IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

ROBERT HAYWOOD, Individually and as personal representative of the estate of Delores Haywood (deceased)

Plaintiffs,

Civil No. 2009 CA 009656 M
Judge John Ramsey Johnson

v.

MEDSTAR-GEORGETOWN MEDICAL CENTER, INC.

Defendant.

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO MOTION TO COMPEL DEFENDANT TO DESIGNATE A SPOKESPERSON FOR A DEPOSITION

The defendant hospital takes an extraordinary position. Seizing on the literal words of Rule 30(b)(6) that it is required to designate "one or more" persons to testify on its behalf, the hospital contends it is allowed to designate ***40 separate individuals*** to respond to a single topic of the plaintiff's corporate deposition notice. Not a single case supports this unique and creative interpretation of Rule 30(b)(6). Indeed, the hospital's position would strip the rule of any meaning.

1. **The defendant wants the plaintiff to have to depose 40 witnesses to obtain the defendant's corporate knowledge.**

Defense Counsel wrote to plaintiff's counsel on August 23, 2010 (letter attached hereto as Exhibit 1). Defendant's counsel stated:

> In response to Category 1(a), defendant has identified a total of 40 providers. ***Plaintiffs have only deposed 4 of the 40 providers***. We are happy to schedule and produce these providers to testify as fact witnesses ***and also as to their piece***

of this institutional defendant's knowledge on the areas outlined in topics 1(c) and 1 (d) of plaintiff's Rule 30(b)(6) Notice.

See Exhibit 1 (emphasis added). Defendant maintains that Plaintiff must depose all these 40 health care providers to determine what the Hospital knows. (Actually the number is now 41. See footnote 2 below concerning another witness identified by a deponent who was not on the list of 40.)

2. The defendant confuses its employees' personal knowledge with the corporate knowledge that it is required to develop and disclose.

The defendant's position essentially is that it has no knowledge, only that of its individual employees. This is at odds with the basic purpose of Rule 30(b)(6), which requires corporations to develop corporate knowledge and to testify to same at a deposition. A leading and often-cited case on this subject is *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), which extensively reviewed the purpose and nature of a Rule 30(b)(6) deposition. The court said:

> The Rule 30(b)(6) designee does not give his personal opinions. Rather, *he presents the corporation's "position"* on the topic. [internal citations omitted] Moreover, the designee must not only testify about facts within the corporation's knowledge, but also its subjective beliefs and opinions. [internal citations omitted] *The corporation must provide its interpretation of documents and events.* [internal citations omitted] The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition. Were it otherwise, a corporation would be able to deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions. [internal citations omitted] Truth would suffer.
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> 166 F.R.D. at 361-62 (internal citations omitted; emphases added).

This duty to prepare and sponsor a witness to testify to the corporation's knowledge is fundamental to Rule 30(b)(6) case law. The cases previously discussed in plaintiff's opening brief will not be gone over again here. Suffice to say that the defendant has offered not one published opinion supporting its position.

In particular, the defendant posits an exception to the Rule 30(b)(6) requirement for "unique and unexpected events," as to which it contends it is impossible for the corporation to develop any knowledge beyond that of the individual actors it employed who were involved in the event. See defendant's brief at pp. 8-9. Notably, the defendant cites to *not one case* that supports this position. All it does is attack the reasoning of Judge Messitte in the *Lakner* case. But Judge Messitte is not alone. The courts in *United States v. Taylor, supra*, and many other decisions cited in our opening brief have made no "event-based" exception and have explicitly held that the corporate designee must be prepared to give more than that individual's personal knowledge. As the court said in *United States v. Taylor:*

> The testimony elicited at the Rule 30(b)(6) deposition *represents the knowledge of the corporation, not of the individual deponents.* The designated witness is 'speaking for the corporation'.... The corporation appears vicariously through its designee. If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation. Thus, *the 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.*
>
> 166 F.R.D. at 361-62 (internal citations omitted; emphases added).[1]

If the defendant hospital was correct, there would have developed in the case law an exception for catastrophic events, where the courts would have held that the plaintiff must depose however many individuals were involved. (One can imagine that a corporation like British Petroleum would dearly love to see such an exception, so the plaintiffs in its Gulf Oil

[1] The *Taylor* court also said: "The Court understands that preparing for a Rule 30(b)(6) deposition can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business." 166 F.R.D. at 362.

Spill litigation would have to depose hundreds of witnesses to determine the corporation's position on what happened.) No such line of authority exists, because it would make no sense; this exception would contradict the whole purpose of the discovery rule.

3. **None of the four spokespersons presented to date has presented anything about the corporation's knowledge.**

In plaintiff's opening brief on this motion, we described how the first two witnesses deposed pursuant to Rule 30(b)(6), Drs. Babushkina and De Jesus, knew nothing beyond their own personal involvement in the events at issue. See motion at pp. 6-9. Since then, the plaintiff has deposed two more hospital witnesses who similarly knew nothing except for their own personal observations.

