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30(b)(6) Deponents and Defense Fact Witnesses

In chapter 9, we introduced the 30(b)(6) deposition as a powerful weapon to defeat the shell game. We talked about the origination of 30(b)(6) from the Federal Rules and how most states also allow these depositions. And we explored the 30(b)(6) concept through the record keeper deposition, designed to expose the lack of support for the defendant's objections and to box the defendant in about whether it had really produced all responsive documents (they will say "yes, we did," but I never believe them, and I'm rarely wrong).

While the 30(b)(6) deposition of a record keeper is a powerful tool, the 30(b)(6) deposition of the corporate witness for "substantive" issues is even more powerful. In some jurisdictions, the deposition of a party can be used for any purpose—including at trial. As a result, we notice the deposition of a 30(b)(6) "for all purposes authorized." Since the 30(b)(6) witness is someone designated by the corporation to provide binding testimony, your cross-examination at trial starts with this deposition.

This is paramount because frequently corporate witnesses are not properly prepared to testify—particularly in smaller premises liability cases. Thus, it is possible to "win" the case—particularly liability—by doing this one deposition well.

How to Approach Your 30(b)(6) Deposition

It seems to me that most people view the defendant's answer as a formality. "Of course the defendant denied everything. What did you expect? Of course he claimed a lack of knowledge. Of course he asserted defenses without having any evidence to support them. Isn't that what the defendant's lawyers are supposed to do?"

I don't view the world that way. Perhaps I'm just a silly romantic, but I believe in the ideals of the civil justice system. I believe that people are supposed to act in good faith. They are required to tell the truth. The rules are supposed to be followed. Maybe I'm foolish, but I am still angry when rules aren't followed. I don't like being lied to. I don't believe anyone likes being lied to.

So I am always excited to read the defendant's answer. Maybe this time the defendant will be candid and honest. Maybe the defense lawyers will meet their duty of candor. Silly me. I get disappointed (and frustrated) over and over, and yet I don't change my expectations.

We can get disappointed and quit, or we can be disappointed and fight back. I choose the latter. Receiving an answer that lacks candor and good faith is a good start to organizing your case for trial. The defendant has just demonstrated that it is an organization that chooses not to follow the rules—both the safety rules and the legal rules. Do you think this is something that you may want to emphasize to the jury? Isn't the credibility of a party an important criterion the jury uses to decide the case?

Your Legal Rights in a Substantive 30(b)(6) Deposition

When I discuss serving a notice of deposition for a 30(b)(6) corporate witness to testify on *substantive* issues, I'm specifically referring to liability defenses and any evidence supporting the defenses. There are procedural defenses that you should check the box on—like statute of limitations, service, venue, immunities, and so on. However, the real meat of combatting premises liability defenses is attacking the substantive defenses:

- "We didn't do anything wrong."
- "It was the plaintiff's fault."
- "It was someone else's fault."
- "That was unforeseeable."

Remember, to win most of your premises liability cases, you need to establish the applicable industry or company standards and the defendant's failure to comply with those standards. (Sometimes you will have to argue that ordinary care requires a different or higher standard from the self-serving standard the industry or corporation applies.)

To initiate a substantive defenses deposition, one of our recent 30(b)(6) deposition notices included this requested issue:

> Avis Rent A Car System LLC and Avis Budget Group's Answer to the Plaintiff's Complaints, facts supporting any

> defenses raised, and responses to Plaintiff's written discovery requests . . .[1]

Be prepared for defense lawyers to howl. "What's this? Our defenses are work product!" To maximize the 30(b)(6) deposition, you need to be prepared to defend your right to take it, your right to ask your questions, and your right to get answers.

While writing this book, I didn't want to cite a lot of cases because the law will vary throughout the country. However, the following citations for the following propositions are very important and should serve as a springboard for you to localize legal authority for these issues to your own jurisdiction.

Case Law and Legal Principles to Know and Love

If you are like me, you want some magic bullets to help you win. We will get to the bullets (no magic) soon, but before we start shooting with the questions, we need to be prepared. Sadly, but realistically, there is homework before the battle. Your homework is to be prepared to argue your right to ask these questions. The good news is that it is not necessary to memorize all of these cases.

