United States District Court
District of South Dakota
Western Division

VERNON R. TRAVERSIE,

Plaintiff,

vs.

RAPID CITY REGIONAL HOSPITAL, INC.; REGIONAL HEALTH, INC.; REGIONAL HEALTH PHYSICIANS, INC.; TRS SURG ASSIST, INC.; AND JOHN AND JANE DOE NOS. 1-100,

Defendants.

Civ. No. 12-05048-JLV

Regional Defendants' Reply Brief in Support of Their Motion for Summary Judgment

Summary

Plaintiff claims he was the victim of a racial hate crime. He publicly vilified Defendants with incendiary allegations of intentional racial cruelty. Yet, after a campaign to publicly condemn Regional, he has failed to produce sufficient evidence to present a triable claim. Indeed, Plaintiff makes two remarkable claims in this case:

First, that a Defendant put "KKK" on his abdomen; and,

Second, that a nurse physically and verbally assaulted him.

Defendants are entitled to summary judgment on the "KKK" allegations because there is no evidence that Plaintiff's scars—whatever shape one might see—are anything but the natural consequences of proper medical care and treatment.

Defendants are entitled to summary judgment on the assaultive nurse allegations because any dispute is not genuine, because the

evidence is insufficient for a reasonable jury to find for Plaintiff on his claims.

Argument

1. All of the "KKK" claims fail for want of proof.

Traversie had open heart surgery. The care he received resulted in scars. That is undisputed. Most people would probably agree that one scar resembles the letter "K." There is no evidence that anyone else thought that he had "KKK" on his abdomen, until his minister "discovered" what he thought was another "K," and informed Traversie that he had been assaulted by the Ku Klux Klan.

Because he has no evidence of intentional conduct, Plaintiff appears to have abandoned his intentional tort claims arising from the "KKK" theory.

A. There is no "KKK" on Plaintiff.

Plaintiff's "KKK" claims turn on two, alternative, facts. Either 1) Defendants put "KKK" on Plaintiff, or 2) Defendants saw a "KKK," and sent him home without telling him that he had a troubling racist symbol on his abdomen. Plaintiff has not produced a single fact supporting either theory.

That people, when prompted, might see three different scars that could resemble the letter "K"—like seeing a camel in a cloud or the Virgin Mary in a piece of toast—is not material. The issue of materiality tests which facts are at issue. The factual dispute must

affect the outcome of the case under the relevant substantive law.[1] In opposing a motion for summary judgment, the nonmoving party must "categorize the factual disputes in relation to the legal elements of her claim."[2] She must "explain the legal significance of her factual allegations beyond mere conclusory statements importing the appropriate terms of art."[3] Thus, it is not enough that there are factual disputes between the parties. Rather, the disputes must be outcome determinative under the prevailing law.[4] Plaintiff has failed to produce any facts that a Defendant, or anyone, put "KKK" on Plaintiff. Further, Plaintiff's claim that Defendants should have informed Plaintiff that he had "KKK" on his abdomen fails because there is no evidence that any Defendant believed a scar or group of scars resembled "KKK." Without those facts, Plaintiff's "KKK" claims cannot survive.

B. The statements by a phantom hospital employee are inadmissible hearsay because Plaintiff cannot lay the foundation to make them admissions.

Traversie says that an unknown, unnamed person came into his room, and told him that someone at Regional Hospital had done something to him. She was female, and said that she worked at the hospital, but Plaintiff does not know her job. She said that she would

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[1] *Quinn v. St. Louis County*, 653 F.3d 745, 751 (8th Cir. 2011).

[2] *Quinn v. St. Louis County*, 653 F.3d 745, 751 (8th Cir. 2011).

[3] *Quinn v. St. Louis County*, 653 F.3d 745, 752 (8th Cir. 2011).

[4] *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017, 1021 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 64 (1997).

not testify, and then slipped out of his room. Such hearsay is inadmissible.

"Hearsay" is a statement that "the declarant does not make while testifying at the current trial or hearing;" and that is offered "to prove the truth of the matter asserted in the statement."[5] The phantom employee's testimony falls squarely within that definition, and is inadmissible.[6] Nor is the statement an admission by a party opponent because Plaintiff has not established that the speaker was "authorized to make a statement on the subject,"[7] or made the statement while acting within the scope of her authority for Regional Hospital.[8] Plaintiff must prove one or both those exceptions, or the evidence cannot come in.[9]

C. Plaintiff lacks the expert opinions necessary to establish medical malpractice because McGrann's opinions are insufficient, and most must be excluded because they were not disclosed.

