IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

MARC FIEDLER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Civil Action No. 2010 CA 001788**
	:	**Judge Edelman**
LUCY WEBB HAYES NATIONAL TRAINING SCHOOL FOR DEACONESSES AND MISSIONARIES Conducting SIBLEY MEMORIAL HOSPITAL,	:	
	:	
Defendant.	:	

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO DESIGNATE A RULE 30(B)(6) SPOKESPERSON FOR A DEPOSITION

1. Introduction

Sibley's Opposition asks the Court to accept its unique and unsupported view of Rule 30(b)(6). Sibley argues, "There is nothing in the plain language of Rule 30(b)(6) or any binding legal authority in this jurisdiction to support Plaintiff's contention that he is entitled to compel Defendant to produce a single corporate designee who must undertake a non-privileged investigation to address the factual issues requested in Plaintiff's Notice." (Opp. at 9). Actually, the plain language of Rule 30(b)(6) says almost exactly that.

Rule 30(b)(6) states that a party may take the deposition of a "a public or private corporation or a partnership or association or governmental agency" through "one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf." The only other requirements of Rule 30(b)(6) are that the notice "describe with reasonable particularity the matters on which examination is requested" and that "[t]he persons so

designated shall testify as to matters known or reasonably available to the organization." Mr. Fiedler has complied with Rule 30(b)(6)'s requirements, providing a detailed Notice of Deposition asking Sibley to produce a representative who can testify to matters that are reasonably known to Sibley.

The federal courts have provided a consistent interpretation of Fed. R. Civ. P. 30(b)(6), which is virtually identical to Super. Ct. R. 30(b)(6). *See* 8A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2103 at 33 (2d ed. 1994). In *Brazos River Auth. v. GE Ionics, Inc.*, the 5th Circuit succinctly stated the requirements of Rule 30(b)(6) as they have been held by numerous courts across the country:

> Rule 30(b)(6) is designed "to avoid the possibility that several officers and managing agents might be deposed in turn, with each disclaiming personal knowledge of facts that are clearly known to persons within the organization and thus to the organization itself." Therefore, the deponent "must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the party noticing the deposition] and to *prepare* those persons in order that they can answer fully, completely, unevasively, the questions posed ... as to the relevant subject matters." "[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." The deponent must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources.
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> Obviously it is not literally possible to take the deposition of a corporation; instead ... the information sought must be obtained from natural persons who can speak for the corporation. Thus, a rule 30(b)(6) designee does not give his personal opinions, but presents the corporation's "position" on the topic. When a corporation produces an employee pursuant to a rule 30(b)(6) notice, it represents that the employee has the authority to speak on behalf of the corporation with respect to the areas within the notice of deposition. This extends not only to facts, but also to subjective beliefs and opinions. If it becomes obvious that the deposition representative designated by the corporation is deficient, the corporation is obligated to provide a substitute.

469 F.3d 416, 432-33 (5th Cir. 2006) (citations omitted).

Compliance with Rule 30(b)(6) is not optional. Rule 30(b)(6) is a statutory discovery tool to be used along with interrogatories, requests for production of documents, requests for admissions, and other depositions. As the court in *Wilson v. Lakner* said, "Rule 30(b)(6) means what it says. Corporations must act responsively; they are not entitled to declare themselves mere document-gatherers. They must produce live witnesses who know or who can reasonably find out what happened in given circumstances." 228 F.R.D. 524, 530 (D. Md. 2005). Sibley gives no compelling reason why it should not comply with Rule 30(b)(6).

2. Sibley's Answers to Interrogatories and Production of Documents do not Nullify its Obligations Under Rule 30(b)(6)

Sibley argues that it is not obligated to comply with Rule 30(b)(6) because it has provided Mr. Fiedler with the names of his treating healthcare providers. Sibley also argues that because it has produced documents, such as its policies and procedures and Mr. Fiedler's medical records, that it does not need to present a witness who can competently discuss these documents and how they relate to Mr. Fiedler's case.

