

United States District Court
District of South Dakota
Western Division

VERNON R. TRAVERSIE,

Civ. No. 12-05048-JLV

Plaintiff,

vs.

**Brief in Support of Regional
Defendants' Motion for
Summary Judgment**

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.

Rapid City Regional Hospital, Inc., Regional Health, Inc., and Regional Health Physicians, Inc. ("Regional Defendants"), submit this brief in support of their summary judgment motion.¹

Summary

Plaintiff asserts four causes of action in his *Complaint* – (1) violation of his civil rights; (2) medical malpractice; (3) battery; and (4) "outrage" or intentional infliction of emotional distress. But each of these causes of action are based on two alleged acts – (A) that someone put "KKK" on Plaintiff's abdomen; and (B) that intensive care unit nurse George Sazama ("nurse Sazama") battered Plaintiff, and denied him his pain medications.

Regional Defendants are entitled to judgment as a matter of law because there is no evidence that anyone put "KKK" on Plaintiff's

¹ This brief is submitted pursuant to D.S.D. Civ. LR 7.1(B).

abdomen, and because no reasonable jury could believe Plaintiff's claims against nurse Sazama.

Factual Background

Plaintiff was admitted to Rapid City Regional Hospital with complaints of chest pain on August 22, 2011.² Dr. Paul Orecchia ("Dr. Orecchia") performed open heart surgery on Plaintiff on August 26.³

After surgery, Plaintiff was transferred to Regional Hospital's Surgical Intensive Care Unit ("SICU"), where nurse Sazama cared for him.⁴ On August 28, Plaintiff was transferred from the SICU to a regular hospital room.⁵ Plaintiff remained in the hospital until he was discharged on September 8, 2011.⁶

Over the course of Plaintiff's hospital stay, nurses and doctors observed skin irritation on Plaintiff's abdomen from the tape and

² Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011, Page 1 [RCRH03754].

³ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011, Page 310 [RCRH04063].

⁴ George Sazama Deposition, 11:7-10.

⁵ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011, Page 394 [RCRH04147].

⁶ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011, Page 1149 [RCRH04902].

bandages covering the surgical incisions and pacer wires.⁷ Nurses tried different tape, different bandages, and alternated placement of the tape in an attempt to stop the irritation.⁸ Eventually, Plaintiff was discharged home on September 8.

Dr. Orecchia ordered that a home health nurse visit Plaintiff, and monitor his incision sites.⁹ The nurse who discharged Plaintiff instructed him on many parts of his discharge, including the need to care for his incision sites, and have them inspected by his home health nurse.¹⁰

The next day, Bobbie Pearman (“Pearman”), the home health nurse ordered by Dr. Orecchia, checked on Plaintiff’s incision sites.¹¹ Although she had never cared for a patient after open heart surgery, Pearman was shocked by Plaintiff’s surgical scars.¹² Pearmantook a photograph,

⁷ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH04588, RCRH04595, RCRH04602, RCRH04608, RCRH04612, RCRH04622, RCRH04629, RCRH04632, RCRH04643, RCRH04646, RCRH04650, RCRH04652, RCRH04663, RCRH04678, RCRH04685, RCRH04691, RCRH04694, RCRH04702, RCRH04709, RCRH04714, RCRH04717, RCRH04727, RCRH04731, RCRH04735, RCRH04737, RCRH04738, RCRH04739, RCRH04746, RCRH04750, RCRH04754, RCRH04758, RCRH04764, RCRH04768, RCRH04771, RCRH04781, RCRH04784, RCRH04789, RCRH04793, RCRH04797, RCRH04803, RCRH04807, RCRH04811, RCRH04813, RCRH04823, RCRH04831, RCRH04841, RCRH04846, RCRH04852, RCRH04854, RCRH04858, RCRH04866, RCRH04890].

⁸ Dr. Paul Orecchia Deposition, 18:2-20.

⁹ Bobbie Pearman Deposition, 14:4-22; Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011, Page 64 [RCRH03817].

¹⁰ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011, Page 1149 [RCRH04902] (“Patient was discharged home with Home Health. . . . Patient received all of his meds and received teaching on meds/med recon. activity. infection control. diet. incision care. follow up care. when to call Doctor and/or EMS.”).

¹¹ Pearman Deposition, 9:14-10:24.