Plaintiff's health care providers know what caused the scars, and they have testified to it. It was constant taping and re-taping related to Plaintiff's medical care. The health care providers testified about their efforts to minimize the skin damage, and Plaintiff has no expert who

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[5] Fed. R. Evid. 801(c).

[6] Fed. R. Evid. 802.

[7] Fed. R. Evid. 801(d)(3)(C).

[8] Fed. R. Evid. 801(d)(3)(D).

[9] *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 636 (8th Cir. 2007).

criticizes that care. Plaintiff and his expert do not know what caused the scars. That ignorance does not create a triable fact.

McGrann's "tape does not easily explain" opinion is insufficient. First, it is not sufficient because Plaintiff bears the burden of proof. Plaintiff must prove duty, breach, causation, and damage by a preponderance of the evidence.[10] "I don't know" does not meet that burden. "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[11]

Second, McGrann's opinion is not even a rebuttal to Defendants' evidence because McGrann has seen none of it. McGrann denied reviewing the medical records, and there is no indication that he read the depositions of any health care providers.[12] Plaintiff cannot survive summary judgment just because a doctor, who has never heard the actual explanation, finds the general category of the explanation "not easy."

Plaintiff has not shown that the scars resulted from anything but proper medical care. There is no evidence of a duty to control the shape of the scars, or even that doctors and nurses are capable of controlling

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[10] *Koeniguer v. Eckrich*, 422 N.W.2d 600, 602 (S.D. 1988) ("Expert testimony is required to establish the fundamental elements of a plaintiff's malpractice action—standard of care, breach, and causation.")

[11] *Depositors Ins. Co. v. Wal-Mart Stores, Inc.*, 506 F.3d 1092, 1094 (8th Cir. 2007) (*quoting*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The standard of Rule 56(c) is now contained in Rule 56(a).

[12] McGrann Deposition, 5:13-6:4 [Docket #46-3].

the shape of the scars. That failure entitles the Defendants to summary judgment on the medical malpractice claim.

1) McGrann's Declaration is filled with undisclosed opinions, which the Court should disregard.

Plaintiff was required to provide Defendants with a disclosure of all of McGrann's opinions, and the basis for each.[13] The only timely opinion that Plaintiff disclosed was that McGrann did not know what caused the scars, but he thought that they "were not easily explained by tape."[14]

In responding to this Motion for Summary Judgment, Plaintiff submits an affidavit by McGrann with a whole list of brand new opinions. Most of them are hypothetical, if-this-then-that opinions, but none was disclosed. Plaintiff had a duty to supplement his disclosures and reports,[15] and his failure to do so subjects him to Rule 37 sanctions, including exclusion.[16] The Court should exclude all of McGrann's new opinions.

In *White v. Howmedica, Inc.*, the Eighth Circuit affirmed the district court's exclusion of undisclosed opinions in an expert affidavit

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[13] Fed. R. Civ. P. 26(e)(1)(B); and, Scheduling Order [Docket #24]

[14] Plaintiff's Expert Disclosure Pursuant to Federal Rule of Civil Procedure 26(A)(2)(B), attached as Ex. 1 to the Supplemental Hurd Declaration.

[15] Fed. R. Civ. P. 26(e)(1)(A).

[16] Fed. R. Civ. P. 37(c)(1); *Tenbarge v. Ames Taping Tool Sys., Inc.*, 190 F.3d 862, 865 (8th Cir.1999) (stating Rule 37(c) applies to untimely disclosure of expert opinions and exclusion of testimony is one sanction that may be allowed under the rule).

submitted in response to a summary judgment motion.[17] And in *Tenbarge v. Ames Taping Tool Sys., Inc.*, the Eighth Circuit reversed the district court's decision not to exclude new expert opinions.

> Discovery of expert opinion must not be allowed to degenerate into a game of evasion. The purpose of our modern discovery procedure is to narrow the issues, to eliminate surprise, and to achieve substantial justice.[18]

McGrann's new opinions are improperly submitted in response to the motion for summary judgment.

2) McGrann's new opinions do not satisfy the elements of medical malpractice, in any event.

The Court should strike each of McGrann's new opinions. But, even if the Court were to consider them, they would not allow the medical malpractice claim to survive summary judgment.

First, to meet the requirements of an expert disclosure, McGrann must state the basis and reasons for his opinions, and the facts and data upon which they are based.[19] He does not do so. His affidavit is largely a list of *ipsa dixit* statements.