Depositions, interrogatories, and requests for production of documents are very different forms of discovery. No rule of law limits a party to gathering information only by written discovery or depositions, with no overlapping information in between. Under Sibley's logic, no party could ever take a deposition of a witness and ask them about matters that have already been touched on in written discovery. But even Sibley recognizes that this is an absurd position, when it states, "Defendant concedes that additional knowledge may be possessed by various healthcare providers who were personally involved in Plaintiff's care and treatment." (Opp. at 13). Therefore, Sibley recognizes that Mr. Fiedler's medical records alone do not represent the

entirety of Sibley's knowledge about Mr. Fiedler's case. This is not only true of Mr. Fiedler's medical records, but of Sibley's policies and procedures as well.

For example, Sibley's production of policies and procedures does not, by itself, explain how these procedures were applied to Mr. Fiedler. Additionally, Sibley's list of treating healthcare provider's names does not explain what these providers were responsible for, how frequently they saw Mr. Fiedler within a shift, how many other patients they were responsible for, or any other information other than their position and the times of their shift. Thus, there is more to be discovered in this case than is contained by Sibley's answers to interrogatories and document production, and Mr. Fiedler is seeking a Rule 30(b)(6) deposition to uncover this information.

Sibley argues that *In re Vitamins Antitrust Litig.* 216 F.R.D. 168, 174 (D.D.C. 2003), is not persuasive because it was a class-action case from a different jurisdiction. But Sibley does not address the rationale behind that court's ruling, which emphasized that written discovery responses are not the equivalent of a deposition, and are complementary of each other. *Id.* That concept is true whether a case is a class-action suit or a case of medical malpractice.

In re Vitamins Antitrust Litig is far from the only case that explains that depositions and interrogatories are different and complementary. In *Rogers v. Tri-State Materials Corp.*, 51 F.R.D. 234, 241 (N.D.W. Va. 1970), the court explained:

> In 2A Barron and Holtzoff, Federal Practice and Procedure, § 763 (1961), is the observation that "interrogatories are useful chiefly to obtain simple facts, to narrow the issues by obtaining admissions from the adverse party, and to obtain information needed in order to make use of other discovery procedures." The methods of discovery are complementary, not alternative or exclusive. *Stonybrook Tenants Association, Inc. v. Alpert*, 29 F.R.D. 165, 167 (D.C.Conn.1961). Answers to interrogatories may be useful in developing later depositions.

Franchise Programs, Inc. v. Mr. Aqua Spray, Inc., 41 F.R.D. 172, 174 (D.C.S.D.N.Y.1966).

Sibley provides no support for its argument that Mr. Fiedler cannot ask witnesses to expound upon its answers to interrogatories. Mr. Fiedler's Rule 30(b)(6) deposition will be "complementary" to his written discovery requests, which should not be considered "alternative or exclusive" from this deposition. Mr. Fiedler should not be denied the opportunity to depose a witness who can help to further explain Sibley's answers to interrogatories and production of documents.

Sibley also argues that because it disagrees with Mr. Fiedler's claims, it should not have to produce a Rule 30(b)(6) witness who could **explain** this position. But depositions would never take place if witnesses could avoid them simply by opposing a party's claims. Sibley cannot shirk its duty to present a Rule 30(b)(6) designee because it has decided to file an Answer in disagreement with Mr. Fiedler's Complaint. If Sibley believes that Mr. Fiedler did not have a decubitus ulcer when he was discharged, then Mr. Fiedler has the right to ask Sibley's designee about its "subjective beliefs and opinions" as to why it holds this belief.

3. A Rule 30(b)(6) Designee does not Require Personal Knowledge

Sibley displays a fundamental misunderstanding of Rule 30(b)(6) when it argues that its designee will not be qualified to testify due to a lack of personal knowledge. "There can be no question that [Fed. R. Civ. P. 30(b)(6)] imposes a duty to prepare the designee that goes beyond matters personally known to the designee or to matters in which that designee was personally involved." *Wilson*, 228 F.R.D. at 528 (citations omitted). Rule 30(b)(6) witnesses do not speak for themselves, but instead for the corporation as a whole. *Taylor*, 166 F.R.D. at 361; *Brazos River Auth.*, 469 F.3d at 33; *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94

(D.D.C. 1998); *Concerned Citizens of Belle Haven v. Belle Haven Club*, 223 F.R.D. 39, 43 (D. Conn. 2004). Rule 30(b)(6) specifically states, "The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent **to testify on its behalf**." (emphasis added). Sibley admits that the purpose of Rule 30(b)(6) is "to obtain testimony from a corporate entity on particular subjects by having the corporation designate a natural person to speak for the entity on those subject." (Opp. at 5). Furthermore, Rule 30(b)(6) would have no meaning if a party was limited only to deposing witnesses with personal knowledge, since a party is entitled to depose such witnesses anyway.

