The Honorable Jeffrey L. Viken

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

VERNON R. TRAVERSIE, an enrolled member of the Cheyenne River Sioux Tribe and citizen of South Dakota,

Plaintiff,

v.

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

Defendants.

NO. 5:12-cv-05048-JLV

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendants[1] argue that they are entitled to Summary Judgment because, after weighing the evidence and making credibility determinations, "no reasonable jury" could return a verdict in favor of Plaintiff.[2] But "[t]he jury is responsible for weighing the evidence and making credibility determinations, not the court."[3]

[1] Defendant TRS Surg Assist, Inc., joined Regional Defendants' Motion for Summary Judgment on January 17, 2014. Docket 51. Regional Defendants and TRS Surg Assist, Inc., are herein collectively referred to as "Defendants."
[2] Docket 39 at 1-2.
[3] *Rynders v. Williams*, 650 F.3d 1188, 1194 (8th Cir. 2011).

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Defendants have failed to enumerate to the Court the multitude of material facts in dispute in this case; in fact, every element of every claim has a material fact in dispute. Indeed, there are instances in Defendants' own Memorandum of Law in Support where Defendants present the very disputed fact that disqualifies them from summary judgment.[4]

Plaintiff has offered testimony under oath, corroborated by witnesses and experts and entered into the record, to prove the elements of his claims. Defendants have attempted to enter testimony and expert opinions into the record to refute those offered by Plaintiff. Defendants now ask the Court to take the word of their declarants and affiants over that of Plaintiff's. But doing so would turn the summary judgment standard on its head.[5]

Plaintiff respectfully requests that this Court find that genuine issues of material fact exist in all claims presented herein, and therefore deny Defendants' Motion for Summary Judgment.

II. FACTS

Defendants have laid out an extensive Statement of Facts, spanning the majority of their Memorandum of Law in Support.[6] There are many "facts" that are clearly in dispute and must be exposed for the Court's benefit. Plaintiff incorporates herein his Statement of Additional Material Facts, filed contemporaneously with this Response. There, Plaintiff fully enumerates an extensive set of disputed facts, specifically refuting the facts set forth in Defendants' Memorandum in relation to each element of each of Plaintiff's claims.

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[4] *See e.g.* Docket 39 at 15-16.

[5] *See Hitt v. Harsco Corp.*, 356 F.3d 920, 923–34 (8th Cir. 2004) (the court must view the facts in the light most favorable to the party opposing the motion and give that party the benefit of all reasonable inferences to be drawn from the record).

[6] Docket 39.

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III. ARGUMENT

A. Summary Judgment Standard.

"Summary judgment is proper if, after viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmovant, no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law."[7] "The court should deny summary judgment if there is sufficient evidence for a jury to return a verdict for the non-moving party."[8] "The jury is responsible for weighing the evidence and making credibility determinations, not the court."[9] The U.S. Court of Appeals for the Eighth Circuit has warned that summary judgment is generally inappropriate in tort cases.[10]

Defendants misunderstand the summary judgment standard. First, Defendants submit that a plaintiff's testimony, taken under oath, somehow constitutes "naked assertions" that the Court is not obligated to assume are true.[11] While Defendants are correct that "[n]aked assertions **in the pleadings** are insufficient to withstand summary judgment,"[12] a non-movant asserting that a fact is genuinely disputed will defeat summary judgment by citing to "materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, [and] interrogatory answers."[13] The difference is obvious: materials in the record are *evidence*, and a "pleading is not evidence for purposes of summary judgment."[14] The Court must "take the non-movant's *evidence* as true, drawing all reasonable inferences in his

