,

vs.

Erik O'Brien, Andrew Smith, Todd J. Delain, Heidi Michel, City of Green Bay, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer, Thomas Zeigle, and John Does 1-5,

Defendants.

Case No. 1:19-cv-00137-WCG

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL AND FOR SANCTIONS

Plaintiffs Susan Doxtator, Arlie Doxtator, and Sarah Wunderlich (collectively "Plaintiffs"), in their capacities as the special administrators of the Estate of Jonathon C. Tubby, submit this Memorandum of Law in support of their Motion to Compel and For Sanctions.

INTRODUCTION

This case concerns the shooting death of Jonathon Tubby ("Mr. Tubby"). Mr. Tubby was shot by a Green Bay police officer while he was in custody at the Brown County jail, unarmed, face down, on the ground, and restrained by a police canine. As a result of this fatal shooting, Plaintiffs assert a number of claims under 42 U.S.C. § 1983 and Wisconsin state law, including claims that Brown County failed to train officers on

the constitutional use of force to remove a suspect from a squad car, Brown County created the danger in the sally port that ultimately led to Mr. Tubby's death, and Brown County was negligent in the events leading up to Mr. Tubby's death.

On February 21, 2020, Plaintiffs served a Rule 30(b)(6) deposition notice on Brown County, a named defendant in the instant lawsuit. In response to the deposition notice, Defendants agreed to produce a Rule 30(b)(6) deponent to testify to Topics 3 through 13 listed in the notice, but failed to designate a deponent to testify to Topics 1 and 2. Topics 1 and 2 concern straightforward and relevant matters: (1) Brown County's efforts to determine whether Mr. Tubby was armed, and (2) any exigencies that exist that required Brown County to remove Mr. Tubby from a police squad car (which Brown County did by forcing Mr. Tubby from the vehicle using pepper spray).

Brown County has refused to produce a designee for Topics 1 and 2. Brown County's purported basis to produce a designee for these topics is that Brown County employee, Defendant Thomas Zeigle ("Lt. Zeigle"), would be the designee but already was deposed. Brown County's refusal to designate a Rule 30(b)(6) deponent to testify to two plainly relevant Topics in a deposition notice violates foundational discovery principles and is contrary to both the text and purpose of Rule 30(b)(6). The text of the Rule plainly notes that a deposition of a designee does *not* preclude another deposition by any other allowable procedure. Moreover, the purpose of Rule 30(b)(6) is to obtain testimony of an organization—not an individual. Lt. Zeigle's prior deposition did not purport to be on behalf of Brown County. This Court should grant Plaintiffs' motion to compel, order that Brown County designate a Rule 30(b)(6) deponent for Topics 1 and 2

in Plaintiffs' Rule 30(b)(6) deposition notice to Brown County, and award sanctions in favor of Plaintiffs for their costs and attorneys' fees incurred in preparing this motion.

BACKGROUND

On October 19, 2018, Mr. Tubby was shot and killed while in custody at the sally port of the Brown County Jail. 3d Am. Compl. ¶ 1. At the time he was shot, Mr. Tubby was unarmed, face-down on the ground, and restrained by a police canine. *Id.* Among claims against other defendants, Plaintiffs have asserted several claims directly against Brown County. *See id.* at ¶¶ 43-49, 62-71, 77-88, 91-93. Plaintiffs' claims allege, *inter alia*, that Brown County failed to train officers on the constitutional use of force to remove a suspect from a squad car, created the danger in the sally port that ultimately led to Mr. Tubby's death, and was negligent in the events leading up to Mr. Tubby's death. *See id.*

On February 21, 2020, Plaintiffs served on Defendants a Notice of Rule 30(b)(6) Deposition of Brown County. *See* Tahdooahnippah Decl., Ex. A. Plaintiffs directed Brown County to "designate and produce for deposition one or more of its employees, officers, directors, agents, or other persons duly authorized to testify on their behalf regarding the topics set forth in Exhibit A" to the Notice. *Id.*, Ex. A at 1. As listed in Exhibit A, Plaintiffs sought Brown County's testimony on 13 Topics. *Id.*, Ex. A at 5-6. Topics 1 and 2 in Exhibit A to Plaintiffs' Notice of Rule 30(b)(6) Deposition of Brown County are the following: (1) "Your efforts, or the efforts of your officers, to determine whether Mr. Tubby was armed after his arrest on October 19, 2018, including any efforts to contact family members including but not limited to Theresa Rodriguez"; and (2) "The

existence of any exigencies on the night of October 19, 2018 requiring the removal of Mr. Tubby from Officer Wernecke's squad car." Tahdooahnippah Decl., Ex. A at 5.