Sibley argues that there is "no one more suitable to testify about the 'events' involving Plaintiff on behalf of Defendant than the event participants." (Opp. at 14). But the courts have found that both sides benefit from having a Rule 30(b)(6) designee testify on behalf of a corporation as a whole when many of the corporate defendant's employees have knowledge about the case:

> [Fed. R. Civ. P. 30(b)(6)] was added in 1970 in order to avoid the difficulties encountered by both sides when the examining party is unable to determine who within the corporation would be best able to provide the information sought, to avoid the "bandying" by corporations where individual officers disclaim knowledge of facts clearly known to the corporation, and to assist corporations which found an unnecessarily large number of their officers and agents were being deposed. Rule 30(b)(6) gives the corporation being deposed more control by allowing it to designate and prepare a witness to testify on the corporation's behalf.

Taylor, 166 F.R.D. at 360 *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996); *see also Myrdal v. Dist. of Columbia*, 248 F.R.D. 315, 317 (D.D.C. 2008).

Sibley's position is that Rule 30(b)(6) is void where fact witnesses exist. Sibley provides no support for this position, which makes sense since such a position makes Rule 30(b)(6)

purposeless. Fact witnesses will be available for deposition in virtually every case filed against a corporation. But Rule 30(b)(6) gives a party the right to take the deposition of someone who can speak for the corporation as a whole, **in addition** to fact witnesses.

Furthermore, deposing the dozens of healthcare providers that Sibley proposes will not provide Mr. Fiedler with the views and positions of Sibley as a whole, but merely its individual employees, all of whom have only a piece of the knowledge that the Sibley has. The testimony of dozens of employees is likely to result in inconsistent, inconclusive, and contradictory testimony. Taking the deposition of so many witnesses is also inefficient and costly for both parties. As the court in *Wilson* wrote under similar circumstances, "[The Plaintiff] is not obliged to depose a string of hospital employees, none of whom is able to speak for the hospital as to how the incident or incidents in question occurred. . ." 228 F.R.D. at 529, 530.

The Defendant in this case, Sibley, is a corporation. Corporations are made of individuals, and the knowledge of those individuals is a matter "known or reasonably available to the organization." Mr. Fiedler is entitled to depose someone who can speak on behalf of the hospital as a whole. "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. Truth would suffer." *Taylor*, 166 F.R.D. at 361 (citations omitted). Therefore, Sibley's arguments concerning its designee's lack of personal knowledge are irrelevant.

4. Mr. Fiedler is not Seeking the Results of a Peer-Review

Sibley is attempting to avoid a Rule 30(b)(6) deposition by baldly claiming that the peer-review privilege prevents its designee from investigating the facts of Mr. Fiedler's case. As Mr. Fiedler explained in his Motion to Compel, he is not seeking the results of any peer-review that has been conducted in this matter. Sibley cites the Superior Court case of Connor v. Washington Hospital Center, *et. al.*,2008 CA 005692 for its argument that Mr. Fiedler's Notice improperly seeks the result of a peer-review.

But Connor does not reconcile the peer-review statute with Rule 30(b)(6). The two statutes are not mutually exclusive. D.C. Code 44-801(5) says only that peer-reviews are protected information, and D.C. Code § 44-805(b) states that "primary health records and other information, documents, or records available from original sources shall not be deemed non-discoverable or inadmissible merely because they are a part of the files, records, or reports of a peer-review body." D.C. Code § 44-805(b). Rule 30(b)(6) allows for the discovery of the "positions" and "views" about a case from non-protected sources, such as those listed in D.C. Code § 44-805(b), which are wholly independent from any peer-review process. As the court said in *Wilson*:

> The work product doctrine provides no shield to the hospital in this regard. While counsel's own investigation into the facts of the case is substantially protected by the doctrine, and while the proceedings of any investigation conducted for purposes of risk assessment or peer review may be privileged by reason of the Maryland statute, the 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.
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> The results of [peer-review] investigations *per se* are not discoverable, just as those of defense counsel's investigation may not be; but this is not the same as saying that a 30(b)(6) witness (or witnesses) is not obliged to investigate the facts of the incidents, independently of counsel's or the risk assessment/peer review team's conclusions.