¹² Pearman Deposition, 23:9-14; 56:21-23.

sent it to the Indian Health Services (“IHS”) hospital emergency department, and called local law enforcement.¹³ Pearman filed a criminal report on behalf of Plaintiff.¹⁴ At the IHS emergency department, several health care professionals explained to Plaintiff that the scarring appeared to be from tape irritation and frequent dressing changes after surgery. Dr. Rommel Brandt (“Dr. Brandt”), who first saw Plaintiff in the IHS emergency department, told Plaintiff that tape can cause these types of scars.¹⁵ Dr. Brandt did not see three Ks, but he did see two scars that looked like Ks, and he explained to Plaintiff they can come in that shape because of the way the tape is placed.¹⁶

Similarly, another physician who cared for Plaintiff in the emergency department believed that Plaintiff’s scars looked like tape burns.¹⁷ And a third physician, when asked by Pearman to look at the picture of Plaintiff’s abdomen, said that they looked like marks caused from surgery.¹⁸

It was Plaintiff’s pastor who told him that he thought there was a “KKK” on his abdomen. Pastor Ben Farrar (“Farrar”) asked a nurse at the IHS hospital in Eagle Butte about the marks. The nurse told Farrar that the “K”s were a reaction to adhesive tape.¹⁹ He found that

¹³ Investigative Report by Pennington County Sheriff’s Office, Page 13 [PLT0081].

¹⁴ Cheyenne River Sioux Tribal Law Enforce Report, with Photos, Page 4 [PLT0004].

¹⁵ Dr. Rommel Brandt Deposition, 12:16-13:6.

¹⁶ Dr. Brandt Deposition, 5:1-24.

¹⁷ Dr. Yeisabeth Jiminez-Almeyda Deposition, 7:12-18.

¹⁸ Pearman Deposition, 53:19-54:3.

¹⁹ Benjamin Farrar Deposition, 92:21-24.

“strange,”²⁰ and identified a mark that he thought was a third “K,”²¹ He suggested to Plaintiff and his friend, Karen Townsend, that the scars were the work of the Ku Klux Klan.²² So, Plaintiff now claims that someone, at some time, somehow, put “KKK” on his abdomen. But he does not know who, or when, or how.²³

Legal Analysis

1. Summary Judgment Standard

Summary judgment is proper when “the movant shows that there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law.”²⁴ Summary judgment is not “a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’”²⁵

On a motion for summary judgment, this court views the evidence “in the light most favorable to the nonmoving party.”²⁶ A party opposing a properly made and supported motion for summary judgment must cite to particular materials in the record supporting the assertion that a material fact is generally disputed.²⁷

²⁰ *Id.*

²¹ Farrar Deposition, 94:23-95:7.

²² Farrar Deposition, 97:15-22, 98:3-23.

²³ Vernon Traversie Deposition, 66:16-23.

²⁴ Fed. R. Civ. P. 56(a).

²⁵ *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (quoting Fed. R. Civ. P. 1).

²⁶ *True v. Nebraska*, 612 F.3d 676, 679 (8th Cir. 2010).

²⁷ Fed. R. Civ. P. 56(c)(1); *Adam v. Stonebridge Life Ins. Co.*, 612 F.3d 967, 971 (8th Cir. 2010).

Moreover, the nonmoving party may not “rest on mere allegations or denials but must demonstrate on the record the existence of specific facts which create a genuine issue for trial.”²⁸ “The mere existence of some alleged factual dispute between the parties is not sufficient by itself to deny summary judgment. . . . Instead, ‘the dispute must be outcome determinative under prevailing law.’”²⁹

2. The elements of Plaintiff’s claims.

Plaintiff asserts four causes of action – (1) violation of his civil rights; (2) medical malpractice; (3) battery; and (4) outrage, or intentional infliction of emotional distress.

A. Civil Rights

Plaintiff alleges a violation of Title VI’s prohibition against discrimination by programs that receive federal assistance. Such claims are analyzed under the burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).³⁰ Therefore, Plaintiff may survive a motion for summary judgment in one of two ways.

“The first is by proof of ‘direct evidence’ of discrimination.”³¹ By which the court means “showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to

²⁸ *Krenik v. Cnty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995).

²⁹ *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992) (citation omitted).

³⁰ *Fuller v. Rayburn*, 161 F.3d 516, 518 (8th Cir. 1998).

³¹ *Torgerson v. City of Rochester*, 643 F.3d 1031, 1044 (8th Cir. 2011).

support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action.”³²

If plaintiff “lacks evidence that clearly points to the presence of an illegal motive,” then he can avoid summary judgment only “by creating the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis, including sufficient evidence of pretext.”³³

Failing that, summary judgment is “not disfavored and is designed for every action. . . . There is no ‘discrimination case exception’ to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial.”³⁴

B. Medical Malpractice

Plaintiff must show that Regional Hospital provided care to him that “is available at hospitals within the same or similar communities.”³⁵ “[E]xpert testimony is required to establish the fundamental elements of [a] plaintiff’s malpractice action—standard of care, breach, and causation.”³⁶

³² *Id.* (citation omitted).