Second, in none of his opinions does McGrann say, "here is the standard, and here is how Defendants breached it, and here is the injury that such breached caused." Rather, his opinions are just universal propositions of his aspirations about care, generally. As such, they do not establish the necessary expert opinions to get to a jury.

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[17] *White v. Howmedica, Inc.*, 490 F.3d 1014, 1016 (8th Cir. 2007).

[18] *Tenbarge v. Ames Taping Tool Sys., Inc.*, 190 F.3d 862, 865 (8th Cir. 1999) (citations omitted).

[19] Fed. R. Civ. P. 26(a)(2)(B)(i) & (ii).

Plaintiff must prove that his alleged injuries are more probably caused by medical malpractice than by anything else,[20] and McGrann does not say that.

Third, McGrann speaks of distress to Plaintiff caused by his scars. Plaintiff is not distressed by the presence of scars; he is distressed because his minister told him that he has "KKK" on his abdomen. Plaintiff is blind. His scars can cause him distress only to the extent that people tell him about them. In his deposition, Plaintiff makes clear that the source of his distress is not that his abdomen has scars, but "what [he] declare[s] to be a racial hate crime committed against my person," when "[s]omebody put three letters—three Ks—three letters in the shape of a K on my abdomen. And we know that the Ku Klux Klan is a terrorist organization."[21] Finally, McGrann is a dermatologist, not a psychologist. There is no foundation for his opinions about the clinical cause of Plaintiff's distress.

Fourth, at his deposition, McGrann conceded that he would defer to those who actually cared for Plaintiff regarding the cause of the post-operative scars.[22] In spite of that, Plaintiff did not provide McGrann with the medical records from Regional Hospital or the depositions of the care providers. The implication is that Plaintiff could only obtain these opinions from McGrann by insuring that he lacked the information necessary to form a proper opinion.

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[20] *Lohr v. Watson*, 68 S.D. 298, 303, 2 N.W.2d 6, 8 (S.D. 1942).

[21] Traversie Deposition, 129:9-21, attached as Ex. 2 to the Supplemental Hurd Declaration.

[22] McGrann Deposition, 4:23-5:22 [Docket #46-3].

Fifth, the opinions are so general, and so little basis has been provided for them, that this is not a case in which cross-examination is sufficient deal with the problem. With apologies to the Court for the long, block quotation, the Delaware Superior Court simply made this point better than I can:

> The Court must reject plaintiff's argument that cross-examination will place Mr. Fleischer's opinions in proper context. While it is true that cross-examination can, in certain instances, effectively expose a weak expert opinion, the cross-examination of an expert whose opinion is based solely on his subjective belief is tantamount to wasted breath. Under these circumstances, the skilled expert witness is virtually untouchable on cross-examination. Accordingly, before the Court will allow a "shaky" expert opinion to pass through the courtroom "gate" on the expectation that cross-examination will serve as an equalizer, the Court should be satisfied that cross-examination can be vigorous. Vigorous cross-examination simply is not possible when neither counsel, the Court, nor the expert himself can discern a process or method by which the expert's opinion was generated.[23]

McGrann's undisclosed opinions cannot save this case, and the Court should grant summary judgment on the medical malpractice claim.

3) Plaintiff did not, and cannot, plead a *res ipsa loquitur* claim because he still needs an expert, and the care and scars are explained.

Plaintiff alleges that he does not need an expert because this is a *res ipsa loquitur* case. But *res ipsa* is not available simply because he

[23] *Marian Ward v. Shoney's*, 2002 Del.Super. LEXIS 143 (Del.Sup. 2002).

cannot find an expert to give him the necessary opinions. First, he still must have expert testimony to establish negligence unless "the kind of negligence involved is within the realm of laymanistic comprehension."[24]

The kind of negligence involved in this case is post-surgical care of open heart surgery patients. That is not within the comprehension of laypeople. Interestingly, both the Regional Hospital providers and IHS providers immediately recognized the skin issues as "tape tears." Thus, the only evidence is that, to the extent Plaintiff's friends formed an opinion about Plaintiff's scabs, the opinion was wrong.

Further, because *res ipsa* is for cases where no one knows what happened, it is not available in medical cases where there is direct evidence of the care provided, and the cause of the complained of condition.[25] Here, Dr. Orecchia explained the post operative care, and how the scars formed.[26] "[T]he doctrine of *res ipsa loquitur* is to be utilized sparingly and only when the facts and demands of justice make its application essential."[27] That is not true here.