I have a separate notebook with Georgia and federal case decisions about discovery. In many states, the state rules of civil procedure are based on the Federal Rules of Civil Procedure. Thus, courts are allowed to take guidance from federal decisions. Your jurisdiction may be the same. This is important because in some states there isn't a plethora of appellate decisions relating to discovery.

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1 *Smith v. Avis Rent A Car System LLC*; *Avis Budget Group, Inc.*; *PV Holding Corp.*; Yonas G. Gebremichael; Peter Duca; and Byron Devon Perry, State Court of Gwinnett County, Civil Action No. 14-C-00798-S4 and *Johnson v. Avis Rent A Car System LLC*; *Avis Budget Group, Inc.*; *PV Holding Corp.*; Yonas G. Gebremichael and Peter Duca;, State Court of Gwinnett County, Civil Action No. 15-C-04651-4.

In my discovery notebook, I have sections filled with legal authority for a variety of issues, such as the Georgia statutes governing discovery (Rule 26 *General provisions governing discovery*; Rule 30 *Depositions upon oral examination*; Rule 33 *Interrogatories to parties*; Rule 34 *Production of documents and things and entry upon land for inspection and other purposes*; Rule 37 *Failure to make discovery*), cases addressing the scope of discovery, improper speaking objections during depositions, and so on. I bring that notebook with me in the event there are problems.

If problems arise, I pull out my notebook and start citing the supporting law on the record. I then ask the defense lawyer if he has any legal authority contrary to what I just cited. I can't remember a defense lawyer ever being able to cite to any law. I then ask the defense lawyer if he is going to instruct the witness not to answer the question and, if so, under what privilege. Almost 100 percent of the time that resolves the roadblock, and I then get answers to the questions I am entitled to ask. The remaining time (probably less than 1 percent), a stalemate remains. At that point, however, we have cited supporting case law and the defense hasn't. Also, it's generally clear that there are good reasons to ask the question. As a result, judges don't typically view the defense shenanigans favorably.

If you are prepared to handle roadblocks the same way, you should be able to ask the necessary questions to shoot holes in the defendant's credibility and its defenses. Now that you have the overview on why you should be prepared to shoot precisely with the law, let's address some of the key issues you will want to convert to legal authority in your jurisdiction.

You Are Entitled to Ask Questions Regarding the Defendant's Evidence and Defenses

- Discovery tools such as depositions are *always available* to discovery *"any evidentiary basis"* for a party's defenses. *Exum v. Melton*, 244 Ga. App. 775, 777 (2000). *Carver v. Tift County Hosp. Auth.*, 268 Ga. App. 153, 155 (2004).

- O.C.G.A. 9-11-26(b)(1) authorizes discovery related to the "*claim or defense* of any other party."

- In federal court a 30(b)(6) deposition is the proper place for a party to ascertain *the factual basis behind an opponent's claims or defenses*. *Bd. Of Regents v. Nippon Telephone and Telegraph Corp.*, 2004 U.S. Dist LEXIS 28819 (W.D. Tex. June 1, 2004). Also *Protective Nat'l Ins. Co. v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 272-77 (D. Neb. 1989). Also *Resolution Trust Corp. v. Sands*, 151 F.R.D. 616 (N.D. Texas 1993).

A Party May Ask about Ultimate Facts and Seek Admissions

- "The plaintiff is entitled to *interrogate* the defendants both as to the *plaintiff's case and* as to the *defendants' case*. The plaintiff is entitled not only to seek answers with reference to *detailed facts*, but also as to *ultimate facts*. For example, 'the thirty-inch rail was not sufficient to protect Mr. Murrey from falling over it,' in addition to obtaining discovery, the plaintiff is also entitled to ask questions that *seek admissions* for the purpose of the trial." *Nelson v. Reid*, 4 F.R.D. 199, 199–200 (S.D. Fla. 1944)

The above citation was from a dog-bite case over seventy years ago. It is powerful because it acknowledges the plaintiff's authority to ask all types of questions. For example:

Q: The Plaintiff's Complaint alleges that Mr. Murrey was attending an Atlanta Braves game on August 29. Isn't that a true statement [a question to support the plaintiff's case]?