³³ *Id.*

³⁴ *Id.* at 1043.

³⁵ *Wuest ex rel. Carver v. McKennan Hosp.*, 2000 S.D. 151, ¶ 23, 619 N.W.2d 682, 689.

³⁶ *Koeniguer v. Eckrich*, 422 N.W.2d 600, 602 (S.D. 1988) (quoting 4B Personal Injury-Actions, Defenses, Damages, ‘Hospitals and Asylums.’ § 1.02[3] (1983)).

C. Battery

“Battery is the intentional harmful or offensive physical contact upon another person.”³⁷ To establish a claim of civil assault and battery, a plaintiff must prove that “the defendant: (a) intended to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact; and, (b) an offensive contact with the person of the other directly or indirectly results.”³⁸ “Intent is an essential element in an action for assault and battery.”³⁹

D. Intentional Infliction of Emotional Distress

To establish a claim of intentional infliction of emotional distress, a plaintiff must prove: “(1) extreme and outrageous conduct by the defendant; (2) that the defendant intended to cause severe emotional distress; (3) . . . a causal connection between the wrongful conduct and the emotional distress; and (4) severe emotional distress”⁴⁰

3. Regional Defendants are entitled to judgment as a matter of law on Plaintiff’s claims relating to the alleged “KKK” scars.

First, Plaintiff is blind, and does not know the location or appearance of any of his surgical scars.⁴¹ Whatever he believes about

³⁷ S.D. Civil Pattern Jury Instruction 20-160-20.

³⁸ *Stratmeyer v. Engberg*, 2002 SD 91, ¶ 15, 649 N.W.2d 921, 925-26 (citations omitted).

³⁹ *Frey v. Kouf*, 484 N.W.2d 864, 868 (S.D. 1992) (citing 6A C.J.S. *Assault & Battery* § 9 (1975)).

⁴⁰ *Stratmeyer*, 2002 SD 91, ¶ 16, 649 N.W.2d at 926 (citations omitted).

⁴¹ Traversie Deposition, 72:17-73:5.

his surgical scars was told to him by someone else. Second, it is not even agreed that there are three "K"s.

When people in the community started talking about Plaintiff's abdominal marks, one said she thought it spelled the word "OINK."⁴² The Tribal Police thought there was a "K" on the left side of Plaintiff's abdomen, "and what looked to be jv" just to the right of that "K" on the left side of his abdomen.⁴³ And another reported, "On the right side was, I don't even know how to explain it--what looked like circle scrapes or what the officers thought looked like bite marks. I don't know - it was just like I said - very hard to explain - random, very random."⁴⁴

Whatever they looked like, Dr. Orecchia testified that the IHS physicians were correct—these are scars relating to the repeated placement and removal of dressings relating to open heart surgery.

Dr. Orecchia has seen the "K" like scars on other patients.⁴⁵ He remembers Plaintiff having skin reactions to the tape, and that is one of the reasons that he kept him in the hospital longer.⁴⁶ Dr. Orecchia tried different adhesives and different positioning to minimize the irritation to Plaintiff's skin.⁴⁷ Finally, Dr. Orecchia ordered home

⁴² Investigative Report by Pennington County Sheriff's Office, Page 13 [PLT0081].

⁴³ Investigative Report by Pennington County Sheriff's Office, Page 13 [PLT0081].

⁴⁴ Investigative Report by Pennington County Sheriff's Office, Page 13 [PLT0081].

⁴⁵ Dr. Orecchia Deposition, 13:20-22.

⁴⁶ Dr. Orecchia Deposition, 16:3-16.

⁴⁷ Dr. Orecchia Deposition, 17:25-18:20.

health visits for the purpose of checking the incision sites on Plaintiff's abdomen.⁴⁸

Plaintiff has designated two expert witnesses on the issue of the "KKK" scars, Dr. James McGrann ("Dr. McGrann") and Dr. Richard Clark ("Dr. Clark"). Dr. McGrann testified that he does not know what caused Plaintiff's scars.⁴⁹ He cannot say whether any of the marks are the result of intentional conduct,⁵⁰ and does not have sufficient information to know what produced the marks.⁵¹ Dr. McGrann admits that he has not seen any explanation from the medical providers about what might have caused the scars, and they would have beneficial information, and might be able to explain the scars.⁵² Indeed, Plaintiffs have not provided Dr. McGrann with any of Plaintiff's medical records from Regional Hospital.⁵³

Dr. Clark testified that he is not offering any expert opinions about the cause or source of Plaintiff's scars.⁵⁴ He will defer to the Rapid City Regional Hospital providers on the source of Plaintiff's scars.⁵⁵

While Plaintiff's scars are proving to be a sort of Rorschach Test for the attitudes of those who look at them, there is no evidence that

⁴⁸ Pearman Deposition, 14:4-22; Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011, Page 64 [RCRH03817].

