. Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KYLE W. STEPHENSON and MICHAEL K. STEPHENSON, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	CASE NO. C03-0113P DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff, Kyle Stephenson, filed suit under the Federal Tort Claims Act, alleging medical negligence by Department of Veterans Affairs (hereinafter "VA") Compensation and Pension examiners during a physical examination in January 1987. As a result, Mr. Stephenson alleges that his colon cancer went undiagnosed until August 1993, resulting in more extensive surgery. Plaintiffs have moved for summary judgment, arguing that the facts demonstrate that Mr. Stephenson received negligent medical care from the VA. The United States opposes summary judgment because (a) the Compensation and Pension examination at issue did not create a physician-patient relationship between Mr. Stephenson and the examiners, and the applicable duty of care is less extensive than that of a physician to his or her patient; and (b) critical issues of material fact preclude summary judgment.

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II. FACTUAL BACKGROUND

On December 11, 1986, plaintiff Kyle Stephenson filed an application for benefits with the VA for a variety of problems related to his 17 years of military service and his exposure to Agent Orange in Viet Nam. (Exhibit 4 to Plaintiffs' Motion for Summary Judgment, hereinafter "Pl. Ex. 4"). In order to evaluate his application, Mr. Stephenson was scheduled for a Compensation and Pension Examination, a physical evaluation analogous to an insurance examination or preemployment screening physical, for the limited purpose of determining whether a veteran has any service-connected physical, mental, or emotional conditions which qualify the veteran for benefits administered by the VA. An examination was conducted by Courtney Nevitt, M.D., on January 23, 1987, to evaluate specific complaints of hearing loss, hematochezia (rectal bleeding), and low back pain.[1] (Pl. Ex. 1). Dr. Nevitt's examination included a digital rectal examination to evaluate his complaints of hematochezia. She reported the results as follows: "Rectal Exam: Sphincter tone normal. There was a 1-cm x 1-cm, soft, moveable mass felt anteriorly. This could represent a hemorrhoid or a polyp. Stool was brown and guaiac positive." (Id.). Her assessment of this finding was reported as "2) Guiac-positive stools and an abnormal rectal exam. Most likely, patient has hemorrhoids. A barium enema will be done to evaluate this problem. GI will also be consulted for further assessment and management of this problem." Dr. Nevitt reported her plan as "A barium enema and GI consult will be ordered and other diagnostic tests as per the Agent Orange Protocol will be ordered." (Id.). In accordance with her plan, Dr. Nevitt completed a radiology consultation and a consultation to Gastroenterology. (Pl. Exs. 2 & 3).

During her evaluations, whether conducted for the extremely limited purpose of a Compensation and Pension evaluation, as in the case at bar, or conducted for the

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[1] Dr. Nevitt was not a member of the VA Medical Center medical staff, but, rather, was briefly employed for the sole purpose of conducting Compensation and Pension examinations. (Ex. A, p. 26, lines 1-8).

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purpose of providing medical care, Dr. Nevitt would routinely inform the individual of any "findings, abnormal and otherwise, and discuss the purpose and reason for any further evaluation." (Ex. A, Excerpts of Deposition of Courtney Nevitt, M.D., at p. 84, lines 10-12). Particularly when the additional examinations were a sigmoidoscopy and a barium enema, Dr. Nevitt was careful to explain to Mr. Stephenson why they were necessary because "that's a highly personal, unpleasant exam that requires a lot of cooperation." (Id. at p. 85, lines 18-23). Because of the extremely limited nature of a Compensation and Pension Examination, Dr. Nevitt never saw Mr. Stephenson again.

For unknown reasons, no gastroenterology evaluation in response to Dr. Nevitt's consult is documented in Mr. Stephenson's records. However, on February 5, 1997, Mr. Stephenson underwent a barium enema as recommended by Dr. Nevitt. The study was performed by Sharlene Teefey, M.D., a staff radiologist, assisted by Patty Hughes, M.D., a radiology resident. (Ex. B, Declaration of Sharlene A. Teefey, M.D., at ¶ 2). The study revealed no radiographically visible rectal mass, but did reveal a small polyp higher in the colon. (Id. at ¶ 6). In accordance with her usual practice, Dr. Teefey would have discussed with Mr. Stephenson the reasons for the study and would have told him of the polyp and the need to have it followed. (Id.). She also notified the Gastroenterology resident of the polyp and recommended endoscopy and biopsy (Pl. Ex. 3); however, again, there is no record that Mr. Stephenson was seen in Gastroenterology.