Q: The Braves are claiming that they meet "applicable building codes." What specific building codes do the Braves contend support its choices [a question as to the defendant's case]?

Q: Who was responsible for setting the rail height to thirty inches and allowing the rail height to remain at thirty inches even after there were more than six reported incidents where fans fell over rails at other stadiums [a question referencing detailed facts]?

Q: Don't the Braves and Major League Baseball claim that fan safety is always the number one priority [a question seeking an admission]?

Q: Wouldn't you agree that the Braves did not put fan safety first when they chose not to raise rail heights to forty-six inches after the Texas Rangers chose to raise rail heights after Shannon Stone died July 7, 2011 [a question relating to an ultimate issue]?[2]

A Work Product Objection Does Not Defeat Your Right to Ask about Evidence and Defenses

- A party is entitled to inquire into the factual basis of the adversary's allegations *even over work product objections*. *U.S. v. McDonnell Douglas Corp*. 961 F. Supp. 1288, 1290 (E.D. Mo. 1997).

2 These hypothetical questions are framed based on facts alleged in *Murrey v. Atlanta National League Baseball Club, LLC, Liberty Media Corporation, and Office of the Commissioner of Baseball*, Fulton State Court, 16EV001898.

- Here are questions that are not supported by the law—questions which tend to reveal counsel's advice, counsel's view as to the significance of specific facts, or counsel's questions to third-party witnesses because these matters are protected by the work-product doctrine. *Ibid.*

A Party Must Take Steps to Have a Knowledgeable 30(b)(6) Witness

- The deponent has a *duty of being knowledgeable* on the subject matter identified as the area of inquiry. *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C.1996); *SEC v. Morelli*, 143 F.R.D. 42, 44-45 (S.D.N.Y.1992); *In re Air Crash Disaster at Detroit Metro. Airport*, 130 F.R.D. 627, 630-32 (E.D.Mich.1989).

- The organization *must prepare the representative to testify* as to the organization's *collective knowledge and information*. *Spring Communications Co., L.P. v. Theglobe.com*, 236 FRD 524 (D.Kan.2006).

- Even where the information is not personally known by any present employees, the corporation has the responsibility to prepare and educate its chosen witness to testify "to the extent matters are *reasonably available*, whether *from documents, past employees, or other sources*." *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C.), *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996).

- The company has a duty to make a conscientious, *good-faith effort* to designate a knowledgeable representative. *Brazos River Authority v. GE Ionics, Inc.* 469 F.3d 416, 433 (5th Cir. 2006).

The Scope of Examination Includes Beliefs and Opinions Held by the Entity

- The testimony is *not limited to the facts*, but *can include beliefs and opinions* held by the entity. *Brazos River Authority v. GE Ionics, Inc.* 469 F.3d 416, 432 (5th Cir. 2006).

Organizing Your 30(b)(6) Deposition

The above case citations support very powerful legal rights and tools. However, it may benefit you to show some examples of how they work in the real world to establish your premises liability case.

Explore and Attack the Defendant's Denials

Don't let defendants off easy when they deny allegations in your complaint. Denials are clear and establish the defendants' position in the case. So you'll want to identify and attack the basis for the denial.

- What facts is the defendant relying on to deny this allegation?
- Who in the defendant's organization knows about the facts?
- What is the defendant's contention about how the incident occurred?
- What does the defendant contend was the cause of the incident?

It seems easy (and reasonable) to assume that a defendant will have a good-faith reason supporting its response to the plaintiff's allegations. However, I frequently find that the most common response incorporates the defendant's assertion that at the time the answer was filed they didn't have information sufficient to form a belief. When I get that type of response, I question whether the answer was filed in good faith. Then, the following questions come to mind:

- Was an investigation performed?
- When was the investigation done?
- What did the investigation show?
- Who performed the investigation?
- Was a report prepared?
- Who was the report sent to?

If the defendant claims the investigation that followed the incident is privileged, I am frequently happy. The presumption then is that the information was not favorable. This sets up a simple argument with significant jury appeal. After all, if the information helped the defendant, don't you think they would have produced it?