After filing the Motion, Plaintiff deposed Lauren Arnold. M.D. and Czarina Tuason, R.N. Dr. Arnold was a first year orthopedic resident who was at Mrs. Haywood's bedside before Mrs. Haywood stopped breathing. Nurse Tuason was one of the nurses who attended to Mrs. Haywood the evening she stopped breathing. Nurse Tuason was also acting as the evening charge nurse, supervising the nursing staff on the ward Mrs. Haywood was admitted to after her surgery.

Neither Dr. Arnold nor Nurse Tuason testified to anything beyond their personal knowledge. Neither Dr. Arnold nor Nurse Tuason testified to the Hospital's knowledge of the cause of Mrs. Haywood's arrest or the Hospital's knowledge of the care rendered to Mrs. Haywood after her arrest. The depositions of these two additional fact witnesses provide further proof of Defendant's non-compliance with Rule 30(b)(6)'s requirements.

In preparation for the deposition, Dr. Arnold looked only at her own progress note. See deposition of Dr. Arnold on August 2, 2010, excerpts attached as Exhibit 2 (pg. 46). Dr. Arnold

wrote her note three days after the respiratory arrest and did so only when requested to prepare a note by the Hospital's risk manager. See Exhibit 3 (Dr. Arnold's progress note of March 5, 2009). When Dr. Arnold was specifically asked if she could speak to the knowledge of the Hospital, she responded:

> ***Q And you're not here to tell me what the hospital knows about what happened to Mrs. Haywood, are you?***
>
> ***A No, I'm not.***
>
> MR. CEPPOS: Just her -- just her piece of it, as we've designated her.
>
> BY MR. DOOREN:
>
> ***Q You don't know what the hospital knows about the cause of why Mrs. Haywood stopped breathing?***
>
> ***A I do not.***
>
> Q Or why she suffered a brain injury?
>
> A I do not.
>
> Q Or why she died?
>
> A I do not.
>
> See Exhibit 2 (pg. 123 emphasis added). [2]

Nurse Tuason did not review any medical records. See deposition of Nurse Tuason on August 6, 2010, excerpts attached as Exhibit 4 (pg. 21 – 22 & 103- 104). Nurse Tuason's entire

[2] In addition, Dr. Arnold identified yet another witness with potential knowledge of this case. (This witness would be the 41st, after those already identified.) Dr. Arnold testified that the morning after Mrs. Haywood stopped breathing, she was contacted by the Intensive Care Unit staff and spoke with the attending physician, Dr. Plotkin. See Exhibit 2 (pg. 66). Dr. Plotkin was asking for information about the events leading to Mrs. Haywood's respiratory arrest. See Exhibit 2 (pg. 66 – 70). Dr. Plotkin was not on the list of providers with knowledge about Mrs. Haywood's case. See Exhibit 5 (Defendant's letter of April 19, 2010 that listed 39 health care providers attending to Mrs. Haywood on March 2, 2009).

testimony is based on what is left of her memory of her personal encounter with Mrs. Haywood more than one year ago. See Exhibit 4 (pg. 21 – 22 & 103- 104). Nurse Tuason has no idea why Mrs. Haywood stopped breathing. See Exhibit 4 (pg. 96-97). Nurse Tuason did not discuss why Mrs. Haywood stopped breathing with anyone. See Exhibit 4 (pg. 96-97). Nurse Tuason had no idea about Mrs. Haywood' s ultimate outcome. See Exhibit 4 (pg. 104). Nurse Tuason, like each of the witnesses before her, was not prepared to offer any corporate information about why Mrs. Haywood stopped breathing. See Exhibit 4 (pg. 128).[3]

4. The D.C. peer review statute does not excuse the hospital from complying with Rule 30(b)(6).

Defendant asserts that the disclosure of the Hospital's knowledge concerning why Mrs. Haywood stopped breathing would violate D.C. Code §§44-801 and 44-805. The only support cited by Defendant is an unpublished trial court Order by Cheryl Long granting a protective order on behalf of the Washington Hospital Center. Defendant creates a false conundrum by claiming that anything the Hospital knows about Mrs. Haywood is known solely through peer review. That is not the case.

Defendant ignores the exclusion from the peer review privilege set forth by D.C. Code §44-804 (b):

> *Notwithstanding subsection (a)* of this section, primary health records and other *information,* documents, or records available *from original sources shall not be deemed nondiscoverable or inadmissible* merely because they are a part of the files, records, or reports of a peer review body.

[3] Defendant demonstrated it is capable of producing a proper corporate spokesperson when Nurse Tuason was offered to provide corporate testimony to part (j) of Plaintiff's 30(b)(6) Notice. Nurse Tuason provided testimony that identified the nursing staff who attended to Mrs. Haywood during the evening shift and the number of patients each nurse on that shift were assigned to. See Exhibit 4 (pg. 118 – 129).

D.C. Code §44-804(b) (emphasis added). Peer review as it is defined by statute, does not include the knowledge and information the Hospital possesses concerning the cause of Mrs. Haywood's respiratory arrest. Plaintiff seeks information available from original sources already known or reasonably obtainable by the Hospital. The Hospital has unlimited access to the doctors, nurses and staff who attended to Mrs. Haywood. The Hospital is obligated to prepare a witness or witnesses to testify as to what the Hospital knows or information that is reasonably available to it to know. What happened to Mrs. Haywood and why it happened is information reasonably available to the Hospital to know. All the Hospital needs to do is ask its own employees.