On May 1, 2020, Plaintiffs followed up with Brown County about scheduling its Rule 30(b)(6) deposition, and followed up again on May 15, 2020. Tahdooahnippah Decl. ¶ 3. On June 2, 2020, Brown County finally provided potential dates for its Rule 30(b)(6) deposition, but stated that it would not be producing any witness to testify regarding Topics 1 and 2. *Id.* ¶ 4. By email correspondence on June 10, 2020, Brown County claimed that it would not produce a witness for Topics 1 and 2 because the person that they would call to testify to Topics 1 and 2—Lt. Thomas Zeigle—has already been deposed by Plaintiffs' counsel in his individual capacity, he can skip the Rule 30(b)(6) deposition, and Brown County is relieved of its obligation under Rule 30(b)(6) to produce someone to testify to Topics 1 and 2. Tahdooahnippah Decl. ¶ 5, Ex. B.

ARGUMENT

A. Standard of Review

It is well-established that "[a] deposition of an individual is not the equivalent of a deposition of an organization under Rule 30(b)(6)." *Ball Corp. v. Air Tech of Mich., Inc.*, 329 F.R.D. 599, 603-04 (N.D. Ind. 2019) (citing *DSM Desotech Inc. v. 3D Sys. Corp.*, 2011 U.S. Dist. LEXIS 3292, 2011 WL 117048, at *10 (N.D. Ill. 2011)). "A Rule 30(b)(6) witness may 'testify not only to matters within his personal knowledge but also to 'matters known or reasonably available to the organization.'" *Id.* at 604 (quoting *PPM Finance, Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894-95 (7th Cir. 2004) (quoting Rule 30(b)(6))). "The fact that other persons with discoverable information were deposed or

will be deposed does not relieve [a party] of its obligations under Rule 30(b)(6)." *DSM Desotech Inc. v. 3D Sys. Corp.*, No. 08 C 1531, 2011 U.S. Dist. LEXIS 3292, at *29 (N.D. Ill. Jan. 12, 2011).

Rule 37 provides that if a party fails to designate a deponent under Rule 30(b)(6), the discovering party may move to compel such a designation. Fed. R. Civ. P. 37(a)(3)(B)(ii). Therefore, where a party has refused to designate a deponent to testify to topics in a Rule 30(b)(6) deposition notice, courts routinely compel the refusing party to produce a deponent, even if the proper Rule 30(b)(6) deponent has been or could be deposed in his individual capacity. *See, e.g.*, *Alloc, Inc. v. Unilin Decor N.V.*, No. 02-C-1266, 2006 U.S. Dist. LEXIS 65889, at *6-8 (E.D. Wis. Aug. 29, 2006) (granting motion to compel Rule 30(b)(6) deposition of two deponents, even though the two deponents had already been deposed in their individual capacities); *Ball Corp. v. Air Tech of Mich., Inc.*, 329 F.R.D. 599, 604 (N.D. Ind. 2019) (granting motion to compel the refusing party to designate a Rule 30(b)(6) deponent whose testimony would be binding on the organization, despite the refusing party's preference that the discovering party depose the person only in his individual capacity under Rule 30(b)(1)); *see also United States v. Taylor*, 166 F.R.D. 356, 360-62 (M.D.N.C. 1996) (distinguishing individual depositions from Rule 30(b)(6) depositions and collecting illustrative cases nationwide).