For example, "Here is the video showing that your client was drunk when she staggered into our store and then fell and broke her leg. You lose. Now dismiss this lawsuit before we pursue attorney's fees against you for filing this." You want to see that video. Sooner rather than later. You don't want to waste time and money on a loser case. But, of course, that video doesn't exist. If it did, there wouldn't be a privilege

asserted. They'd waive that privilege in a heartbeat, and you would move on to another case.

In addition, if the defendant did a proper investigation before the suit was filed, how could the defendant lack knowledge about what happened? These are all difficult questions for the defendant to answer. In reality, defendants frequently employ a "circle-the-wagons" approach to an incident. After something bad happens, it seems the corporation's first response is, "We are going to find out what happened." Its investigators might even do a conscientious job with the investigation, looking at video footage, taking photographs, talking to witnesses, and preparing a report. However, if the investigation reveals something that does not look good for the corporation, we frequently see the corporation deny everything. The mentality is apparently, "So sue us! We'll then demand strict proof. We'll see what happens in court." Yet when exposed to a jury, that is stubbornly litigious behavior.

Sometimes corporations will produce an investigation report and witness statements and *still* claim that there isn't enough knowledge to admit an allegation. For example, in a case we are currently working on, we included an allegation, "Greg lost his balance and fell forward over a rail that was only thirty inches high." The defendant produced multiple eyewitness reports and even a video showing the fall. Yet the defendant's answer stated, "Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained within paragraph 15 of Plaintiffs' Complaint, and therefore denies same."

Look back at the allegation. The defendant just denied that the plaintiff:

1. Lost his balance

2. Fell forward

3. Fell over a rail that was thirty inches high

They know he fell forward because there were eyewitness reports in their investigation and they have a video of the fall. They know the rail is thirty inches high. The only thing they might claim is, "We don't know why he fell, so we can't say he lost his balance." But how can someone fall without losing his balance? Perhaps if a person jumped, but there is no evidence that the plaintiff jumped. Perhaps there was a medical emergency? Even so, the defendant should admit to two-thirds of the allegations. Yet, the defendant rarely does so.

The defendant is doing you a favor in destroying its credibility by denying things it has no business denying. However, you have to mine the complaint, the answer, and the defendant's knowledge in order to establish that the defendant knew better. The defendant just isn't willing to accept responsibility for its own conduct. Nor will the defendant acknowledge that it answered the complaint and discovery in bad faith.

Make the Defendant Support Its Defenses

Since the law allows us to inquire about what evidence the defendant has to support its defenses, you might want to cycle through all of the affirmative defenses contained in the defendant's answer. For example, ask questions like this:

> What evidence does the defendant have to support its first affirmative defense—that the damages sought by the plaintiff resulted from acts or omissions of others, over whom this defendant exercised no authority or control?

After getting a response to the question, consider asking the exact same question for the second defense, third defense, and so on. You may wish to replace "evidence" with "facts," "documents," or "testimony" in order to inoculate your questions from work-product objections. The effect is the same. You aren't asking for the defendant's lawyer's opinion about the defense. You are asking for the facts that support the defense. Or more likely, you are seeking to discover or confirm the absence of facts supporting a defense.

Make the Defendant Prove Its Apportionment

Apportionment was sold during a tort reform campaign over ten years ago as something that was fair because the jury should really consider who was "at fault" even if those persons "at fault" cannot legally be held responsible—for example, a governmental entity with sovereign immunity or an employer with a worker's compensation protection from tort liability or unnamed, unidentified criminals. In short, apportionment is an opportunity for the defendant, despite its own liability, to point after the fact at other persons or entities it contends are at fault.

Apportionment is one of the key defenses that defendants use in premises liability cases—particularly in negligent security cases. With apportionment, the defendant gets an additional defense, which is basically the equivalent of "Okay, you caught me not following the rules. But wait! Someone else is at fault—the jury should not make me fully responsible because someone else is at fault."

However, if the plaintiff's lawyer handles her business, apportionment isn't the panacea the insurance companies hoped that it would be. No one likes finger pointers—especially when they are seeking to avoid all responsibility and have done so in bad faith.