Based upon the results of these and several other evaluations Mr. Stephenson underwent in early 1987, the VA awarded him a 10% service-connected disability for his low back pain, and also noted that he had service-connected Post Traumatic Stress Disorder and right-sided hearing loss which were not currently disabling. His hemorrhoids and left-sided hearing loss were determined to be not service connected, and he was found to have no Agent-Orange-related disabilities as of 1987. (Pl. Ex. 4).

The first and only time that Mr. Stephenson sought medical care from the VA was on May 22, 1989. On that date, he presented on a walk-in basis to the triage nurse

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complaining of "Painful bleeding hemorroids x 3-5 months. Now thinks he wants to have something done." (Pl. Ex. 5). Mr. Stephenson was referred to the General Surgery Clinic where he was seen by the Chief of Surgery Service, Hubert Radke, M.D., who was accompanied by a third-year medical student, H. Miller. (Pl. Ex. 6). Dr. Radke personally spoke with Mr. Stephenson, performed both a digital rectal examination and an anoscopy, and dictated his findings to the medical student, who wrote the findings in the medical record. (Ex. C, Declaration of Hubert M. Radke, M.D., ¶ 5). Dr. Radke noted:

> S: 46 year old man in excellent health presents via PEC referral for internal hemorrhoids. Has had long history of hemorrhoids treated with Tucks, sitz baths, now worsening since Jan. 89. Increased bleeding with BM; also now protrusion requiring manual reduction. Inquiring about treatment.
> O: No external tags. Spastic sphincter tone. 1 large internal hemorrhoid at 4 o'clock. Some excoriation of anal mucosa by anoscopy. Swollen crypts.
> A: 46 year old man in excellent health with 1 int[ernal] hemorrhoids and cryptitis.
> P: Metamucil, increase stool bulk, hydration, decrease strain, avoid spices, sitz baths. Return to clinic 1 month.

(Pl. Ex. 6). Mr. Stephenson was educated about the diagnosis and plan and was given a follow-up appointment on June 29, at 9 a.m. (Id.).

Mr. Stephenson failed to keep his follow up appointment on June 29, 1989. (Pl. Ex. 8). Dr. Radke directed that Mr. Stephenson be rescheduled (Id.); however, Mr. Stephenson did not return to the VA for treatment.

It is not known whether Mr. Stephenson sought additional medical care during the ensuing four years, until August 19, 1993, when he visited a primary care physician at Group Health Cooperative, Tacoma, complaining of passing bright red blood. (Pl. Ex. 9). He was referred to Joe Jack Davis, M.D., a general surgeon at Harrison Memorial Hospital, Bremerton, WA. Dr. Davis palpated "a tumor mass several centimeters proximal to the dentate line lying posteriorly." (Pl. Ex. 10). The rectal mass was found to be malignant upon colonoscopy. (Pl. Ex. 11). The polyp revealed

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by the 1987 barium enema was also biopsied on August 31, 1993. The pathologist reported the polyp was not malignant. (Pl. Ex. 12).

Mr. Stephenson was admitted to Harrison Memorial Hospital from September 1, 1993 to September 9, 1993, where Dr. Davis performed an abdominoperineal resection on September 1,1993, which left the patient with a permanent colostomy. On discharge, Mr. Stephenson was ambulatory and able to manage his colostomy, and Dr. Davis sent him home on a regular diet and with no activity restrictions.

III. ARGUMENT

A. A physician performing a Compensation and Pension examination has only a limited duty to inform the veteran of any abnormal findings which posed a danger to the veteran.

The purpose of a Compensation and Pension examination is not to provide treatment; it is to assess whether various health conditions claimed by a veteran are service-connected, entitling the veteran to veterans benefits. *See* 38 C.F.R. § 3.326. Under Washington law, such non-therapeutic evaluations give rise to only a limited duty on the part of the examiner "to perform [the examination] competently, not to inflict injury, and to inform the worker of any unknown morbid condition disclosed." Judy v. Hanford Environmental Health Foundation, 106 Wash.App. 26, 39, 22 P.3d 810, 818, *review denied* 144 Wash.2d 1020, 32 P.3d 284 (2001). "[T]his duty is not coextensive with that of the person's own doctor, where the purpose of the examination is therapeutic." *Id.* at 38. *See* Daly v. U.S., 946 F.2d 1467, 1470 (9th Cir. 1991) ("In the setting of a preemployment examination, where the physician-patient relationship does not yet exist, the physician's duty should be less extensive.").

