IN THE 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,

Case No. 19-CV-00137

v.

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

Defendants.

DEFENDANTS TODD J. DELAIN, HEIDI MICHEL, BROWN COUNTY, JOSEPH P. MLEZIVA, NATHAN K. WINISTERFER, AND THOMAS ZEIGLE'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL AND FOR SANCTIONS (ECF NO. 88)

The above-named Defendants, Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer, and Thomas Zeigle (collectively, "County Defendants"), by their attorneys, Crivello Carlson, S.C., respectfully submit the following Brief in Opposition to Plaintiffs' Motion to Compel and for Sanctions, (ECF No. 88.)

BACKGROUND

Plaintiffs move to compel Brown County to produce a witness under Fed. R. Civ. P. 30(b)(6) to testify about two topics requiring firsthand, personal knowledge of the events that took place on the night that a Green Bay Police Officer used deadly force on Jonathon Tubby. Plaintiffs frame those two topics as follows: (1) "[Brown County's] efforts, or the efforts of

[Brown County's] officers, to determine whether 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) "[t]he existence of any exigencies on the night of October 19, 2018, requiring the removal of Tubby from Officer Wernecke's squad car." (Notice at 5, ECF No. 91-1.) These are the first two of thirteen topics identified in Plaintiffs' Rule 30(b)(6) notice of deposition. (*Id.* at 5–6.)

Brown County is a Defendant in this action based on Plaintiffs' claims for municipal liability under 42 U.S.C. § 1983 premised on allegations of insufficient training and state-created danger, and for vicarious liability premised on Defendant Thomas Zeigle's alleged negligence while acting within the scope of his employment for Brown County. (3d Am. Compl. ¶¶ 43–49, 62–71, 83–88, ECF No. 83.) As it relates to the state-created danger claim, Plaintiffs allege that Lieutenant Zeigle "is a policy-making official of Brown County," and that he "had final authority over the actions of the law enforcement officers in the sally port on the night of October 19, 2018." (*Id.* ¶ 63.) Plaintiffs further allege that, when Lieutenant Zeigle "ordered officers present in the sally port to use potentially lethal force to break the back window of the squad car, he was announcing a policy of Brown County." (*Id.*) Plaintiffs have sued Lieutenant Zeigle "in his official and individual capacit[ies]." (*Id.* ¶ 16.)

Lieutenant Zeigle was deposed on January 10, 2020,[1] over the course of approximately five hours. (Decl. of Benjamin A. Sparks, June 24, 2020, ¶ 2, Ex. A, Dep. of Thomas Zeigle, Jan. 10, 2020, at 1 [hereinafter "Zeigle Dep."].) During his deposition, Lieutenant Zeigle was asked and provided answers to multiple questions about his "efforts . . . to determine whether Tubby was armed after his arrest on October 19, 2018," (Notice at 5, ECF No. 91-1):

[1] The relevant allegations and claims in the operative complaint as of January 10, 2020 were materially the same as those in the Third Amended Complaint. *See* (2d Am. Coml. ¶¶ 16, 71–76, 88–93, ECF No. 66.)

Q. All right. So **it was communicated to you** that the person in the **back of the squad car was saying that he had a gun**?

A. Correct.

* * *

Q. Okay. After Lt. Buckman tells you this, what do you do next?

A. And, again, about that same time, and, again, I don't know if it was before or after I talked with Lt. Buckman but **I talked with one of the dispatchers** and [s]he is the dispatch supervisor and she asked me if I had heard about the incident going on in the jail so I talked to her.

Q. **What did she say** about what was going on in the jail?

A. The exact same thing. That there was a **gentleman in the back of a Green Bay police car that was saying he had a gun** . . . .

* * *

A. On my way over, **I had called the communications center on the radio and asked if the ranking officer on the scene for Green Bay could give me a call just to give me some more information**; and if I remember correctly Lt. Allen from the city called me.

Q. Okay. What did you guys talk about on the phone?

A. Basically the same thing that Lt. Buckman and I talked about. Just what they had, the situation, so I told him I was just a couple minutes out at the time, so . . .

Q. And **what did he tell you** about what the situation was?

A. The same thing. That **there was a gentleman in the back of a Green Bay squad car, that was making gestures and, you know, led officers to believe that he had a gun**.

* * *

Q. What were you specifically concerned about with not being able to see him?

A. The **weapon**.

Q. **So you wanted to see whether he had actually had a weapon**?

A. **Correct**.

* * *

Q. The fact that you believe that he might have a **handgun**, is that **based on what others told you or based on something you personally observed** or both?

