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' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL AND FOR SANCTIONS

INTRODUCTION

Brown County does not have a substantial justification to refuse to designate a Rule 30(b)(6) witness for Topics 1 and 2[1] of its deposition notice. Brown County's arguments in opposition to Plaintiffs' Motion to Compel merely ignore the text of the Federal Rules of Civil Procedure and the purpose of the rules as articulated in the Advisory Committee notes. For instance, Brown County argues that a Rule 30(b)(6)

[1] These topics are: (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." ECF 91-1 at 5.

deposition of an organization is not appropriate to learn the knowledge of its employees. Yet, the Advisory Committee notes specifically state that an advantage of a Rule 30(b)(6) deposition is to discover that facts within an organization's knowledge where (as here) it is unclear which specific employees possess that knowledge.

Brown County also ignores the plain text of Rules 26 and 30. Brown County argues that Topics 1 and 2 are not relevant to claims against Defendant Zeigle. This is wrong, but more fundamentally, Brown County ignores that the scope of discovery includes not only Plaintiffs' claims but also Defendants' defenses. Topics 1 and 2 are clearly relevant to Zeigle's qualified immunity defense, as well as the defenses of Defendants O'Brien, the City of Green Bay, and Brown County itself. Brown County also ignores the plain text of Rule 30, which specifically notes that the prior deposition of Zeigle as an individual does not preclude a Rule 30(b)(6) deposition of Brown County with Zeigle as the designee.

Brown County also attempts to raise the scepter of inefficiency—arguing that Topics 1 and 2 are better suited for contention interrogatories. Yet, Topics 1 and 2 do not ask for contentions at all. Moreover, the Rule 30 Advisory Committee Notes specifically state that efficiency is an *advantage* of a Rule 30(b)(6) deposition. Without a Rule 30(b)(6) deposition on Topics 1 and 2—Plaintiffs will have to depose *thirty* some law enforcement officers to determine their efforts to determine whether Jonathon Tubby ("Tubby") was armed at the time of his shooting (he was not) and whether any exigency existed that required him to be forced from containment in a squad car (a decision that created a danger towards him that ultimately led to his death).

For all these reasons, those stated below, and those stated in Plaintiffs' opening brief, the Court should compel Brown County to produce a witness to testify regarding Topics 1 and 2 and also award Plaintiffs' their costs and attorneys' fees associated with this motion.

ARGUMENT

A. Topics 1 and 2 Are Proper Topics For a Rule 30(b)(6) Deposition.

Brown County's first argument is that Topics 1 and 2 are "not proper topics to a municipal entity sued under 42 U.S.C. § 1983." ECF No. 92 at 6. Brown County's argument has two underlying premises. First, Brown County premises its argument on its belief that a governmental entity cannot "step into the shoes of its individual officers" to answer questions. ECF No. 92 at 8. Second, Brown County premises its argument concerning relevancy on the claims against Defendant Thomas Zeigle alone—rather than *all* claims and defenses in this action. Brown County is wrong on both accounts.

1. Rule 30(b)(6) Envisions That an Entity Will Testify Regarding the Knowledge of Its Employees

Brown County's argument that the answers to questions related to Topics 1 and 2 would require "firsthand, personal knowledge," ECF No. 92 at 1, 8, is misguided. No organization—whether public or private corporation, a partnership, an association, a governmental agency, etc.—is a living, breathing being capable of having firsthand knowledge or recollection of anything. Yet, Rule 30(b)(6) was created with the purpose of having a corporate designee learn the knowledge of the corporation's employees and agents and then provide answers to questions regarding that knowledge. The Advisory

Committee Notes specifically state that Rule 30(b)(6) was created to avoid inefficiency created by deposing large numbers of employees of an organization, who either have no knowledge of the facts or "bandy[]" superior knowledge of the facts to another employee. Fed. R. Civ. P. 30(b)(6), Notes of Advisory Committee on Rules – 1970. In other words, the entire purpose of Rule 30(b)(6) is to do precisely what Brown County avers is a "legal impossibility." ECF No. 92 at 9. The Rule requires an organization to learn what its employees know (where "reasonably available"), and then testify regarding that knowledge. *See Integra Bank Corp. v. Fid. & Deposit Co.*, 2014 U.S. Dist. LEXIS 3039, at *11-12 (S.D. Ind. Jan. 10, 2014) (holding that having employee learn information was "not an undue burden, but is the duty that Rule 30(b)(6) places upon entities").