⁴⁹ Dr. James McGrann Deposition, 6:2-10.

⁵⁰ Dr. McGrann Deposition, 7:22-8:3.

⁵¹ Dr. McGrann Deposition, 9:21-10:1.

⁵² Dr. McGrann Deposition, 5:10-6:1.

⁵³ Dr. McGrann Deposition, 4:23-5:9.

⁵⁴ Dr. Richard Clark Deposition, 9:10-24.

⁵⁵ Dr. Clark Deposition, 13:20-24.

anyone put a “KKK” on Plaintiff. Like any Rorschach Test, the scars indicate something about the observer, but they indicate nothing about the medical providers who cared for Plaintiff.

A. Because there is no evidence that anyone put “KKK” on Plaintiff, the scars cannot give rise to a claim of either battery or intentional infliction of emotional distress.

Battery requires a touching with intent to harm or offend.⁵⁶ IIED requires outrageous conduct that the defendant intends to cause severe emotional distress.⁵⁷ There is not evidence of intend to harm or offend. Dr. Orecchia explained what caused the scars.

I remember making rounds on the floor when he was upstairs, and at some point I noticed that he had a lot of skin burns. And we have conversations about this when we're making rounds and we say, "Okay, it looks like he's having a reaction. Let's try this." And somebody says, "Well, I heard that this particular dressing is a good one," so they may try that one in that circumstance. And you just try to put the dressings in slightly different positions because the areas are raw. And I think that would explain some of the irregular positioning of these things. Because generally if you take it off and you pull it off, you might pull off a little strip with it. And then you put it on another direction the next time so you're not doing it exactly the same, and so you're alternating the positions of the tape to try to minimize the problem and not cause pain taking the dressings off.⁵⁸

⁵⁶ *Stratmeyer*, 2002 SD 91, ¶ 15, 649 N.W.2d at 925-26 (citations omitted).

⁵⁷ *Stratmeyer*, 2002 SD 91, ¶ 16, 649 N.W.2d at 926 (citations omitted).

⁵⁸ Dr. Orecchia Deposition, 18:2-20.

Plaintiff has provided no evidence that his scars were the result of intentional conduct intended to harm or offend him. Defendants are entitled to summary judgment.

B. There is no evidence that Plaintiff's scars resulted from any medical malpractice.

There is no evidence that any defendant violated any medical standard of care resulting in the "KKK." Importantly, his experts have refused to so testify. Without those experts, Plaintiff cannot meet his burden.⁵⁹

Even the IHS emergency department nurses and physicians explained to Plaintiff that his abdomen scarring appeared to be from tape irritation and frequent dressing changes at the surgical incision sites.

C. Defendants are entitled to judgment on Plaintiff's civil rights claims because there is no evidence of an adverse decision.

Plaintiff's claim must fail because he fails to provide any evidence that he was subjected to adverse treatment, or that he was treated differently than any other patient.

In an employment discrimination claim, from which *McDonnell Douglas* springs, the prima facia case requires the plaintiff to show that "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his

⁵⁹ *Koeniguer v. Eckrich*, 422 N.W.2d 600, 602 (S.D. 1988) (quoting 4B Personal Injury-Actions, Defenses, Damages, 'Hospitals and Asylums,' § 1.02[3] (1983)).

rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."⁶⁰ But what constitutes a prima facie case will change depending upon the circumstances of the case.⁶¹

Here, it is undisputed that Plaintiff is Native American. But that is the only burden that Plaintiff can meet. Every *McDonnell Douglas* prima facie case requires that the defendant make some adverse decision—terminating employment, refusing to hire, denying admittance into a university, denying a physician staff privileges—some type of adverse decision. The point of the analysis is to determine whether that decision was motivated by Plaintiff's protected status. Here, there is no evidence of any adverse decision.

There is no evidence that someone decided to scar Plaintiff. Plaintiff has no evidence of medical malpractice, so there is not even any evidence of a poor medical decision.

Plaintiff cannot establish a prima facie case of discrimination in this case. Plaintiff cannot show that someone decided to put "KKK" on his abdomen because he belongs to a racial minority. Indeed, Plaintiff cannot show that someone put "KKK" on his abdomen at all.