228 F.R.D. at 529. The ruling in *Wilson* makes sense, because were it otherwise, a defendant hospital could claim that its positions and views were completely non-discoverable. But no such Rule 30(b)(6) has no such exception.

Sibley states that the opinion in *Wilson* is not analogous to this case, pointing out that *Wilson* involved witnesses that were not sufficiently knowledgeable about the topics contained in the notice of discovery. Sibley claims that this case is different because "Sibley is not refusing to produce witnesses. In fact, Defendant has identified all of the treating health care providers . . ." (Opp. at 13).

What makes this argument so bizarre is that Sibley most certainly **is** refusing to produce witnesses. Mr. Fiedler has requested a Rule 30(b)(6) witness, and Sibley has refused, offering up fact witnesses instead. That is the very reason Mr. Fiedler has filed a Motion to Compel. In *Wilson*, the court ruled that the witnesses who were designated under Rule 30(b)(6) were unsatisfactory. The principal difference between *Wilson* and this case is that in *Wilson* the defendant at least made some attempt to comply with Rule 30(b)(6), even though it was unsatisfactory. Sibley will not even take this step. It has refused to comply with Mr. Fiedler's Notice altogether.

Sibley has also not explained why it cannot designate a witness who could testify about the events of this case without disclosing protected materials. There are ample non-protected sources for Sibley's representative to educate himself about the facts of this case, such as the medical records and discussions with witnesses. Mr. Fiedler is not asking for memoranda from counsel, peer-review reports, or any other legitimately protected information. But Sibley cannot simply bar a Rule 30(b)(6) deposition because some protected material might exist regarding this

case. "The deponent must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources." *Brazos River Auth.*, 469 F.3d at 433. Therefore, Sibley is required to prepare its designee to answer Mr. Fiedler's questions and discuss the topics stated in the Notice of Deposition using the non-protected material that is available.

5. Mr. Fiedler is not Asking Sibley to Provide an Expert

Once again Sibley misinterprets what Mr. Fiedler is seeking in his Notice. At a Rule 30(b)(6) deposition, a corporation "must provide its interpretation of documents and events," including "its subjective beliefs and opinions." *Taylor*, 166 F.R.D. at 361.

Mr. Fiedler is not seeking an expert opinion from a corporate designee. Instead he is asking whether Sibley has formed any subjective beliefs or opinions about Mr. Fiedler's case, and if so, to explain those beliefs. If members of Sibley's staff have formed opinions about these topics, then Mr. Fiedler is entitled to hear them, as they represent Sibley's knowledge that is "reasonably available." If Sibley has no opinion at all about when, why, and how Mr. Fiedler formed a decubitus ulcer, then its representative can say that as well, or it can say that Sibley does not believe that Mr. Fiedler formed a decubitus ulcer while he was an admitted patient. None of these answers requires Sibley's designee to be an expert at anything; his or her job as a designee is to investigate and be prepared to speak about the corporation's knowledge. If the corporation has no knowledge, then the designee should say so, but he or she will certainly not be expected to make up opinions on his or her own.

6. Mr. Fiedler is Entitled to Meta-Data

Sibley is attempting to avoid producing legitimately sought evidence by stating that the production of meta-data is "irrelevant," arguing that the nursing notes in this case are handwritten. However, Mr. Fiedler's medical record from his time at Sibley is not merely limited handwritten nursing notes. There are, in fact, what appear to be numerous computer generated documents in Mr. Fiedler's medical record. (Ex. 1). Mr. Fiedler must continue to request this evidence since Sibley has not affirmatively stated that no meta-data exists.

Sibley still claims that the term "meta-data" is vague. Mr. Fiedler has tried to explain this term as clearly as possible, but to no avail. Perhaps the best explanation about meta-data – what it means, how it is obtained, and its possible relevance – is contained in *Williams v. Sprint/United Mgmt. Co.*:

> Metadata, commonly described as "data about data," is defined as "information describing the history, tracking, or management of an electronic document . . . when and by whom it was collected, created, accessed, or modified and how it is formatted . . . . Some examples of metadata for electronic documents include: a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it).