If the Court grants Plaintiffs' Motion to Compel, or if Brown County provides the discovery Plaintiffs seek after they file their Motion, Rule 37(a)(5)(A) "require[s] the party . . . whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion,

including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A); *see, e.g.*, *Menendez v. Wal-Mart Stores E. L.P.*, No. 1:10-CV-00053, 2012 U.S. Dist. LEXIS 81710, at *7-10 (N.D. Ind. June 13, 2012) (awarding reasonable expenses incurred in filing motion to compel to Plaintiffs under Rule 37(a)(5)(A) where the defendant refused to designate a Rule 30(b)(6) deponent). The court may not order such payment only if: "(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii).

B. This Court Should Compel Brown County to Designate a Rule 30(b)(6) Deponent to Testify to Topics 1 and 2 in Plaintiffs' Rule 30(b)(6) Deposition Notice to Brown County

Brown County refuses to designate a Rule 30(b)(6) deponent to testify on its behalf for two plainly relevant Topics, despite Rule 30(b)(6)'s requirement that it must. Rule 30(b)(6) provides that the organization named in a Rule 30(b)(6) deposition notice must "designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify." Fed. R. Civ. P. 30(b)(6). The designated person(s) "must testify about information known or reasonably available to the organization." *Id.* Crucially, Rule 30(b)(6) "does ***not*** preclude a deposition by any other procedure allowed by these rules." *Id.* (emphasis added).

Brown County has represented to Plaintiffs that it refuses to designate a deponent for Topics 1 and 2 because Plaintiffs have already deposed the person whom Brown

County would designate to testify to Topics 1 and 2—Lt. Thomas Zeigle. The County's purported rationale to avoid designating a deponent is unavailing for several reasons. First, the fact that Plaintiffs previously deposed Lt. Zeigle is of no moment because Plaintiffs deposed Lt. Zeigle in his *individual* capacity, *not* as a representative of Brown County under Rule 30(b)(6). The text of Rule 30(b)(6) plainly contemplates that the same person may be deposed under another rule in addition to under Rule 30(b)(6) because the Rule expressly "*does not preclude* a deposition by any other procedure allowed by these rules." Fed. R. Civ. P. 30(b)(6) (emphasis added). Therefore, if Lt. Zeigle is the best person to testify on behalf of Brown County as to Topics 1 and 2, as Defendants represent he is, Defendants must produce him for the Rule 30(b)(6) deposition, unless they can identify another appropriate deponent.

Second, a Rule 30(b)(6) deponent must testify to "information known or reasonably available to *the organization*." Fed. R. Civ. P. 30(b)(6) (emphasis added). When Plaintiffs' counsel deposed Lt. Zeigle in his individual capacity, he testified only to information within his personal knowledge. In contrast, if Lt. Zeigle were to be produced at the Rule 30(b)(6) deposition, Rule 30(b)(6) would require him to testify to information known or reasonably available to *Brown County*, and his answers would constitute *Brown County's* answers and bind *Brown County*. Therefore, Lt. Zeigle can be deposed under Rule 30(b)(6) because the pool of knowledge that Lt. Zeigle would draw from in a Rule 30(b)(6) deposition, is different from the knowledge he drew from when he was deposed in his individual capacity, and further, his answers would bind Brown County.

Alloc, Inc. v. Unilin Decor N.V. illustrates why Brown County must designate a deponent to testify to Topics 1 and 2. No. 02-C-1266, 2006 U.S. Dist. LEXIS 65889 (E.D. Wis. Aug. 29, 2006). In *Alloc*, the discovering party moved to compel the responding party to produce deponents for a Rule 30(b)(6) deposition. *Id.* at *2. The responding party apparently would have designated two employees who had already been deposed as its Rule 30(b)(6) designees because it argued that the discovering party "is attempting to take 'two bites at the apple' by deposing the very same witnesses on the very same topics on which they have already been deposed." *Id.* at *3. The court disagreed with the responding party, holding that the responding party must produce the two deponents for the Rule 30(b)(6) deposition, even if they had already been deposed in their individual capacities. *Id.* at *8. The court explained that "[a] Rule 30(b)(6) deponent's testimony does not represent the knowledge or opinions of the deponent, but that of the business entity." *Id.* at *6 (citing *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1999)). The court elaborated that "[t]he duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved," which creates a "qualitative difference" in testimony that one person may give as an individual and as a Rule 30(b)(6) deponent. *Id.* at *7-8. Therefore, the discovering party was entitled to depose designated Rule 30(b)(6) witnesses, even if it had already deposed them in their individual capacities.