A. **Both**.

Q. Okay. What did you personally observe that led you to think that he had a handgun?

A. Again, it was the **hands underneath the shirt up towards his head area** so that's what I **personally observed**.

Q. You observed that he had his hands under his shirt?

A. Correct.

Q. But you didn't ever -- you never saw an actual **gun**, right?

A. I did not.

Q. Did you see anything that looked like a gun?

A. Not under his shirt, no.

Q. You just saw that there was kind of like a bulge under his shirt?

A. **He was making a motion like he had a weapon in his hand**.

Q. Okay. What do you mean he was making a motion like he had a weapon in his hand?

A. Like somebody would hold a weapon if they were going to commit suicide or, you know, something of that nature.

Q. Okay. So the way that his hand was positioned was consistent with gripping like a gun, like the handle of a gun?

A. Correct.

Q. Anything else that you personally observed?

A. No.

(Zeigle Dep. at 15:23–16:1, 16:7–20, 18:3–20, 127:13–18, 85:7–86:16) (emphasis added).

Similarly, Lieutenant Zeigle was asked and provided answers to multiple questions relating to "[t]he existence of any exigencies on the night of October 19, 2018, requiring the removal of Tubby from Officer Wernecke's squad car," (Notice at 5, ECF No. 91-1):

> Q. All right. At the time that window was broken, was there some **exigency** that existed that required a law enforcement to have a visual of him immediately?
>
> . . . .
>
> A. We wanted to make sure again, we talked about the communication portal and like I said, with the windows fogged up, you needed as much visual input of what he was doing in there as possible. So I guess from my perspective, **there was an exigency to get that window out of the way so we could see exactly what's going on and exactly what we have**.
>
> * * *
>
> Q. Was there any sort of **exigency** that existed at that moment that required the OC spray?
>
> . . . .
>
> [A.] **During the whole situation, there was exigency in my eyes based on the imminent threat** to the safety of the officer, and there was civilian ride-alongs out there so to me it was imminent throughout the entire situation.
>
> . . . .
>
> Q. Was there any additional **exigency** other than that threat that you just identified of a potential weapon that existed at the moment the OC spray was deployed?
>
> A. Not that I recall.
>
> * * *

Q. So anything -- any other sort of **exigency** that existed that required the OC spray to be deployed?

MR. GUNTA: Objection to form.
MR. SPARKS: Object to form.

THE WITNESS: Again, I guess I am not understanding your question, sir.

BY MR. TAHDOOAHNIPPAH:
Q. Anything else besides his noncompliance that would have led you to think that it was the time to take the next step and use OC spray?

MR. SPARKS: Sorry. Object to form. Asked and answered.

THE WITNESS: Yeah. Based on, **like I said, the entire situation was exigent**.

BY MR. TAHDOOAHNIPPAH:
Q. Was there any additional **exigency** that existed at that moment?

MR. SPARKS: Same objection.

THE WITNESS: No. Not that I recall.

(Zeigle Dep. at 126:13–127:11, 131:5–24, 133:8–134:2) (emphasis added).

The County Defendants have objected to producing a witness to the first two topics in Plaintiffs' Rule 30(b)(6) notice because (1) the topics are not proper topics to a municipal entity sued under 42 U.S.C. § 1983, and (2) even to the extent such topics are proper, Plaintiffs have already obtained testimony from the appropriate County witness on such topics. *See* (E-mails at 2, 4, ECF No. 91-2.) For these reasons, as outlined more fully below, the County Defendants respectfully request that the Court deny Plaintiffs' Motion to Compel and for Sanctions.

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFFS' MOTION TO COMPEL.

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of

the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

"A motion to compel discovery pursuant to Rule 37(a) is addressed to the sound discretion of the trial court." *Morris v. Ley*, No. 05-C-0458, 2006 WL 2585029, at *1 (E.D. Wis. Sep. 7, 2006). To that end, the Court may limit discovery when:

> **(i)** the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> **(ii)** the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> **(iii)** the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Fed. R. Civ. P. 26(b)(2)(C).

More specifically, "[a] party may properly resist a Rule 30(b)(6) deposition on the ground that the information sought is more properly sought through contention interrogatories," such as in instances where the Rule 30(b)(6) topics seek legal conclusions. *Alloc, Inc. v. Unilin Decor N.V.*, Nos. 02-C-1266, 03-C-342, 04-C-121, 2006 WL 2527656, at *1–2 (E.D. Wis. Aug. 29, 2006). Further, a party must obtain leave of the court before deposing a witness who has already been deposed. Fed. R. Civ. P. 30(a)(2)(A)(ii).