Defendants frequently will point the finger of fault at the close of discovery (and after the statute of limitations). So you'll

want to thoroughly explore the evidentiary underpinnings of any potential apportionment claim that the defense could later assert. Establishing a lack of sufficient evidence supporting apportionment is key to success at trial and to later defending the verdict on appeal. As a result, you should ask the following questions:

Q: Who are the other people or entities you contend caused the damages?

Q: What did these people do that caused harm?

Q: How do you know this?

Q: Who are the people that know this?

Q: When did you learn it?

Q: What documents exist on this topic?

Address the Assumption of the Risk Defense

Assumption of the risk is a universal defense in a premises liability case. To a defense lawyer and those in the jury pool who view the world with a "defense bent," people assume the risk of bad things happening simply by getting out of bed in the morning. The law is not typically that unfriendly. But if you don't know the law in your jurisdiction, you aren't able to defuse the assumption-of-risk defense by showing that there is no evidence to support it in your client's case.

In Georgia, assumption of the risk applies only when a person, without coercion of circumstances, chooses a course of action with *full knowledge* of its danger and while exercising a free choice as to whether to engage in the act.[3]

3 See *Turner v. Sumter Self Storage Co.*, 215 Ga. App. 92, 94 , 449 S.E.2d 618, 620 (1994).

The Georgia Supreme Court has held that the plaintiff must have had *both actual and subjective knowledge* of *the specific, particular risk of harm* associated with the activity or condition that proximately causes injury, rather than a knowledge of nonspecific risks that might be associated with such conditions or activities.[4]

The Georgia Supreme Court pointed out, "The knowledge requirement does not refer to a plaintiff's comprehension of general, nonspecific risks that might be associated with such conditions or activities."[5] The Court then goes on to cite Dean Prosser's *Law of Torts*.

> In its simplest and primary sense, assumption of the risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from *a known risk arising from what the defendant is to do or leave undone.*[6]

This is a crucial distinction. To legally establish assumption of the risk, it is not enough in Georgia to argue, "You knew it was cold and that it could be icy." Nor is it enough to argue, "You knew there was ice at other points on the road." To establish a *prima facie* case on assumption of the risk, the defendant would have to be able to say, "You knew there was ice right where you were about to step, and you stepped anyway." In order to defeat this defense, research and understand the legal and factual contours of the assumption of the risk defense in your jurisdiction.

In the negligent security arena, let's say your truck driver client is attacked after he goes outside his truck to investigate a noise. A defense lawyer would likely argue that the plaintiff assumed the risk of harm by going to investigate. However, the plaintiff would

4 *Vaughn v. Pleasant*, 266 Ga. 862, 864, 471 S.E.2d 866 (1996).

5 *Ibid.*

6 Dean Prosser, *Law of Torts*, (4th Ed.1971) p. 440 (emphasis added).

have had to know there was someone out there who was a threat to him. Otherwise, the noise could have been another truck that bumped into his trailer while backing up. The plaintiff has a duty to his employer to investigate and report property damage. By investigating promptly, the plaintiff might have discovered the driver who bumped the trailer and obtained insurance information so that a claim could be made. The plaintiff doesn't have to assume that the noise was caused by a thief who might attack him and cause catastrophic harm if discovered.

We've never accepted a premises liability case in which the plaintiff's conduct supported an assumption-of-risk defense. In fact, we have filed and won partial motions for summary judgment on the issue of assumption of the risk. Never forget that even though the defendant may not be entitled to a legal defense on assumption of the risk, you can still lose a case if you have a juror inclined to view the world that way, and if you don't take time to explain the intersection of your client's conduct and the facts.

The below questions are relevant to establishing whether the plaintiff exercised ordinary care. Because of this embedded risk, be extra careful when accepting slips on ice. There is always someone thinking, "I never would have been out there. I would've stayed home."

Q: What evidence do you have to support your second defense, that the plaintiff assumed the risk of harm?

Q: What evidence do you have that [plaintiff's name] walked on the path with actual knowledge that there was [black] ice?