Here, the court should compel Brown County to designate a deponent for Topics 1 and 2 under *Alloc*'s rationale. Although Plaintiffs have deposed Lt. Zeigle in his individual capacity, Brown County must produce him as a Rule 30(b)(6) deponent if they

have no alternative because his Rule 30(b)(6) testimony would represent Brown County's testimony, rather than his individual testimony. Further, Lt. Zeigle's preparation for the Rule 30(b)(6) deposition would "go[] beyond matters personally known to [him] or to matters in which [he] was personally involved." *Alloc, Inc.*, 2006 U.S. Dist. LEXIS 65889, at *7. Therefore, this Court should compel Brown County designate a Rule 30(b)(6) deponent for Topics 1 and 2 in Plaintiffs' Rule 30(b)(6) deposition notice.

Further, any arguments that Plaintiffs' Rule 30(b)(6) deposition would be duplicative or violate Rule 26's proportionality requirement are unavailing. "[T]here is a qualitative difference in the testimony that one witness may give as an individual and as a Rule 30(b)(6) deponent." *Alloc, Inc. v. Unilin Decor N.V.*, No. 02-C-1266, 2006 U.S. Dist. LEXIS 65889, at *8 (E.D. Wis. Aug. 29, 2006). "Because depositions given by individuals on their own behalf and depositions given by organizations' designees are qualitatively different, proposed depositions under Rule 30(b)(6) are not duplicative and will not violate the proportionality requirement of Rule 26." *Ball Corp. v. Air Tech of Mich., Inc.*, 329 F.R.D. 599, 606 (N.D. Ind. 2019) (citing *Babjak v. Arcelormittal USA, LLC*, 2016 U.S. Dist. LEXIS 104660, 2016 WL 4191050, at *1 (N.D. Ind. 2016)).

C. Plaintiffs Are Entitled to Sanctions

Plaintiffs are entitled to sanctions for costs incurred in preparing this motion. Rule 37 states that if a motion to compel is granted, "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion . . . to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A). This Rule "presumptively requires

every loser to make good the victor's costs . . . ." *Menendez v. Wal-Mart Stores E. L.P.*, No. 1:10-CV-00053, 2012 U.S. Dist. LEXIS 81710, at *7 (N.D. Ind. June 13, 2012) (quoting *Rickels v. City of South Bend*, 33 F.3d 785, 786 (7th Cir. 1994)). Rule 37 provides only three exceptions to the general rule that the refusing party must pay the discovering party's costs in a successful motion to compel. Specifically, "the court must not order this payment if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii).

Here, none of the three exceptions applies. First, Plaintiffs attempted in good faith to obtain a Rule 30(b)(6) deponent to testify to Topics 1 and 2 prior to filing this motion. Tahdooahnippah Decl. ¶ 6. Second, as set forth in Section B above, Defendant's refusal to designate a Rule 30(b)(6) deponent for Topics 1 and 2 was not substantially justified. Third, the simple and straightforward nature of this dispute raises no compelling issues that weigh against the award of costs, or that would render the award of costs unjust. Plaintiffs' counsel respectfully requested that Defendants designate a Rule 30(b)(6) deponent for Topics 1 and 2 in its deposition notice and several times in subsequent conversations. Nevertheless, Defendants repeatedly refused to designate a person to testify to Topics 1 and 2. Accordingly, no special factors weigh against the Court following the default rule awarding sanctions to the discovering party in a successful motion to compel.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion to compel, order that Brown County designate a Rule 30(b)(6) deponent for Topics 1 and 2 in Exhibit A to Plaintiffs' Rule 30(b)(6) deposition notice to Brown County, and award sanctions in favor of Plaintiffs for their costs and attorneys' fees incurred in preparing this motion.

Dated: June 17, 2020

By */s/ Forrest Tahdooahnippah*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of June, 2020, I served the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL via the Court's CM/ECF system, causing Defendants to be served electronically.

/s/ Forrest Tahdooahnippah
Forrest Tahdooahnippah