Plaintiff also failed to exhaust his administrative remedies. Complaints of discrimination must be made within 180 days from the alleged discriminatory act.⁶² The medical records show that Plaintiff

⁶⁰ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

⁶¹ *McDonnell*, 411 U.S. at 802 n.13; *Putman v. Unity Health Sys.*, 348 F.3d 732, 735-36 (8th Cir. 2003).

⁶² 45 C.F.R. § 80.7.

was hospitalized from August 22, 2011 to September 8, 2011.⁶³

Therefore, the time for Plaintiff to file his administrative complaint expired on March 6, 2012. According to the Office of Civil Rights, Plaintiff did not file his complaint until March 20, 2012.⁶⁴

4. Regional Defendants are entitled to judgment as a matter of law on Plaintiff's claims relating to George Sazama because no reasonable jury could believe his account.

Plaintiff has testified that nurse Sazama physically and verbally abused him because Plaintiff interrupted Sazama while he was watching television. But every verifiable fact of Plaintiff's story is demonstrably false. Further, Plaintiff was on narcotics during the entire time, and admits that he was sedated. No reasonable jury could believe his story.

The Supreme Court has ruled that a genuine dispute of fact is not created simply because someone is willing to swear to their version. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."⁶⁵ Plaintiff and the record are certainly telling differently stories. But, the record is undisputed and overwhelmingly demonstrates that Plaintiff's story is untrue. The Court should not adopt Plaintiff's unsupported version of

⁶³ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011, Page 3-4 [RCRH03756-03757].

⁶⁴ Complaint to Office of Civil Rights.

⁶⁵ *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007).

the facts for purposes of this summary judgment motion. Regional Defendants are entitled to judgment as a matter of law on Plaintiff's claims relating to nurse Sazama.

A. Plaintiff's Current Story

From the time he left surgery on August 26, 2011, until about 6:00 p.m. on August 28, Plaintiff was in the surgical intensive care unit. His day nurse was George Sazama.

Plaintiff reports that as he was just coming out of sedation following surgery, he was in severe pain. He called out for pain medication, but Sazama was not around because he was watching television somewhere. Plaintiff asked another nurse to go get him.⁶⁶ Sazama was so angry that Plaintiff had summoned him, that he refused to give Plaintiff any pain medication, and he banged Plaintiff's arm against the bed four times.⁶⁷

Sazama then yelled at Plaintiff, "You f***ing son of bitch, he said, I'll teach you a f***ing lesson you'll never forget you dumb f***ing Indian."⁶⁸ Sazama kept,

Calling me a f**ker over and over and over again. And when -- he said if I asked for -- I was asking for pain medication and he refused to give me any. And he said if I asked for any more, he was going to teach me a lesson. And so I -- I got scared and I started to pray because I thought that I was going to be killed or hurt really bad. And I was in no way able to defend myself. When I couldn't even lift

⁶⁶ Traversie Deposition, 62:2-15.

⁶⁷ Traversie Deposition, 35:12-23.

⁶⁸ Traversie Deposition, 58:7-59:2.

my arm to put it in front of my face to defend myself, why, I was scared."⁶⁹

But Sazama threatened to hurt Plaintiff if Plaintiff did not stop praying.⁷⁰ Plaintiff thought that Sazama was going to kill him.⁷¹

After assaulting Plaintiff, Sazama started doing something to his "belly," but Plaintiff does not know what Sazama was doing because he went to sleep again.⁷² Plaintiff does not remember what time Sazama abused him because Plaintiff was sedated.⁷³

B. Plaintiff's history of complaints omits any mention of this horrible treatment.

There can be no dispute that, if true, the conduct of which Plaintiff complains is horrendous. So horrendous, in fact, that one would expect Plaintiff to complain about it. But he did not.

While he was in the hospital, Plaintiff did complain, and those complaints were documented. He just did not complain about nurse Sazama. On August 30, after he had been out of the ICU for a couple of days, Plaintiff complained that he wanted to "speak to a social worker about the linens being rough, the bed he is in and the possibility to go to rehab."⁷⁴ The nurse spoke to doctors and a social worker to find solutions to Plaintiff's concerns, and "[b]eds were changed per pt

⁶⁹ Traversie Deposition, 59:3-18.

⁷⁰ Traversie Deposition, 59:19-60:7.

⁷¹ Traversie Deposition, 59:16-18.

⁷² Traversie Deposition, 39:3-13.

⁷³ Traversie Deposition, 35:24-36:9.

⁷⁴ Significant Communications from Electronic Medical Record, Page 7 [RCRH04929].

request and he later stated that he wishes to have is original bed back.”⁷⁵ The nurse spoke with the physician about Plaintiff’s difficulty sleeping, the physician expressed concern about not giving Plaintiff pain medications throughout the night, rather, “[p]ain medication was given throughout the day for pain.”⁷⁶ Plaintiff also complained about the food.⁷⁷ But there was no complaint about nurse Sazama, or the horrendous conduct.