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[7] *Rynders*, 650 F.3d at 1194 (quotation omitted).
[8] *Young–Losee v. Graphic Packaging Int'l, Inc.*, 631 F.3d 909, 911 (8th Cir. 2011).
[9] *Bosley v. Cargill Meat Solutions Corp.*, 705 F.3d 777, 779 (8th Cir. 2013); *see also Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 993 (8th Cir. 2011) ("Credibility determinations and the weighing of the evidence are jury functions, not those of a judge.").
[10] *Williams v. Chick*, 373 F.2d 330, 332 (8th Cir. 1967); *Hanke v. Global Van Lines, Inc.*, 533 F.2d 396, 397 (8th Cir. 1976).
[11] Docket 39 at 25.
[12] *Viger v. Commercial Ins. Co. of Newark, N.J.*, 707 F.2d 769, 771 (3rd Cir. 1983) (emphasis added).
[13] Fed. R. Civ. Proc. 56(c)(1)(a).
[14] *Parks v. City of Carrollton*, No. 03-0103, 2005 WL 2219072, at *6 (11th Cir. 2005).

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or her favor."[15] Thus, contrary to what Defendants represent, the sworn testimony of Plaintiff, for instance, must be taken as true, whereas the factual assertions made in the Complaint, if controverted by evidence, need not be.[16]

Second, Defendants argue that they are entitled to summary judgment because "no reasonable jury could base a verdict upon" Plaintiff's evidence, when compared to Defendants' evidence, which Defendants claim is more "objective" than that Plaintiff's.[17] Relying on the U.S. Supreme Court's decision in *Scott v. Harris*,[18] Defendants submit that the case at bar is one of those cases where "'opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it,'" such that the Court is not obligated to draw all reasonable inferences in the light most favorable to Plaintiff.[19] Defendants misrepresent *Scott*. Under *Scott*, unless there is some video or audio evidence that *clearly* shows a "different story," all inferences must still be drawn in the light most favorable to Plaintiff.[20] Here, Defendants do not allege that there is video or audio evidence that blatantly contradicts Plaintiff's evidence. *Scott* is inapplicable. Defendants are not entitled to summary judgment.

B. Defendants Are Not Entitled To Summary Judgment On Any Of Plaintiff's Claims.

Defendants argue that they "are entitled to summary judgment as a matter of law because there is no evidence that anyone put 'KKK' on Plaintiff's abdomen, and because no reasonable jury could believe Plaintiff's claims against nurse [George] Sazama."[21] Plaintiff, a Native American, has produced evidence that scars resembling three letters "K" were permanently placed

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[15] *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 964 (8th Cir. 1999) (emphasis added).
[16] *Cf.* Docket 39 at 16.
[17] *Id.* at 25.
[18] 550 U.S. 372 (2007).
[19] *Id.* at 14 (quoting *Scott*, 550 U.S. at 380).
[20] *See e.g. Coker v. Arkansas State Police*, 734 F.3d 838 (8th Cir. 2013); *Dunston v. Harrison*, 2014 WL 126047, at *1 (E.D.N.C. Jan. 13, 2014); *Wauchope v. Shellenbarger*, No. 12-0247, 2013 WL 594471, at *3 (W.D. Mich. Feb. 14, 2013).
[21] Docket 39 at 1-2.

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on his abdomen.[22] Plaintiff has also produced evidence that nurse George Sazama and, possibly other employees of Defendants, have harmed him.[23] These are questions for the jury.

1. Defendants Are Not Entitled To Summary Judgment On Plaintiff's Negligence Claims.

Defendants argue that they are entitled to summary judgment on Plaintiff's negligence claims because "there is no evidence that any defendant violated any medical standard of care resulting in the 'KKK.'"[24] Defendants are mistaken.

Plaintiff is blind[25] and was unconscious and/or incapacitated while in the care of Defendants.[26] He does not know what produced the K-shaped scars on his abdomen.[27] Defendant's expert—without physically examining Plaintiff—speculates that the scars were caused by "areas where the tape caused a reaction in the skin."[28] Plaintiff's expert—after physically examining Plaintiff—has concluded that the K-shaped scars "would not be easily explained on the basis of tape" and in fact could have been "caused by an intentional injury of a superficial pattern such as electrocautery."[29] In short, the K-shaped scars exist, they were created while Plaintiff was unconscious and/or incapacitated and under the exclusive care and supervision of Defendants, and the expert opinions differ as to their cause.[30]