In the case at bar, Mr. Stephenson was undergoing a Compensation and Pension examination to determine whether, among other things, his hemorrhoids were service-connected. Dr. Nevitt performed a thorough examination, discovered a rectal mass, and ordered further evaluation of the mass in the context of her Compensation and Evaluation examination. (Pl. Ex. 1). In accordance with her usual practice, she also

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informed Mr. Stephenson of the abnormal finding and the need for further evaluation. (Ex. A, p. 84, lines 10-12). She is certain that she explained the potential seriousness of a rectal mass to Mr. Stephenson not only because it is her usual practice, but also because it is necessary to secure the veteran's cooperation in such "highly personal, unpleasant" examinations as barium enemas and sigmoidoscopy. (Id. at p. 85, lines 14-23). By advising Mr. Stephenson of the abnormal finding and the potential seriousness of the finding, Dr. Nevitt fulfilled the duty imposed by Washington law on a physician performing a nontherapeutic evaluation. Judy, 106 Wash.App. at 39, 22 P.3d at 818.

Similarly, Dr. Teefey performed the barium enema requested by Dr. Nevitt, and, in accordance with her usual practice, informed Mr. Stephenson of the polyp in his colon and of the need for follow up. (Ex. B, ¶ 6). This advice fulfilled her limited duty to Mr. Stephenson to advise him of the abnormal finding and reinforced Dr. Nevitt's advice concerning the potential seriousness of the finding. While additional work-up was recommended and apparently did not take place, the limited standard of care applicable to a nontherapeutic compensation and pension evaluation was not violated by the failure, as Mr. Stephenson was notified by both Dr. Nevitt and Dr. Teefey of their abnormal findings and concerns.

Plaintiffs argue that the Compensation and Pension evaluation by A.J. Thompson, M.D., demonstrates that the standard of care was not met during the 1987 Compensation and Pension evaluation. (Pl. Ex. 20, 21). Dr. Thompson's opinion is not dispositive of the issue. As discussed at length in Littlejohn v. United States, 321 F.3d 915 (9th Cir.), *cert. denied* 124 S.Ct. 486 (2003), such disability determinations are "*ex parte* and nonadversarial." *Id.* at 920. Evidence considered in such determinations "is limited to information presented by the claimant and certain types of information discovered by the VA. . . . The VA is not authorized to develop evidence for the purpose of challenging the claimant, but rather is required to 'assist a claimant in developing the facts pertinent to [his or her] claim.' 38 C.F.R. § 3.103." *Id.* In upholding the district court's judgment for the United States, the Ninth Circuit noted

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that, "[t]his claimant-friendly system provides no opportunity for the VA to develop and offer evidence of the kind that eventually proved the undoing of Littlejohn's FTCA claim." *Id.* at 921.[2] In light of the significant factual issues present in the case at bar, as well as the issue of the applicable standard of care, Dr. Thompson's opinion is of limited usefulness in this context.[3]

B. Plaintiff cannot show that any breach of the standard of care proximately caused any injury to him

Even assuming, without admitting, that the failure to complete a gastroenterology examination or sigmoidoscopy was a breach of the standard of care in evaluating Mr. Stephenson, such failure did not proximately cause Mr. Stephenson's injuries. Mr. Stephenson was physically evaluated by Hubert Radke, M.D., the Chief of Surgery at the VA Medical Center. Dr. Radke personally conducted both a digital rectal

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[2] Plaintiffs are correct that Littlejohn does not stand for the proposition that Dr. Thompson's opinion is not admissible. It does, however, provide a detailed and cogent discussion of why such opinions are of limited value in determining whether the standard of care was met.

[3] Plaintiffs have moved to strike the United States' disclosure of expert witnesses as untimely because the United States failed to disclose its experts in Initial Disclosures. The basis for this motion is not clear as Fed.R.Civ.P. 26(a)(1) does not require disclosure of experts in Initial Disclosures. Plaintiffs have also moved to exclude any testimony by Richard Billingham, M.D., a colorectal surgeon who has reviewed this matter for the defense. The United States acknowledges that although he was aware of the disclosure deadline, because of conflicts in his schedule, Dr. Billingham was unable to complete his written report in time to include it with the expert witness disclosure. The United States submits, however, that it substantially complied with the requirements of Rule 26(a)(2), as Dr. Billingham's opinion was summarized in the disclosure, and is substantially similar to that of Dr. Radke, whose declaration was included in the disclosure. (Ex. D). While the United States apologizes for any inconvenience the lack of a written report may have caused, plaintiffs have not alleged that they have been prejudiced in any way by the lack of a written report, merely characterizing the failure as "wilful" under state case law. Federal case law, however, requires a balancing of interests in determining the appropriateness of a discovery sanction. *See* In Re Exxon Valdez, 102 F.3d 429, 433 (9th Cir. 1996) (in determining whether to impose dismissal as a discovery sanction, the court must weigh five factors: (1) the public's interest in expeditious resolution of litigation, (2) the court's need to manage its dockets, (3) the risk of prejudice to the party seeking sanctions, (4) public policy favoring disposition of cases on their merits, and (5) the availability of less drastic sanctions). Dr. Billingham's written report is attached as Exhibit E.