Or,

Q: What evidence do you have that, when the plaintiff walked outside the truck to investigate a noise, he knew it was a

thief who would attack him and cause catastrophic harm if discovered?

As you go through questions relating to the defenses, you may draw objections from the defense lawyer that the questions call for a legal opinion. Remember to point out that you are only asking for evidence (facts, documents, or testimony) supporting the defendant's position. If necessary, force the defendant's lawyer to instruct the witness not to answer. If that happens, ask the defense lawyer this, on the record:

Q: What privilege are you asserting in order to instruct your witness not to answer?

Insist the Defendant Admit or Deny Its Mistakes

We like to ask if the defendant feels that any mistakes were made. Almost always, the corporate representative will deny that the company made any mistakes. Sometimes they will deny that anything could have been done better. This opens the door to feasibility and admissibility of subsequent remedial measures. So consider asking questions regarding mistakes or what could have been done better.

Q: Is there anything that you think Monitronics could have done better with regard to the handling of the situation on March 29, 2006?

A: I think that we handled all the alarm signals that we received properly, according to our procedures.

Q: Do you think there is anything you could have *done better to handle it*?

A: No. We handled them within our standards.

Q: Is there anything that you would prefer that *your employees had done on that day*?

A: No.[7]

The above response is fun because at trial we compared what Monitronics claimed they did to what they actually did to what their "procedures" and "standards" stated they should do. Suffice to say, they did not meet their standards. It appeared the jury did not appreciate the scorched-earth defense, as it returned a $9 million verdict.

Recently, I took a deposition in which the 30(b)(6) deponent denied making mistakes. This was a case in which a property manager's employee, a maintenance man, raped a minor while on the property. After a break, the witness came back and acknowledged that there were a few mistakes. That was a fun turn of events. We had this exchange:

Q: After three years, what mistakes are you now willing to acknowledge occurred?

A: Our lower-level employees should have reported any concerns they had about the maintenance man.

Q: If you had known about the concerns of those employees, would you have terminated the maintenance man and made sure he was off the property?

A: Yes—if only we had known.

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7 *Monitronics International, Inc. v. Veasley*, 323 Ga. App. 126, 746 S.E.2d 793 (2013).

The problem for the defendant is that the knowledge of the employee is imputed to the company. So the property management company did know, even if it wasn't reported. The value of that case went up significantly after asking about whether the defendants made any mistakes.

Recognize "I Don't Know" Can Be as Good as "I Know"

Because many 30(b)(6) witnesses are not prepared to testify on the topics you have designated, a witness will often say, "I don't know." It is very important that you lock that favorable admission in:

Q: As we sit here today, the defendant is not aware of any facts that support its contention that the plaintiff's damages were caused by the acts or omissions of others, correct?

The purpose of the question is not to harass the witness. The purpose is to learn whether the defendant has any facts so you can assess the defense and decide what to do next. If the defendant's representative says on behalf of the defendant, "I don't know," that should be a binding admission. It should eliminate that defense as unsupported. You might consider a motion for partial summary judgment on the defense.

Also, this is golden evidence of the defendant's lack of credibility. You can frame it more aggressively:

Q: Although the defendant had no evidence to support its first defense, it still asserted it, right? Would you agree that it is bad faith to assert a defense to which you have no evidence?

Deal with the Know-Nothing 30(b)(6) Witness

When you get a litany of "I don't knows" in a 30(b)(6) deposition, you must lock in the defendant's lack of knowledge. However, you may also need to press for a knowledgeable 30(b)(6) witness, which is your right.

Courts have analyzed the requirements of a party to comply with Rule 30. The organization *must prepare the representative to testify as to the organization's collective knowledge* and information.[8] Remember Rule 30(b)(6), "The persons so designated shall testify as to matters known or reasonably available to the organization."[9]

As a result, the individual will often have to testify to matters *outside the individual's personal knowledge*. The 30(b)(6) witness's testimony is not limited to the facts, but can include beliefs and opinions held by the entity.[10]

Notwithstanding the above requirements, defendants will sometimes produce a 30(b)(6) witness who isn't knowledgeable on the topics identified. Then you have two options:

1. **Smile and accept it**. This works particularly well if the witness has no knowledge about any evidence supporting a defense. You can file a motion for partial summary judgment or a motion *in limine* barring future testimony on the subject.