230 F.R.D. 640, 646-47 (D. Kan. 2005) (citations omitted). This explanation should make it abundantly clear that Mr. Fiedler is seeking any data Sibley has regarding any electronically kept files. This includes the file's name, dates of creation and alteration, and any of other data similar to that outlined in *Williams*.

Sibley also complains about the cost for "forensic experts" to collect meta-data, which seems remarkable considering that Sibley claims that there is no relevant meta-data in this case. But as *Williams* points out, some meta-data can be easily located, and

would not require the enormous effort that Sibley is anticipating. *See Id*.

Sibley also questions the relevance of meta-data altogether. (Opposition at 21-22). But *Williams* also indicated why it is important that meta-data be produced along with the electronically kept documents it concerns:

> Most metadata is generally not visible when a document is printed or when the document is converted to an image file. Metadata can be altered intentionally or inadvertently and can be extracted when native files are converted to image files.

Id. (citations omitted).

Sibley has no authority to claim that the meta-data in this case is irrelevant. Electronic data that concerns the creation, maintenance, and storage of Mr. Fiedler's records could prove extremely valuable. Records can be altered and amended, and any such change could be quite relevant in claim of medical malpractice.

Sibley should not be permitted to bar a legitimately noticed Rule 30(b)(6) deposition by raising only abstract objections without any specific references to actual problems, as it does with virtually all of its objections contained in its Opposition. If Sibley finds that it has meta-data about Mr. Fiedler, but cannot extract it without great difficulty and expense, then at that time it might be appropriate to object. But to do so now, without any basis for stating that gathering meta-data would be unduly costly or burdensome, while also claiming that no relevant meta-data exists, is just another attempt by Sibley to avoid this legitimate discovery method.

7. Mr. Fiedler's Request for a Rule 30(b)(6) Designee is not Overly Burdensome

Sibley claims that Mr. Fiedler's Rule 30(b)(6) Notice "is not limited in any way by time frame or scope." (Opposition at 23). Yet Sibley instantly acknowledges that Mr. Fiedler's Notice did both of these things. Mr. Fiedler limited the timing that Sibley's representative should be

prepared to discuss as being the time of his admission at Sibley; from March 27 through April 9. Sometime during this time period, Mr. Fiedler developed a decubitus ulcer that is the focus of this case. Mr. Fiedler, who is quadriplegic and had just undergone rotator cuff surgery, was unaware of this wound until it was discovered by his home aide following his departure from Sibley. Part of the discovery process in this case is investigating when and how Mr. Fiedler developed this wound while he was admitted at Sibley. Sibley offers no explanation whatsoever for why Mr. Fiedler should further limit the timing of his investigation to fewer days than he has. If Sibley believes that events that occurred on March 27, March 28, or any other date are irrelevant to this case, then it should offer an explanation as to why.

Mr. Fiedler's Notice is also not overly broad in its scope. Sibley suggests that it will have to find separate individuals with knowledge about many different subjects, and spend extensive time educating them about topics of discussion. As Mr. Fiedler has already shown, Sibley has an obligation to "prepare a witness" to testify on its behalf. Rule 30(b)(6) "certainly requires a good faith effort on the party of the designate to find out the relevant facts-to collect information, review documents, and interview employees with personal knowledge just as a corporate party is expected to do in answering interrogatories." *Wilson*, 228 F.R.D. at 528-29.

Furthermore, it does not seem likely that a hospital would need to spend an overly burdensome amount of time educating someone on its staff about the hospital's policies and procedures. Surely somebody at Sibley must be familiar with these already. Also, Mr. Fiedler does not demand that Sibley present a single witness. He will not object if Sibley offers several witnesses to discuss the different topics he has noticed, as long as these witnesses are prepared to speak on behalf of Sibley for the areas of discussion they are designated to speak about.

8. Conclusion

Objections such as Sibley's have been addressed and rejected by the courts time and again in favor of allowing parties to conduct the statutorily allowed depositions that they request. There is nothing about Mr. Fiedler's that would require the creation of an exception to that case law. Sibley provides no support that allows it to flatly refuse to designate a Rule 30(b)(6) witness, as it now seeks to do. Therefore, the Court should compel Sibley to designate a representative to speak on its behalf at a Rule 30(b)(6) deposition.

Respectfully submitted,

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I HEREBY CERTIFY that on this 25th day of January 2011, a copy of the foregoing was sent via e-service to:

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