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[22] Declaration of Ryan D. Dreveskracht ("Dreveskracht Decl."), Ex. A; *id.* Ex. I (Dr. Richard Clark noting in medical examination notes of Plainitff, "[l]etters KKK can be seen in the lower abdomen which appear to have been burned into the skin.").
[23] *Id.*, Ex. B, at 5, 6, 10, 15.
[24] Docket 39 at 12.
[25] *Id.* at 8.
[26] Dreveskracht Decl., Ex. B, at 9, 12, 16.
[27] *Id.*
[28] Docket 45-1 at 2; *but see* Dreveskracht Decl., Ex. B, at 6 ("[W]hen I did have the drainage tubes on me, they were dangling free. They weren't—they weren't taped to me.").
[29] *Id.*, Ex. C, at 4; *see also id.* ("I cannot explain [the scars] easily on the basis of tape. It does appear to be some kind of an excoriated injury."); Declaration of Dr. James R. McGrann ("McGrann Decl."), at 3 ("In my opinion, and to a reasonable degree of medical certainty, Vernon Traversie sustained injuries that are not easily explained on the basis of tape while in the care and supervision of the Defendants.").
[30] *See generally* Charles A. Wright, et al., *Grounds for Summary Judgment—Credibility*, 10A Fed. Prac. & Proc. Civ. § 2726 (3d ed. 2013).

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Generally, "[i]n order to prevail in a suit based on negligence, a plaintiff must prove duty, breach of that duty, proximate and factual causation, and actual injury."[31] Evidence of breach and causation are not always required, though. Under the doctrine of *res ipsa loquitur*, a jury may "infer the existence of negligence and causation where the injury at issue is one that does not ordinarily occur in the absence of negligence."[32] In order to invoke *res ipsa loquitur*, a Plaintiff is required to show that:

> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.[33]

As to the final factor, although medical expert testimony is usually necessary to establish the "duty" element, "[e]xpert medical testimony is not necessary to support a *res ipsa loquitur* claim where the matters to be proved fall within an area of common knowledge and developing lay comprehension of medical techniques . . . ."[34] Thus, as a general rule, the doctrine of *res ipsa loquitur* is applicable "where it is a matter of common knowledge among laymen *or* medical men or both that the injury would not have occurred without negligence."[35]

The duty to keep a patient free from injuries that are not medically necessary or related to the procedure to which they have agreed to undergo is undoubtedly "within the general

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[31] *Highmark Federal Credit Union v. Hunter*, 814 N.W.2d 413, 415 (S.D. 2012).
[32] *Sedlitsky v. Pareso*, 582 A.2d 1314, 1315 (Pa. Super. 1990); *see also Norberg v. Labor Ready, Inc.*, 384 F.Supp.2d 1328, 1332 (S.D. Iowa 2005) ("*Res ipsa loquitur* thus fills the gap where there is no direct evidence of causation and an inference of negligence is permissible from the fact of injury itself.").
[33] Restatement (Second) of Torts § 328D(1) (2013); *see also Thompson v. Avera Queen of Peace Hosp.*, 827 N.W.2d 570, 575 (S.D. 2013) ("Under the doctrine of *res ipsa loquitor*, negligence is inferred from surrounding circumstances because the specific act of negligence is not known and the type of injury in and of itself provides evidence of negligence."); *Ybarra v. Spangard*, 154 F.2d 687, 691 (Cal. 1944) ("[W]here a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all of those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.").
[34] *Mattke v. Deschamps*, 374 F.3d 667, 670 (8th Cir. 2004); *see also generally Magbuhat v. Kovarik*, 382 N.W.2d 43, 46 (S.D. 1986); *Wick v. Henderson*, 485 N.W.2d 645, 648 (Iowa, 1992).
[35] *Gubbins v. Hurson*, 885 A.2d 269, 283 (D.C. 2005) (citation and quotation omitted).