2. **Move for sanctions and a knowledgeable witness**. In some cases, you need the information that was withheld. You should point out that the court has options on how to handle that conduct. Those options include striking an answer for failure to appear or issue preclusion (striking a specific defense).

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8 *Sprint Communications Co., L.P. v. Theglobe.com*, 236 F.R.D 524 (D.Kan 2006).

9 *Protective Nat'l Ins. v. Commonwealth Ins.*, 137 F.R.D. 267, 277–78 (D. Neb. 1989).

10 *Brazos River Authority v. GE Ionics, Inc.,* 469 F.3d 416, 432 (5th Cir. 2006).

With regard to the second scenario, a few years ago we had a trucking case that is illustrative of what to do when you need to know more (or you think the testimony is more favorable than even a presumption would be) and you aren't convinced the judge will sanction the defendant.

We were handling a case in state court (as opposed to federal court where you might have a better chance of the judge imposing strong sanctions for a rule violation). In this case, our client was seriously injured and transported to the hospital. The truck driver blamed her for causing the wreck.

We took the 30(b)(6) depositions of the company's corporate witnesses, relating to numerous topics, such as the completeness of documents produced, the enforcement of safe driving practices, the company's understanding of the facts of the wreck, and the company's post-collision investigation.

During the depositions, the witnesses were not able to answer a number of questions. After the depositions, we sought dates for the representatives to be re-deposed. However, the defendants' counsel refused to make the witnesses available again. After we sent notices for new depositions, the defendants moved for—*but did not obtain*—protective orders and did not show up for the depositions.

If a party objects to a deposition taking place, the party bears the responsibility of *securing* a protective order. Filing the motion for a protective order does not excuse the party from attending. A party may be severely sanctioned for its intentional failure to appear at a noticed deposition in the absence of a signed protective order, including the striking of pleadings.

The defendant chose to produce 30(b)(6) witnesses who were not knowledgeable despite its obligation to do so. Rule 30(b)(6) "places a[n] affirmative duty on organizations to make a conscientious, good-faith effort to sufficiently prepare the designated

representatives so that they can answer fully, completely, [and] unevasively the questions posed."[11]

We argued to the trial judge that Rule 30(b)(6) was intended to ensure that the designated corporate witness be deemed to speak for the corporation so that his or her testimony binds the corporation.[12] Numerous courts agree and require such 30(b)(6) testimony to bind a corporate entity.[13] This is because a corporate witness is the voice of the corporation.[14] Thus, a corporate defendant has an obligation "to prepare its designee to be able to give binding answers on [its] behalf. If the designee testifies that [it] does not know the answer to plaintiff's questions, [it] will not be allowed effectively to change its answer by introducing evidence during trial. The very purpose of discovery is 'to avoid trial by ambush.'"[15] "Producing an unprepared witness is tantamount to a failure to appear."[16]

In other words, the designated corporate witness represents the corporation just as an individual represents himself or her self

11 *See In re Analytical Systems, Inc.*, 71 B.R. 408, 412 (Bankr. N.D. Ga. 1987) (quoting *Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Resources Authority*, 93 F.R.D. 62, 66–67 (D.P.R. 1981)); *Alexander v. F.B.I.*, 186 F.R.D. 148, 152 (D.D.C. 1999); *In re Air Crash Disaster at Detroit Metropolitan Airport on Aug. 16, 1987*, 130 F.R.D. 627, 631–32 (E.D. Mich. 1989).

12 *Sanders v. Circle K Corp.*, 137 F.R.D. 292, 294 (D. Ariz. 1991).

13 *See Worthington Pump Corp. v. Hoffert Marine Inc.*, 34 F.R. Serv. 2d 855 (D.N.J. 1982) (holding when a designated 30(b)(6) witness claimed a personal Fifth Amendment privilege, then that silence was binding on the corporation, and the corporate entity would not be permitted to offer into evidence any information to fill in the gaps created by the lack of 30(b)(6) testimony).