The first two topics in Plaintiffs' Rule 30(b)(6) notice stray beyond the scope of discovery in this case, and, even to the extent they might seek relevant information, they do so in a manner that is unreasonably duplicative and that can be sought from sources that are more convenient, less burdensome, and less expensive.

Because the first two topics seek information about specific acts and decisions that one or more individual County law enforcement officers made on scene during this isolated incident (i.e., officers' "efforts" to determine whether Tubby was armed, and officers' recognition of any "exigencies" requiring Tubby's removal from the squad car), they effectively ask the County to produce testimony on its behalf that would amount to a summary and adoption of the firsthand, personal knowledge of individual officers who were present on scene. To that end, the wording of the first two topics exhibits a fundamental misunderstanding of the connection between the acts and observations of individual governmental officers, and the acts of a municipal entity in the context of civil rights claims against the entity. Importantly, the County's exposure to liability under § 1983 arises not by its mere adoption of the observations and acts of its individual officers, but instead by its own governmental acts. *See Estate of Brown v. Thomas*, 7 F.Supp.3d 906, 915 (E.D. Wis. 2014) ("[T]he County cannot be liable under § 1983 unless the constitutional violation was caused by (1) an express municipal policy; (2) a widespread, though unwritten, custom or practice; or (3) a decision by a municipal agent with final policymaking authority." (internal quotations omitted)).

The first two Rule 30(b)(6) topics require the County to produce testimony that would effectively give the impression that the County can somehow step into the shoes of its individual officers on scene the night of the incident and adopt those individual officers' acts and observations. By asking the County to testify in such a way that simply adopts the acts and observations of its individual officers, the first two topics run directly counter to the axiom in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), that a municipal entity cannot be held vicariously liable for the acts of its employees under Section

1983. *See Reimer v. Donarski*, Case No. 15-C-65, 2016 WL 3920226, at *2 (E.D. Wis. July 15, 2016).

Thus, unlike the other eleven topics in Plaintiffs' Rule 30(b)(6) notice seeking information about the County's policies, training, customs, or practices, the first two topics seek to have the County produce a witness and implicitly concede a legal impossibility: that the acts and observations of the County's individual officers in an isolated setting are one and the same as the acts and observations of the County as a municipal Defendant. Producing a witness to provide such testimony would be an exercise in irrelevancy that stretches not only beyond the specific municipal-liability claims in this case, but beyond the parameters of municipal liability in settled case law. Accordingly, the first two topics fall outside the scope of discovery for a municipal liability claim under § 1983, and the Court should not require the County to produce such irrelevant evidence through a 30(b)(6) witness.

Further, even to the extent the first two topics could be construed as relevant to Plaintiffs' state-created danger and negligence claims—both of which are solely premised on the alleged isolated acts and decisions of Lieutenant Zeigle, (3d Am. Compl. ¶¶ 62–71, 83–88, ECF No. 83)—the witness most knowledgeable about these topics, Lieutenant Zeigle, has already testified at length about both topics. Plaintiffs have specifically alleged that Lieutenant Zeigle was "announcing a policy of Brown County," and that the County is exposed to vicarious liability for negligence via the acts of Lieutenant Zeigle while in the scope of his employment. (*Id.* ¶¶ 63, 87.) In other words, Plaintiffs' state-created danger and negligence theories of liability are based on the individual acts and decisions of a municipal officer on scene, not an act or decision by the municipality—such as a policy or widespread custom—and the municipal officer whose acts are at issue has been deposed at length on the topics identified.

Compelling Lieutenant Zeigle to respond to the same questions about the same subject matter as a Rule 30(b)(6) witness would add nothing useful or relevant to the evidentiary record that has not been (or could have been) gathered during Lieutenant Zeigle's deposition, as Plaintiffs' state-created danger and negligence claims are premised solely on Lieutenant Zeigle's acts and observations as an alleged policymaker and/or agent of the County. *See* (*id.*) Plaintiffs' insistence that the County re-produce Lieutenant Zeigle to provide the same testimony on behalf of the County runs counter to both of their theories of liability, which are premised on Lieutenant Zeigle's acts, not the County's. Thus, producing Lieutenant Zeigle as a Rule 30(b)(6) witness will provide no evidence relevant to Plaintiffs' claims against the County, and instead will amount to an opportunity for Plaintiffs to re-depose Lieutenant Zeigle under the guise of a Rule 30(b)(6) deposition.

To the extent Plaintiffs' first two topics do not identically retrace the Lieutenant Zeigle's answers to prior questions, Plaintiffs can seek additional information in a far less burdensome and costly ways, such as through contention interrogatories. Accordingly, the first two topics are squarely duplicative of testimony already obtained from Lieutenant Zeigle who should not have to testify a second time on same topics and in a capacity that would not produce relevant evidence for the claims underlying those topics.