This is not a matter of vicarious liability—as Brown County appears to argue—but simply a matter of efficiency. As noted by the Advisory Committee, the Rule 30(b)(6) process is "one which may be advantageous to both sides as well as an improvement in the deposition process." Fed. R. Civ. P. 30(b)(6), Notes of Advisory Committee on Rules – 1970. The facts of this case illustrate exactly why this is the case. On the night of the shooting of Jonathon Tubby, there were more than *thirty* law enforcement officers present in the sally port performing various functions. It would obviously be highly inefficient for Plaintiffs to have to depose every single officer to find out whether or not they have any knowledge relevant to Topics 1 and 2. Precisely to avoid this result, Rule 30(b)(6) exists and allows Plaintiffs to avoid deposing "an unnecessarily large number of their officers and agents" in order to ascertain who has relevant knowledge on the topics. Fed. R. Civ. P. 30(b)(6), Notes of Advisory Committee on Rules – 1970.

2. Topics Are Plainly Relevant to Claims and Defenses, Such as Qualified Immunity Defenses

Brown County also argues that the Topics—its efforts to determine whether Mr. Tubby was armed (in fact, he was not), and exigencies that required him to be forced from a squad car (which ultimately lead to his death)—are somehow not relevant. They are highly relevant: this is a case in which a police officer claims he shot Tubby because Tubby was believed to be armed. In any case in which § 1983 claims are asserted against individual officers, qualified immunity is a potential defense. Significantly, qualified immunity is determined based on objective reasonableness. *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986) (defining qualified immunity in terms of objective reasonableness). These Topics are squarely relevant to the *reasonableness* of law enforcement's actions leading up to the shooting.

In this case, Defendant O'Brien claims that he believed Tubby was armed, even though Tubby was not. The efforts of law enforcement officers on the scene—including those employed by Brown County—to determine whether Mr. Tubby was armed is probative of the reasonableness of that belief. In addition, O'Brien, Zeigle, Green Bay, and Brown County all owed duties to Tubby to protect his life and health. Due care in the circumstances would have included exercising reasonable efforts to determine if he was armed. Similarly, Defendant Zeigle's defense likely will be that his plan to pepper spray Tubby while Tubby was confined in a squad car (thereby forcing him to flee from the squad car at the same time Green Bay police believed he was armed) was reasonable. Because reasonableness is an objective, not subjective, standard, *Rising-Moore v. Wilson*,

No. 1:03-cv-01813-SEB-VSS, 2005 U.S. Dist. LEXIS 13955, at *25 (S.D. Ind. July 7, 2005) ("[T]he officer's subjective beliefs are immaterial in asserting protection by qualified immunity."), it is also relevant whether officers on the scene determined that some exigency existed (and what that exigency was) that required Tubby to be forced from the vehicle.

This is all true regardless of the requirement of *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) to establish municipal liability through municipal policy rather than vicarious liability. While *Monell* sets forth the elements of Plaintiffs' *Monell* claim against Brown County, the metes and bounds of discovery are not determined in reference to the elements of a single claim alone. Instead, the scope of discovery is determined by reference the claims *and defenses*. Fed. R. Civ. P. 26x. Brown County simply ignores this fundamental tenet of discovery.

B. Topics 1 and 2 Are Not Redundant of Other Discovery—Topics 1 and 2 Are Most Efficient Means of Preventing Trial By Surprise

Brown County also argues that a Rule 30(b)(6) deposition on Topics 1 and 2 will be duplicative of prior deposition testimony by Defendant Zeigle. Yet as explained by Plaintiffs previously, there are basic differences between a Rule 30(b)(6) deposition and deposition of an individual. "[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)).

Indeed, refusing to produce a Rule 30(b)(6) designee on Topics 1 and 2, Brown County is essentially attempting to force a trial by surprise. As discussed above, there were many (more than thirty) law enforcement officers on the scene. Accordingly, Plaintiffs cannot efficiently depose every single officer on scene—as the Advisory Committee Notes recognize, a Rule 30(b)(6) deposition is the most efficient means of obtaining testimony that reflects the efforts and knowledge of all the Brown County officers on the scene. Fed. R. Civ. P. 30(b)(6), Notes of Advisory Committee on Rules – 1970 ("The provisions should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge."). Without a Rule 30(b)(6) deposition, Plaintiffs will be forced to depose all officers on scene or else there will always be the threat that Brown County will be able to find some officer on the scene to offer a different version of events that support its defenses, creating a moving target.