14 *Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F.Supp.2d 82, 94 (D.D.C. 1998).

15 *Ierardi v. Lorillard Inc.*, 1991 WL 158911 (E.D. Pa. 1991); *see also Federal Deposit Insurance Corp. v. Butcher*, 116 F.R.D. 196, 202 (E.D. Tenn. 1986) (requiring a 30(b)(6) witness to "be prepared to answer questions fully, unevasively, and completely").

16 *U.S. v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996).

at a deposition.[17] 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.[18]

The court required that 30(b)(6) depositions recommence. We continued and eventually established that the trucking company had not kept electronically stored documents. A sanctions order was imposed. The case settled at mediation. The same roadmap can apply to premises liability cases.

While the law states that 30(b)(6) depositions are binding and the failure to produce a knowledgeable witness leads to sanction or could lead to a binding admission that the corporation has no knowledge to rebut the plaintiff's allegations, I haven't personally seen that scenario play out. I would think it more likely in federal court than state court. It is my feeling that most state court judges would like the jury to assess the evidence and will lean toward requiring the defendant to produce a knowledgeable witness. I'd prefer to take someone's deposition to see how he or she answers my questions.

Don't Stand for Speaking Objections during Depositions

After you start getting better harnessing the power of a 30(b)(6) deposition, you'll begin to notice defense lawyers under pressure. They'll recognize that the witnesses' answers aren't supported by evidence or that their positions aren't well considered. The more they realize things are not going well, the more likely you are to encounter vigorous speaking objections.

Speaking objections are objections that improperly suggest to the witness how to answer or how not to answer the question. "You can answer that *if you know* the answer" can be code for "I

17 *Taylor* at 361.

18 *Id.*

don't want you to know the answer." Insist that the defense counsel limit their objections "to the form of the question."

Georgia law—through O.C.G.A. 9-11-30(c)(1)—states, "Examination and cross-examination of witnesses *may proceed as permitted at the trial* under the rules of evidence." I haven't been at a trial where a lawyer interrupts questioning to suggest the witness only answer if he knows, not to guess, and so on. Yet "speaking objections" are an issue that occurs in depositions more than it should. In Georgia, we have statutes within our "Civil Practice Act," O.C.G.A. § 9-11-37(a)(4) and O.C.G.A. § 9-15-14, that offer legal standards so that deposition conduct should not become abusive. Yet despite these safeguards, speaking objections persist.

About ten years ago, I had to file a thirty-page motion seeking the court's intervention and sanctions because of obstructive deposition conduct during a case in which I was seeking to depose a nationally known retailer's 30(b)(6) witness. After reading the motion, the judge ruled in our plaintiff's favor, conducted a hearing on attorney's fees, and imposed the *Clifton Hall*[19] *standards*. The Clifton Hall standards bar the witness from conferring with the defending lawyer except as to privilege. Also, the lawyer is not permitted to object to issues that were already reserved until the time of trial. The defending lawyer is strictly prohibited from making any comments during deposition that may suggest answers to the witness.

Afterward, the defendant changed law firms, and the case reached a confidential settlement at mediation. The process was a long one, which I hope I won't have to repeat. I would suggest that you bring similar legal authority with you to your deposition in the event you encounter similar unprofessional behavior.

19 *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1983).

Conclusion

This chapter may be the most important new addition to your arsenal to help you win premises liability cases. In premises cases, unlike car wreck cases, you may encounter dozens of possible witnesses. Who knew about the spill? Who knew this was an area that was frequently wet? Who was responsible for inspecting the floor prior to the fall? Who were the cashiers working in the vicinity? Who was the person that helped the plaintiff after the fall? Who was the person that prepared the incident report? Who was the person that called the plaintiff the day after the fall? Who spoke to her several weeks later?

With a 30(b)(6) deposition, you are supposed to get corporate knowledge. Most of the time, these depositions are a tremendous opportunity to streamline a case. However, despite the streamlining, you will still need to take advantage of other depositions. Large premises cases can require dozens of depositions at times. In our Six Flags case, there were sixty depositions. The next chapter will address other important depositions you need to be aware of in order to win a premises liability case.