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evaluation and an anoscopy and found no evidence of a polyp in the area later described by Dr. Davis as the location of Mr. Stephenson's cancer, or anywhere else in Mr. Stephenson's rectum.[4] (Ex. C, ¶¶ 6, 7, 11). Dr. Radke's examination disclosed only a large internal hemorrhoid, consistent with the soft, movable mass Dr. Nevitt reported finding *anteriorly* (*i.e.,* on the portion of the rectum nearest the front of the body) in Mr. Stephenson's rectum. (Id. at ¶ 7; Pl. Ex. 1). The tumor Dr. Davis removed was located *posteriorly* (*i.e.,* on the portion of the rectum nearest the back). (Id. at ¶ 11). Dr. Radke opines that, "[o]n a more probable than not basis, the rectal tumor which was subsequently excised on September 1, 1993, was not present or clinically detectable on either January 23, 1987, or May 25, 1989." (Id. at ¶ 7). Contrary to plaintiff's argument that the mass Dr. Nevitt felt was the same cancerous mass removed by Dr. Davis, Dr. Radke personally examined the entire rectum and states unequivocally that it could not have been the same mass because it was in a different anatomical position. (Id.)

Plaintiff may argue that Dr. Radke should have addressed the polyp in Mr. Stephenson's colon; however, by failing to return for his scheduled appointment, Mr. Stephenson deprived Dr. Radke of the opportunity to do so. Dr. Radke gave Mr. Stephenson detailed instructions to reduce the pain and inflammation associated with his hemorrhoid and explained why he needed to follow the plan. (Pl. Ex. 6; Ex. C, ¶ 6). Had the recommended treatment not succeeded in resolving Mr. Stephenson's symptoms, Dr. Radke would have had an opportunity to continue to evaluate other potential causes. Unfortunately, Mr. Stephenson did not keep his follow up appointment and never returned to Dr. Radke or the VA Medical Center. (Ex. C, ¶ 7).

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[4] Dr. Radke's declaration and CV were furnished to plaintiffs with the United States' Disclosure of Expert Witnesses. (Ex. D at p. 3).

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C. Summary judgment is not appropriate when there is a genuine issue of material fact.

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." A fact is material if it affects the outcome of the lawsuit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. Inferences from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348 (1986).

In the case at bar, factual issues abound. Dr. Nevitt is adamant that, while she does not specifically remember Mr. Stephenson's examination, she would have told him of her findings and the reasons why followup was important. (Ex. A, p. 84, line 10 - p. 85, line 32). Dr. Teefey likewise is certain that she would have advised Mr. Stephenson of her findings and their significance. (Ex. B, ¶ 6). Dr. Radke states unequivocally that he personally examined Mr. Stephenson, that the cancer which Dr. Davis excised was not present or clinically detectable on either January 23, 1987, or May 25, 1989, and that he discussed his care plan with Mr. Stephenson at length. (Ex. C, ¶¶ 6, 7, 11). Mr. Stephenson denies that any of these discussions happened and denies that Dr. Radke ever saw Mr. Stephenson at all. These factual disputes are critical to the determination of whether the standard of care was met in this case. Plaintiffs' motion for summary judgment should be denied.

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IV. CONCLUSION

After over 15 years, the memories of all the participants in Mr. Stephenson's Compensation and Pension examination have faded, leaving significant factual issues for the trier of fact to resolve. These factual issues are of critical importance to the determination of whether the limited standard of care was met by the VA examiners, and whether there was any causal relationship between any breach of that standard and the injuries Mr. Stephenson claims. It would be inappropriate to attempt to resolve those factual issues in the context of a summary judgment motion. Plaintiffs' motion for summary judgment should be denied.

DATED this 1st day of a December, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

That on December 1, 2003, she served the original (or copies) of the ***Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment***, and this ***Certificate of Service***, to be served upon the individual(s) hereinafter named by Messenger, and addressed as follows:

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DATED this 1st day of December, 2003.

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