On September 9, 2011, when Plaintiff’s home health nurse called the Tribal Police, Plaintiff did not complain to the Tribal Police about nurse Sazama’s conduct.⁷⁸

On September 12, 2011, Farrar and Plaintiff called Regional Hospital to complain about Plaintiff’s scars.⁷⁹ When Plaintiff spoke to the Patient Advocate about his complaint, he did not mention nurse Sazama, or allege any mistreatment by nurses.⁸⁰ Indeed, Plaintiff told the Patient Advocate that he did not remember anything unusual about his stay at Regional Hospital, other than going through surgery.⁸¹

The first time that there is a record of Plaintiff complaining about Sazama is on March 20, 2012—more than six months later—in a

⁷⁵ Significant Communications from Electronic Medical Record, Page 7 [RCRH04929].

⁷⁶ Significant Communications from Electronic Medical Record, Page 7 [RCRH04929].

⁷⁷ Significant Communications from Electronic Medical Record, Page 7 [RCRH04929].

⁷⁸ Cheyenne River Sioux Tribal Law Enforce Report, with Photos, Page 1 [PLT0001].

⁷⁹ Patient Relations Worksheet regarding Mr. Traversie, Page 1 [RCRH05169].

⁸⁰ Patient Relations Worksheet regarding Mr. Traversie, Page 2 [RCRH05170].

⁸¹ Eric Hupp Deposition, 15:12-14; Patient Relations Worksheet regarding Mr. Traversie, Page 2 [RCRH05170].

Complaint to the Office of Civil Rights of the Department of Health and Human Services.⁸²

On May 23, 2012, Plaintiff told a newspaper that he complained about the “male nurse,” when he made his police report in September of 2011.

Tribal police met with Traversie and asked him for a statement regarding where he had been and whom he thought did this to him. He replied that he had been in the hospital for two weeks. “I told them I had a confrontation with a male nurse while I was in intensive care. I was in so much pain, I begged him for pain medication. He told me to shut my F-ing mouth or he'd shut it for me. I didn't provoke him. I didn't disrespect him.”⁸³

The police reports are in evidence. Plaintiff reported no such thing to the police. In the same article, Plaintiff claims to have reported nurse Sazama to his supervisor. “I did talk to his supervisor. She said she'd take care of it and even take disciplinary action if necessary.”⁸⁴ Plaintiff made no complaints to Sazama's supervisors.⁸⁵

While Plaintiff's story is truly outrageous, he never mentioned it to anyone until several months after he was discharged from the hospital, in spite of the fact that he was complaining to law enforcement about his scars.

⁸² Complaint to Office of Civil Rights.

⁸³ Article - Indian Country, Unlawful Surgery, Page 4 [PLT0122].

⁸⁴ Article - Indian Country, Unlawful Surgery, Page 4 [PLT0122].

⁸⁵ Stock and Mills Affidavits.

C. The actual pain medication record proves that Plaintiff's allegations are untrue.

Plaintiff claims that nurse Sazama's abusive conduct was prompted by his request for pain medications. Sazama denied him pain medications, and because Sazama was abusive to him, Plaintiff "finally stopped asking for the medication."⁸⁶ The medical record shows that Plaintiff's story is simply untrue.

Plaintiff was on a patient controlled analgesia pump (a "PCA" pump) that provided him with Fentanyl for pain.⁸⁷ Fentanyl is a potent, synthetic narcotic that is approximately 100 times more potent than morphine. A PCA pump gives a patient a base dose of pain medication. The patient also has a button that allows him to give himself additional doses of the pain medication.⁸⁸ Both the base dose and the amount of additional medication the patient may self-administer are ordered by the patient's attending physician.⁸⁹

So Sazama could not have denied Plaintiff his pain medication because it was automatically delivered to him. When he did not think he was receiving enough, he would "hit" the pump, receiving up to the maximum medication prescribed by his doctor. The pump is programmed according to the physician's order to prevent over dose of the narcotic.

⁸⁶ Complaint to Office of Civil Rights.

⁸⁷ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03834].

⁸⁸ See generally <http://www.webmd.com/pain-management/guide/pca>.

⁸⁹ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03782].

The nurses also requested and administered additional pain medications for Plaintiff from his physicians. A timeline of events might be helpful.