The D.C. Code defines peer review as:

> (5) "Peer review" means the procedure by which health-care facilities and agencies, group practices, and health professional associations monitor, evaluate, and take actions to improve the delivery, quality, and efficiency of services within their respective facilities, agencies, and professions, including recommendations, consideration of recommendations, actions with regard thereto, and implementation of the actions. The term "peer review" includes, but is not limited to, the following:
>
> (A) Matters affecting membership of a health professional on the staff of a health-care facility or agency;
>
> (B) The grant, delineation, renewal, denial, modification, limitation, or suspension of clinical privileges to provide health-care services at a health-care facility or agency;
>
> (C) Matters affecting employment and the terms of employment of a health professional by a health-care facility, agency, or group practice;
>
> (D) Matters affecting membership and terms of membership in a health professional association, including decisions to suspend membership privileges, expel from membership, reprimand or censure a member, or other disciplinary actions;
>
> (E) Review of the qualifications, activities, conduct, or performance of any health professional, including a grievance against a health professional;

> (F) Review of the quality, efficiency, or utilization of services provided by a health professional, a health-care facility, agency, or group practice; and
>
> (G) Review of a health professional's ability to perform, including allegations of mental or physical impairment, and imposition of programs of education, treatment, or rehabilitation, including monitoring and supervision, or conduct of programs of education.
>
> See D.C. Code §44-801.

Absent from Defendant's opposition is any argument that the information sought by Plaintiff fits any of the categories of protected information under the peer review statute. Defendant's opposition did not quote or cite any particular part of the peer review statute. None of the categories of information protected by peer review applies to bar the discovery of the knowledge possessed by the Hospital regarding the care of Mrs. Haywood.

Plaintiff has not sought to pierce the peer review practices of the Hospital. No request has been made to obtain peer review reports even if such files exist. No request has been made to determine whether the Hospital has reprimanded anyone or if the Hospital found anyone's care lacking or substandard.

Rather, Plaintiff seeks to discover what is expressly excluded from peer review, information the corporate Defendant has about the care given to Mrs. Haywood. In *Jackson v. Scott*, 667 A.2d 1365, 1369 (D.C. 1995), the Court of Appeals held that the key to discoverability of original source information is that it does "not owe [its] existence to the peer review investigation." Defendant admits that such information and knowledge exists and that such information and knowledge were not created by a peer review process when it stated: "We are happy to schedule and produce these providers to testify as fact witnesses and also as to their

piece of this institutional defendant's knowledge…." See Exhibit 1 (Defense Counsel's August 23, 2010 letter).

The knowledge possessed by the Hospital as to why Mrs. Haywood stopped breathing is an informational inquiry not protected by the peer review statute. Questions concerning the factual knowledge of the Hospital do not breach the internal assessment or quality control of care peer review protects.

Defendant also ignores its responsibility under Rule 30(b)(6) to prepare a witness to testify not just as to their personal knowledge, but also as to the corporation's knowledge. See *Myrdal v. District of Columbia*, 248 F.R.D. 315, 317 (D. D.C. 2008) and *Wilson v. Lakner*, 228 F.R.D. 524 (D. Md. 2005).

In *Wilson v. Lakner,* Judge Messite rejected the defense that a Rule 30(b)(6) deposition would invade knowledge protected by the peer review privilege or attorney work product privilege. He wrote: "[T]he fact remains that a designated witness or witnesses must still be prepared to respond to the 30(b)(6) notice. If that preparation means tracking much the same investigative ground that counsel and the risk management/peer review committee have already traversed, but independently of that investigation, so be it." 228 F.R.D. at 529.

5. Conclusion

Defendant continues to violate what Judge Lamberth identified as one of the "four basic duties" that Rule 30(b)(6) imposes on corporate deponents. The designating party is required to "prepare the witness to testify on matters not only known by the deponent, but those that should be reasonably known by the designating party." *Myrdal v. District of Columbia*, 248 F.R.D. 315, 317 (D. D.C. 2008). Defendant admits in its opposition that it has not offered a single witness

who can speak on the Hospital's behalf about what the Hospital, not merely the individual deponents, knows about the events that led to Mrs. Haywood's fatal event on March 2, 2009.

Defendant is attempting to shield corporate knowledge behind a wall of fact witnesses. Even if Plaintiff were to depose at least 37 more witnesses, what the Defendant Hospital knows about the cause of Mrs. Haywood's respiratory arrest and the care that was rendered to her would remain a mystery. This is unfair to the plaintiff, because it would allow the defendant to pick and choose among the 41 stories for the version most favorable to itself, and promulgate that at trial as its new account of what happened. This is contrary to the entire purpose of Rule 30(b)(6).

The motion to compel should be granted.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of August 2010, a copy of the foregoing Reply to Defendant's Opposition to the Motion to Compel was sent via e-service to:

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/s/
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