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[24] *Van Zee v. Sioux Valley Hosp.*, 315 N.W.2d 489, 492 (S.D. 1982).

[25] *Magbuhat v. Kovarik*, 382 N.W.2d 43, 47 (S.D. 1986).

[26] See the highlighted portions of Orecchia's Deposition [Docket #45-1].

[27] *Van Zee v. Sioux Valley Hosp.*, 315 N.W.2d 489, 492 (S.D. 1982).

2. There is no genuine dispute about whether a nurse assaulted Plaintiff because the evidence as a whole would not support a verdict for Plaintiff.

Everyone agrees that Plaintiff has testified to the assault. If that were sufficient, then the Court should deny Defendants' motion for summary judgment on these claims. But it is not sufficient.

Whether a dispute of fact is "genuine," tests the weight of the non-movant's evidence. An issue of fact is "genuine," if it is such "that a reasonable jury could return a verdict for the nonmoving party."[28] Plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts."[29] "The mere existence of a scintilla of evidence in support of the nonmovant's position will be insufficient."[30] Rather, Plaintiff must "establish significant probative evidence to prevent summary judgment."[31] There must be "specific facts showing that there is a *genuine issue for trial*."[32] "Where the record taken as a whole could not lead a rational trier of fact to find for

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[28] *Depositors Ins. Co. v. Wal-Mart Stores, Inc.*, 506 F.3d 1092, 1094 (8th Cir. 2007) (*citing*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)); *To v. US Bancorp*, 651 F.3d 888, 892 (8th Cir. 2011).

[29] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-7 (U.S. 1986).

[30] *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 791 (8th Cir. 2011), *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

[31] *Great West Cas. Co. v. Travelers Indem. Co.*, 925 F. Supp. 1455, 1462 (D.S.D. 1996) *aff'd* 111 F.3d 135 (8th Cir. 1997).

[32] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-7 (U.S. 1986) (citations omitted) (emphasis in original).

the nonmoving party, there is no 'genuine issue for trial.'"[33] And where there is clear, objective evidence demonstrating that Plaintiff's claim is not true, then it is a not a genuine dispute.[34]

In this case, the only evidence of the alleged assault is Traversie's testimony that he was waking from sedation, and asked for pain medication. In response to his request for pain medication, a nurse named "George" assaulted Plaintiff, repeatedly swore at him, denied him the right to pray, and refused to give him any pain medication.

Now, look at the evidence as a whole. The facts are laid out fully in our opening brief, but the undisputed facts are:

- Plaintiff complained to the tribal police about his scars, but never said anything about the assault.
- He complained to
    - the F.B.I.,
    - the Pennington County Sheriff's Office,
    - the United State Attorney, and
    - Regional Hospital itself, without every complaining about this horrible assault.
- Indeed, when Plaintiff complained to Regional Hospital, he told the Patient Advocate that he did not remember anything

[33] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-7 (U.S. 1986).

[34] *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 1775, 167 L. Ed. 2d 686 (2007).

unusual about his stay at Regional Hospital, other than going through surgery.[35]

- He first reported his story about the abusive nurse, seven months after his discharge.
- The medical record demonstrates that the very basis of this entire assault, the denial of pain medications, is untrue.

In an effort to cloud the problems with the objective record, Plaintiff has replaced the specific reference to an assault in the surgical intensive care unit, to an assault that might have happened at any point during his hospitalization. But however he changes his story this time, there was only one nurse named George who cared Plaintiff. The relevant medical records are in evidence.

While there is a dispute about whether George assaulted Plaintiff, the dispute is not genuine because no rational fact finder could return a verdict for Plaintiff on his claims about the assault. Summary judgment is appropriate

Conclusion

The Court should grant Defendants summary judgment on all claims. There is no medical testimony necessary to maintain a medical malpractice action. The intentional tort claims are all premised upon an assault by a nurse, but the objective evidence is such that no rational jury could find for Plaintiff on his claim.

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[35] Eric Hupp Deposition, 15:12-14 [Docket #48-1]; Patient Relations Worksheet regarding Mr. Traversie, Page 2 [RCRH05170] [Docket 43-1, p. 70] (The original ECF filed exhibits to too light to read. We provided more legible copies by email.).

D.S.D. Civ. LR 7.1(B)(1) Certificate

I certify that the brief complies with the typevolume limitation of D.S.D. Civ. LR 7.1.B.1. The brief contains 2801 words. I have relied on the word count of the Word® word-processing system used to prepare the brief.

Respectfully submitted this 13th day of February 2014.

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