August 26, 2011

- 2:10 p.m. Plaintiff comes out of surgery.⁹⁰
- 2:10 p.m. Physicians prescribe Plaintiff Fentanyl by PCA 20 mcg with a 10 minute delay and Basal Rate of 20 mcg/hr.⁹¹ So Plaintiff received 20 mcg/hr of Fentanyl automatically. He could give himself another 20 mcg every 10 minutes.
- 2:15 p.m. Plaintiff is admitted into the SICU. George Sazama, RN is his nurse.⁹²
- 2:15 p.m. Plaintiff is intubated, and sedated to the point that he could not be aroused.⁹³
- 6:48 p.m. Plaintiff is extubated.⁹⁴
- 7:30 p.m. Plaintiff is receiving Fentanyl at Base 20 Fentanyl 20 mcg. He says his pain level is 10.⁹⁵
- 7:45 p.m. Because his pain is still a 10, nurse Sazama increases his base rate of Fentanyl to 40 mcg/hr.⁹⁶

⁹⁰ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH04063].

⁹¹ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03782].

⁹² Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH04143].

⁹³ *Id.*

⁹⁴ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH004142].

⁹⁵ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03834 and 4143].

- 8:00 p.m. Nurse Sazama goes off-duty.
- 8:20 p.m. Since starting to use his pump, Plaintiff gave himself 10 doses of Fentanyl, and his pain level decreased from 10 to 6.⁹⁷

August 27, 2011

- 12:01 a.m. Since 8/26/11 at 2020, Plaintiff gave himself another 10 doses of Fentanyl, and his pain level is back up from 6 to 8.⁹⁸
- 4:00 a.m. Plaintiff gave himself another 6 doses of Fentanyl, and his pain level is down from 8 to 7.⁹⁹
- 5:30 a.m. Plaintiff gave himself another 3 doses of Fentanyl, and his pain level is back up to an 8.¹⁰⁰
- 7:00 a.m. Nurse Sazama comes back on-duty and assumes care.
- 8:00 a.m. Plaintiff gave himself another 5 doses of Fentanyl, but his pain level has stayed at 8.¹⁰¹
- 8:52 a.m. Less than an hour later, Plaintiff's pain level is still an 8, so Sazama notified his physician.
- 9:39 a.m. The physician ordered Torodal 30 mg by IV push, and Sazama administers it.¹⁰²

⁹⁶ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03834].

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03835].

- 12:00 noon Pain level is a 3.¹⁰³
- 3:30 p.m. Plaintiff gave himself another 8 doses of Fentanyl. No pain.¹⁰⁴
- 4:00 p.m. Pain level is a 2.¹⁰⁵
- 8:00 p.m. Nurse Sazama goes off-duty.
- 8:00 p.m. Plaintiff gave himself another 7 doses Fentanyl at 20 mcg, but his pain level is back up to a 10.¹⁰⁶
- 8:20 p.m. Plaintiff's physician is called, and he orders the Fentanyl dose increased to 30 mcg with Basal Rate of 60 mcg/hr.¹⁰⁷
- 8:30 p.m. The dosing of the Fentanyl PCA is increased to a Base 80 Fentanyl with an additional 30 mcg on 10 minute delay.¹⁰⁸
- 9:50 p.m. Plaintiff gave himself no extra doses in the intervening period, but his pain level is a 2.¹⁰⁹
- 11:20 p.m. Plaintiff gave himself 5 doses Fentanyl 30 mcg. No pain.¹¹⁰

¹⁰² Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03791].

¹⁰³ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH04384].

¹⁰⁴ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03835].

¹⁰⁵ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH04389].

¹⁰⁶ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03835].

¹⁰⁷ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03791].

¹⁰⁸ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03835].

¹⁰⁹ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03835].

12:00 midnight No Pain.¹¹¹

August 28, 2011

1:00 a.m. Pain level is 4.¹¹²

2:00 a.m. Pain level is 6.¹¹³

3:00 a.m. Pain level is a 6.¹¹⁴

3:20 a.m. Plaintiff gave himself 9 doses Fentanyl 30 mcg since
8/27/11 at 2320. Pain level is a 4¹¹⁵

4:00 a.m. Pain level is a 4.¹¹⁶

5:00 a.m. Pain level is a 4.¹¹⁷

5:12 a.m. Plaintiff gave himself 6 doses Fentanyl 30 mcg. Pain level
is a 4.¹¹⁸

8:00 a.m. Nurse Sazama is back on-duty, and assumes care for
Plaintiff.

8:00 a.m. Plaintiff gave himself 1 dose Fentanyl 30 mcg.¹¹⁹

¹¹⁰ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03836].

¹¹¹ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH04147].

¹¹² Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH04147].

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03836].

¹¹⁶ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH04147].

¹¹⁷ *Id.*

¹¹⁸ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03836].