II. THE COURT SHOULD DENY PLAINTIFFS' MOTION FOR SANCTIONS.

Any sanction imposed pursuant to the Court's inherent authority must be premised on a finding that the culpable party willfully abused the judicial process or otherwise conducted the litigation in bad faith. *Ramirez* v. *T&H Lemont, Inc.*, 845 F.3d 772, 776 (7th Cir. 2016) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46–50 (1991)). "Fault" describes "the reasonableness of the conduct—or lack thereof—which eventually culminated in the violation." *Id.* (quotations

omitted). "Fault, however, is not a catch-all for any minor blunder that a litigant or his counsel might make. Fault, in this context, suggests objectively unreasonable behavior; it does not include conduct that we would classify as a mere mistake or slight error in judgment." *Long v. Steepro*, 213 F.3d 983, 987 (7th Cir. 2000).

When deciding whether to sanction a party, courts should take into account "the egregiousness of the conduct in question *in relation to all aspects of the judicial process*." *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003) (emphasis in original, internal quotations omitted); *see also Danis v. USN Commc'ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *52 (N.D. Ill. Oct. 20, 2000) (finding that an award of attorneys' fees and costs to the plaintiff in any amount would be unjust where the plaintiff failed to establish "intentional or willful misconduct"); *Trimec, Inc. v. Zale Corp.*, No. 86 C 3885, 1992 WL 245602, at *6 (N.D. Ill. Sep. 23, 1992) (finding that the defendant's acts were not "so egregious as to warrant the granting of fees"). For instance, in *Leaver v. Shortess*, No. 14–C–224, 2015 WL 4506867, at *5–6 (E.D. Wis. July 24, 2015), this Court denied the plaintiff's request for sanctions where the defense encountered logistical difficulties in producing a legible copy of a unique law enforcement record because, ultimately, the record was "largely irrelevant" to a resolution of the merits of the case.

Here, as explained above, the first two topics in Plaintiffs' Rule 30(b)(6) notice are simply not framed as topics seeking information relevant to the allegations and claims against the County. Even to the extent the information sought could be relevant, such information has already been provided by Lieutenant Zeigle, whose acts and decisions allegedly form the basis for Plaintiffs' state-created danger and negligence claims. Based on the claims and allegations against the County and Lieutenant Zeigle, the County Defendants had a good faith basis to object

to the first two Rule 30(b)(6) topics as improper for a municipal entity and as seeking cumulative testimony already obtained from the appropriate witness. Moreover, such testimony would not add any useful evidence to the record because the claims against the County are premised on Lieutenant Zeigle's individual acts and decisions, and Plaintiffs have already deposed Lieutenant Zeigle to inquire about those acts and decisions. Given the awkward framing of the first two topics and their contradictions with Plaintiffs' alleged bases for municipal liability, the County Defendants had a good faith basis to object to producing a witness, as doing so in and of itself could be construed as an incorrect legal concession that the County's acts and knowledge were one and the same as its on-scene officers on the night of the incident.

In short, Plaintiffs' proof of their inadequate training, state-created danger, and negligence claims require no showing of the County's entity-wide efforts to determine whether Tubby was armed on the night of the incident, or the County's entity-wide recognition of any exigencies existing while Tubby was believed to be armed and barricaded in the back of a squad vehicle in the sally port of the jail. The framing of the first two topics implicitly circumvents the settled understanding of how municipalities are exposed to liability under Section 1983, and the County Defendants' objection to producing a witness in response to those topics was reasonable and represented a good faith effort to avoid making inadvertent legal concessions and unnecessarily re-producing a witness. Accordingly, sanctions are not warranted in this instance.

CONCLUSION

For the foregoing reasons, the County Defendants respectfully request that the Court deny Plaintiffs' Motion to Compel and for Sanctions, (ECF No. 88), and instead award costs and such other relief that the Court deems equitable in favor of the County Defendants.

Dated this 24th day of June, 2020.

CRIVELLO CARLSON, S.C.
Attorneys for Defendants Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer, and Thomas Zeigle

BY: s/ Benjamin A. Sparks
SAMUEL C. HALL, JR.
State Bar No. 1045476
BENJAMIN A. SPARKS
State Bar No. 1092405

PO ADDRESS:

710 N. Plankinton Avenue, Suite 500
Milwaukee, WI 53203
Phone: 414-271-7722
Fax: 414-271-4438
Email: shall@crivellocarlson.com
Email: bsparks@crivellocarlson.com