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knowledge of laymen."[36] What is more, Dr. James McGrann has testified that Defendants' standard of care, as it relates to surgical and nonsurgical incisions and injuries and their care and aftercare, is as follows:

> [Defendants] have a duty to keep a patient free from injuries that are not medically necessary and/or not related to the procedure to which they have agreed to undergo[;] to inform a patient of any inadvertent injuries that have occurred while under their care and supervision[; and] to recommend postoperative follow-up treatment if there is a possibility that injuries occurring in their care and supervision may result in long-term scarring.[37]

Here, Plaintiff has averred and presented evidence that he has sustained injuries that were not medically necessary or related to the procedure that he agreed to undergo.[38] He is entitled to the *res ipsa loquitur* inference on this claim and thus need not point to a specific breach of duty or causation—it is enough that the injuries occurred and that there is conflicting evidence as to their cause.[39] Plaintiff has also averred and presented evidence that he was not informed of any inadvertent injuries—if they were inadvertent—that he sustained while under Defendants' care and supervision.[40] Plaintiff has presented expert testimony declaring that "if Defendants informed

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[36] *Nelson v. Murphy*, 258 P.2d 472, 474 (Wash. 1953); *see also Mattke*, 374 F.3d at 670 (same); *Romero v. Hanisch*, No. 08-5040, 2010 WL 1812578, at *3 (D.S.D. May 3, 2010) (quoting *Magbuhat*, 382 N.W.2d at 46) (same); *Luther v. City of Winner*, 674 N.W.2d 339, 344 (S.D. 2004) (same); *see e.g. Norman v. U.S.*, No. 04-0111, 2006 WL 335510, at *3 (E.D. Mo. Feb. 13, 2006) (cases cited therein); *Swan v. Tygett*, 669 S.W.2d 590, 592 (Mo. App. 1984) (cases cited therein).

[37] McGrann Decl., at 2.

[38] Docket 1 at 10-11; Dreveskracht Decl., Ex. B, at 7-8; *id.*, Ex. C, at 4; *see also* McGrann Decl., at 3 ("In my opinion, and to a reasonable degree of medical certainty, Vernon Traversie sustained injuries that are not easily explained on the basis of tape while in the care and supervision of the Defendants."); Dreveskracht Decl., Ex. F (hospital record noting that Mr. Traversie "HAS ALL KINDS OF CUTS, ABRASIONS AND CONTUSIONS ALL OVER HIS CHEST AND BACK" and that "IT LOOKS LIKE SOMEONE CARVED THEIR INITIALS INTO HIS SIDE OF HIS CHEST . . . . [Mr. Traversie] DOESN'T REMEMBER IF SOMEBODY ATTACKED HIM, HE WAS IN THE HOSPITAL THE WHOLE TIME, AND HE DID NOT HAVE A ROOM MATE. NOBODY IS REALLY SURE HOW HE GOT ALL THE WOUNDS.") (emphasis in original).

[39] There is not even conflicting evidence in some instances. Much of the "evidence" that Defendants rely on is illegible or otherwise indecipherable and does not meet the requirements of Fed. R. Civ. Proc. 56 (c)(1). *See e.g.* Docket 43-1 at 15-69, 72-75.

[40] Docket 1 at 10-11; Dreveskracht Decl., Ex. B, at 15, 19; *see also id.* at 16 ("I Wasn't aware of any – any scars until I got home. . . . I wasn't aware of it until I got home until my home health nurse discovered them."); McGrann Decl., at 3 ("In my opinion, and to a reasonable degree of medical certainty, the medical care that Vernon Traversie received while in the care and supervision of the Defendants fell below the acceptable standards in South Dakota if Mr.

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Mr. Traversie of any inadvertent injuries and recommended postoperative follow-up treatment, they could have prevented Mr. Traversie's distress and scarring."[41] Plaintiff has also averred and presented evidence that Defendants did not recommend postoperative follow-up treatment to care for his scarring.[42] Plaintiff has presented expert testimony declaring that "if Defendants failed to prevent injuries that were not medically necessary and/or not related to the procedure to which Mr. Traversie had agreed to undergo, such failure was a preventable cause of Mr. Traversie's distress and scarring."[43] Defendants are not entitled to summary judgment on Plaintiff's negligence claims.