8:00 a.m. Fentanyl PCA shut off to try to relieve nausea. The Fentanyl is replaced by Norco 5/325 mg tablets by mouth. Norco contains a combination of acetaminophen and hydrocodone. Hydrocodone is a narcotic.¹²⁰

Based upon the medical records, nurses were monitoring Plaintiff's pain; he was receiving pain medications according the physician orders; and, when the physician ordered medication was insufficient, nurse Sazama and the other nurses were requesting, and obtaining, new pain medication orders.

Sazama had no disagreements with Plaintiff about pain medication.¹²¹ Sazama had no confrontation or dispute with Plaintiff.¹²² Sazama was not summoned from watching television to care for Plaintiff.¹²³ Sazama never refused Plaintiff pain medication.¹²⁴ Sazama never used the "f word" around Plaintiff.¹²⁵ Sazama never slammed Plaintiff's arm down on the bed.¹²⁶ Sazama never spit on Plaintiff.¹²⁷ Sazama remembers Plaintiff as an easy, ordinary SICU patient.¹²⁸

¹¹⁹ Rapid City Regional Hospital In-Patient Medical Record August 22 to September 8, 2011 [RCRH03837].

¹²⁰ *Id.*; RCRH04421.

¹²¹ Sazama Deposition, 20:24-21:2.

¹²² Sazama Deposition, 28:1-5.

¹²³ Sazama Deposition, 28:15-23.

¹²⁴ Sazama Deposition, 28:24-29:1.

¹²⁵ Sazama Deposition, 29:2-4.

¹²⁶ Sazama Deposition, 29:5-7.

¹²⁷ Sazama Deposition, 29:8-10.

¹²⁸ Sazama Deposition, 11:7-10.

The objective evidence contradicts Plaintiff's naked assertions, and the Court is not obligated to assume they are true.

Conclusion

Discovery is closed, and there is no probative evidence that anyone put "KKK" on Plaintiff. The undisputed evidence is that Plaintiff's skin tears occurred in spite of the doctors' and nurses' best efforts to minimize the irritation to the skin. Plaintiff's allegations against Sazama are incredible under every objective standard. No reasonable jury could base a verdict upon them, and the Court need not accept them as true.

Regional Defendants respectfully request that this Court grant their summary judgment motion.

Certifications

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

I certify that the brief complies with the type volume limitation of D.S.D. Civ. LR 7.1.B.1. The brief contains 4706 words. I have relied on the word count of the Word® word-processing system used to prepare the brief.

Request for Oral Argument

Defendant requests oral argument upon its motion pursuant to D.S.D. Civ. LR 7.1(C).

Respectfully submitted this 10th day of January 2014.

**BANGS, McCULLEN, BUTLER, FOYE
& SIMMONS, L.L.P.**

By: /s/ Jeffrey G. Hurd
Daniel F. Duffy
Jeffrey G. Hurd
Jessica L. Fjerstad
333 West Boulevard, Ste 400
P.O. Box 2670
Rapid City, SD 57709
Telephone: (605) 343-1040
Facsimile: (605) 343-1503
jhurd@bangsmccullen.com
dduffy@bangsmccullen.com
jfjerstad@bangsmccullen.com

ATTORNEYS FOR DEFENDANTS
RAPID CITY REGIONAL HOSPITAL, INC.,
REGIONAL HEALTH, INC., AND
REGIONAL HEALTH PHYSICIANS, INC.

Traversie v. Regional Hospital,
Civ. No 12-05048-JLV

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Gabriel S. Galanda
Anthony S. Broadman
Ryan D. Dreveskracht
GALANDA BROADMAN, PLLC
P.O. Box 15146
Seattle, WA 98115
Phone: (206) 691-3631
Fax: (206) 299-7690
gabe@galandabroadman.com
anthony@galandabroadman.com
ryan@galandabroadman.com
ATTORNEYS FOR PLAINTIFF

Chase Iron Eyes
IRON EYES LAW OFFICES
1024 West Highland Acres
Bismarck, ND 58501
Phone: (303) 968-7904
Fax: (866) 810-6099
Email: chaseironeyes@gmail.com
ATTORNEYS FOR PLAINTIFF

Lonnie R. Braun
THOMAS, BRAUN, BERNARD &
BURKE, L.L.P.
4200 Beach Drive, Suite 1
Rapid City, SD 57702
Telephone: (605) 348-7516
Facsimile: (605) 348-5852
lbraun@tb3law.com
ATTORNEYS FOR DEFENDANT TRS
SURG ASSIST

/s/ Jeffrey G. Hurd
Jeffrey G. Hurd