C. Topics 1 and 2 Are Not Better Suited For Contention Interrogatories—They Do Not Ask for Contentions At All

Perhaps recognizing the futility of avoiding a Rule 30(b)(6) deposition by arguing that the designee was previously deposed, Brown County also suggests that Topics 1 and 2 would be better suited to contention interrogatories. Putting aside the fact that Brown

County does not actually offer to treat them as contention interrogatories and provide sworn answers, Topics 1 and 2 do not ask for Brown County's contentions at all.

A contention interrogatory asks for "an opinion or contention that relates to fact or the application of law to fact." *See* Fed. R. Civ. P. 33(a)(2). An example of a contention interrogatory is the interrogatory in *SmithKline Beecham Corp. v. Apotex Corp.*, 2004 U.S. Dist. LEXIS 8990 (E.D. Pa. March 23, 2004), which is the case cited in *Alloc, Inc. v. Unilin Decor N.V.*, 2006 U.S. Dist. LEXIS 65889, *4 (E.D. Wis. August 29, 2006). (*Alloc* is the case relied upon by Brown County for the proposition: "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." ECF No. 92 at 7.) *SmithKline* was a patent infringement action in which the Rule 30(b)(6) topic asked for a party's "claim construction." 2004 U.S. Dist. LEXIS 8990, at *4—11. Claim construction (or interpretation) is a matter of law, *Markman v. Westview Instruments*, 517 U.S. 370, 391 (1996), and therefore the topic was properly viewed as a contention interrogatory—asking for application of fact to law. Here, Topics 1 and 2 are not properly viewed as contention interrogatories because they do not ask for an opinion or contention relating to facts or the application of law to fact. The Topics ask only for the facts themselves—efforts to determine whether Tubby was armed, and the existence of exigencies requiring him to be removed from a squad car—not opinions or contentions related to those facts.

For all these reasons, Brown County's objections to Topics 1 and 2 are misguided, and the Court should grant Plaintiffs' Motion to Compel.

D. Brown County Misstates the Standard for Sanctions, and Fails to Offer a Substantial Justification for its Refusal to Designate a Witness for Topics 1 and 2

Not only should the Court grant Plaintiffs' Motion to Compel, but the Court should also award Plaintiffs discovery sanctions in the form of the attorneys' fees and costs related to this motion. Brown County wrongly suggests that the operative standard is whether Brown County intentionally acted in bad faith. *See* ECF 92 at 10-12. The primary cases Brown County cites for this proposition do not relate to discovery sanctions under Rule 37(a)(5)—but instead relate to more severe sanctions (such as dispositive sanctions) available under the Court's inherent authority or other provisions of Rule 37 (such as Rule 37(b) or (e)). *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 775-776 (7th Cir. 2016); *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003); *Long v. Steepro*, 213 F.3d 983, 986 n.3 (7th Cir. 2000).

In fact, as discussed in Plaintiffs' opening brief, Rule 37(a)(5)(A) "*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)). To the extent that Brown County's good faith is relevant at all, it is relevant only if its objections to Topics 1 and 2 are "substantially justified." Fed. R. Civ. P. 37(a)(5)(A)(ii).

Brown County's objections to Topics 1 and 2 are not substantially justified. As discussed above, Brown County's objections fly in the face of the plain text of the Federal Rules of Civil Procedure and Advisory Committee Notes. For instance, Brown County's relevance argument ignores the text of Rule 26, which expressly notes that the

scope of discovery includes both claims and defenses. As another example, Brown County's argument that Defendant Zeigle was already deposed and would be the County's designee ignores the text of Rule 30, which expressly notes that the deposition pursuant to subdivision (b)(6) does not preclude depositions by other procedures. Fed. R. Civ. P. 30(b)(6).

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 29, 2020

By */s/ Forrest Tahdooahnippah*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of June, 2020, I served the foregoing PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL AND FOR SANCTIONS via the Court's CM/ECF system, causing Defendants to be served electronically.

/s/ Forrest Tahdooahnippah
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