

MAR 16 2012

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT – DIVISION 3
CIVIL ACTION NO. 10-CI-5512

VELMA HISLE, et al.,
individually and for all other similarly
situated current and former employees of defendant

PLAINTIFFS

vs. **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION
FOR PROTECTIVE ORDER**

CORRECTCARE – INTEGRATED HEALTH, INC. DEFENDANT

Defendant's motion for protective order requests this Court to
eviscerate the purpose and value of a CR 30.02(6) deposition and impose
substantial costs and expenses on plaintiffs.

The civil rules "should be construed to secure the just, speedy, and
inexpensive determination of every action." *Grange Mut. Ins. v. Trude*, 151
S.W.3d 803, 814 (Ky. 2004). A CR 30.02 deposition is perhaps the best vehicle
in this regard, so a review of its function and purpose is proper:

Rule 30(b)(6) also operates as a vehicle for streamlining the
discovery process. The effect of the rule is to place upon the
business entity the burden of identifying witnesses who possess
knowledge responsive to subjects requested in the Rule
30(b)(6) request. The rule is designed to prevent business
entities from "bandying", the practice of presenting employees
for their deposition who disclaim knowledge of facts known by
other individuals within the entity. Consequently, *it imposes a
duty upon the named business entity to prepare its
selected deponent to adequately testify not only on matters
known by the deponent, but also on subjects that the entity
should reasonably know.*

Hooker v. Norfolk Southern Ry. Co., 204 F.R.D. 124, 126 (S.D. Ind.
2001)(citations omitted and emphasis added).

The district court in *United States v. Taylor*, 166 F.R.D. 356, 360-361 (M.D.N.C. 1996), also explains helpfully:

Once served with a Rule 30(b)(6) notice, the corporation is compelled to comply, and it may be ordered to designate witnesses if it fails to do so. 8A Charles A. Wright, Arthur R. Miller and Richard L. Marcus, *Federal Practice and Procedure* § 2103, at 33 (2d ed. 1994) [hereinafter Wright & Miller]. As this Court noted in Marker,

[a] notice of deposition made pursuant to Rule 30(b)(6) requires the corporation to produce one or more officers to testify with respect to matters set out in the deposition notice or subpoena. A party need only designate, with reasonable particularity, the topics for examination. The corporation then must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete knowledgeable and binding answers on behalf of the corporation.

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," and this testimony must be distinguished from that of a "mere corporate employee" whose deposition is not considered that of the corporation and whose presence must be obtained by subpoena. 8A Wright & Miller, § 2103, at 36-37. "Obviously it is not literally possible to take the deposition of a corporation; instead, when a corporation is involved, the information sought must be obtained from natural persons who can speak for the corporation." 8A Wright & Miller, § 2103, at 30. The corporation appears vicariously through its designee. *Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993).

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. *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995) (citing Marker, 125 F.R.D. at 126). 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. *Buycks-Roberson v.*

Citibank Federal Sav. Bank, 162 F.R.D. 338, 343 (N.D. Ill. 1995); *S.E.C. v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y. 1992).

The Rule 30(b)(6) designee does not give his personal opinions. Rather, he presents the corporation's "position" on the topic. *U.S. v. Massachusetts Indus. Finance Agency*, 162 F.R.D. 410, 412 (D. Mass. 1995); *Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 21 (E.D. Pa. 1986); *Toys "R" Us, Inc. v. N.B.D. Trust Company*, 1993 U.S. Dist. LEXIS 13621, No. 88 C10349, 1993 WL 543027, at *2 (N.D. Ill. Sept. 29, 1993). Moreover, the designee must not only testify about facts within the corporation's knowledge, but also its subjective beliefs and opinions. *Lapenna*, 110 F.R.D. at 20. The corporation must provide its interpretation of documents and events. *Ierardi v. Lorillard, Inc.*, 1991 U.S. Dist. LEXIS 11320, Civ. A. No. 90-7049, 1991 WL 158911 (E.D. Pa. Aug. 13, 1991). 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 fingerpointing witnesses at the depositions. See *Lapenna*, 110 F.R.D. at 25. Truth would suffer.

Several material points come from the foregoing. First, CR 30.02 imposes a duty upon defendant to prepare its selected deponent(s) to adequately testify "on subjects that the entity should reasonably know." So to streamline the discovery process and serve the purposes of CR 30.02, as well as to achieve "the just, speedy, and inexpensive determination of every action," defendant is required to adequately prepare a representative to testify. It cannot simply throw up its hands and ask this Court to relieve it of its responsibilities.

Second, defendant's contention that CR 30.02 requires the representative have "first hand knowledge" is incorrect. Defendant's 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." *Buycks-Roberson v. Citibank Federal Sav. Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995); *S.E.C. v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y. 1992). Defendant's protestations to the contrary again seek to relieve it of its responsibilities.

Third, defendant makes no complaint about the particularity of the topics noticed for inquiry nor about the adequacy of the time it has been allowed to prepare a deponent in accordance with the rule. Plaintiffs provided to defendant on December 7, 2011 --- more than 3 months ago -- a detailed notice of CR 30.02 deposition, which is identical to that served on defendant on February 3, 2012. . There is no surprise here, nothing that has come up all of a sudden. Furthermore, the efforts to get scheduled the CR 30.02 that precede defendant's motion include the following:

In sum, defendant's motion is directly contrary to the purpose and function of a CR 30.02 deposition. It proposes this Court to require precisely the "bandying" that CR 30.02 aims to preclude, condemn plaintiffs to deposing multiple far-flung about our Commonwealth witnesses and relieve it wholly from the duty "to prepare its selected deponent to adequately testify on subjects that the entity should reasonably know." This position is without merit. That it is raised more than 90 days after plaintiffs sent defense counsel the proposed notice of deposition does support the reasonable conclusion that defendant has been ignoring its duties under CR 30.02,

unnecessarily delaying this matter and now requests this Court to sanction same.

CR 30.02 depositions are customarily taken at the corporation's principal place of business. *Moore v. Pyrotech Corp.*, 137 F.R.D. 356, 357 (D. Kan. 1991); *Turner v. Prudential Ins. Co.*, 119 F.R.D. 381, 383 (M.D.N.C. 1988). Defendant's principal place of business is at 366 South Broadway in downtown Lexington. Accordingly, the CR 30.02 deposition is properly noticed to take place in Lexington.

Conclusion

Defendant's motion should be overruled in its entirety. The Court should order defendant to propose multiple dates within 30 days of the hearing for the CR 30.02 deposition to take place in Lexington, Kentucky.

Respectfully submitted,



ROBERT L. ABELL
120 North Upper Street
P.O. Box 983
Lexington, KY 40588-0983
Telephone: (859) 254-7076
Facsimile: (859) 281-6541
COUNSEL FOR PLAINTIFF

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing was mailed, *ccf* postage pre-paid, this 16 day of March 2012, to the following:

James M. Mooney
Frank Miller
Moynahan, Irvin & Mooney
110 North Main Street
Nicholasville, KY 40356

Ronald L. Abell

Counsel for Plaintiffs