2. Defendants Are Not Entitled To Summary Judgment On Plaintiff's Civil Rights Act Claims.

Defendants hang their opposition to Plaintiff's Civil Rights Act claims on the absence of a discriminatory intent.[44] Defendants' argument fails for at least two reasons. First, if the scars were determined to be the letters KKK, a discriminatory intent would be clear, "[g]iven that the KKK is a white-supremacist hate group with a history of violence" and that Plaintiff is a Native American.[45] Defendants' statement that "there is no evidence that anyone put a 'KKK' on Plaintiff" is false.[46] Plaintiff has produced evidence that these marks were made on him while he

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Traversie was neither (a) informed of the inadvertent injuries that occurred while under Defendants' care and supervision, or (b) made aware that those inadvertent injuries may result in long-term scarring.").

[41] McGrann Decl., at 4.

[42] Dreveskracht Decl., Ex. B, at 19; *id.*, Ex. D, at 6-7; Docket 43-1 at 3 (Discharge Summary stating nothing about postoperative follow-up treatment to care for scarring).

[43] McGrann Decl., at 4.

[44] Docket 39 at 6, 8-10, 12-14.

[45] *Fennell v. Marion Independent School Dist.*, No. 12-0941, 2013 WL 3994649, at *13 (W.D. Tex. Aug. 2, 2013); *see also McMullen v. Carson*, 754 F.2d 936, 938 (11th Cir. 1985) (noting that "the nature, both actual and perceived, of the K[KK i]s a violent, criminal, and racist organization"); *Thompson v. Dacco, Inc.*, No. 03-0079, 2006 WL 2038007 (M.D. Tenn. Jul. 19, 2006) (the "offensiveness" of KKK "graffiti writings [wa]s not contested" in proving discriminatory intent); Alfred L. Brophy, 20 Harv. BlackLetter L.J. 17, 35 (2004) ("Perhaps the worst case of Klan whippings involved a . . . Native American."); Leo R. Chavez, *Spectacle in the Desert: The Minuteman Project on the U.S.-Mexico Border*, *in* Global Vigilantes 3 (David Pratten & Atreyee Sen, eds., 2006) (discussing the KKK's attack on a Native American, causing a broken jaw and forearm and two cracked ribs).

[46] Docket at 39 at 10-11.

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was under the exclusive care and supervision of Defendants.[47] Plaintiff has produced evidence, and Defendants concede,[48] that reasonable minds and medical experts differ as to whether the marks actually resemble the letters "KKK."[49] Whether or not those marks actually resemble the letters "KKK" is a question for the jury.

Second, Plaintiff has produced evidence that he sustained a racially motivated attack when a male nurse, who may be named "George," assaulted and battered him, exclaiming "I'll teach you a lesson you'll never forget you dumb fucking Indian."[50] While Defendants have attempted to rebuff this evidence by entering evidence of their own into the record,[51] the Court must view the facts in the light most favorable to Plaintiff and give him the benefit of all reasonable inferences.[52] Whether Plaintiff has sustained a racially motivated attack is a question for the jury.

Defendants also argue that Plaintiff is barred from asserting a Civil Rights Act violation because he failed to exhaust his administrative remedies.[53] Defendants are mistaken, yet again. The regulation that Defendants cite for this proposition applies only to Plaintiff's 42 U.S.C. 2000d claim,[54] and the law is clear that "[a] plaintiff need not exhaust administrative remedies prior to instituting a Section 2000d action."[55]

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[47] Dreveskracht Decl., Ex. A; *id.* at Ex. I (Dr. Richard Clark noting in medical examination notes of Plainitff, "[l]etters KKK can be seen in the lower abdomen which appear to have been burned into the skin.").

[48] Docket 39 at 10.

[49] Docket 46-1 at 2; Docket 47-1 at 3 (Dr. Richard Clark, MD, Cardiologist, when asked "The scars that you saw, the first time you saw Mr. Traversie's abdomen, did you perceive that they were in the shape of K's?" answers "I did perceive that"); Dreveskracht Decl., Ex. E (September 9, 2011, Emergency Room visit with Dr. Jimenez noting "scars to abdomen . . . which appears to be a letter K.").

[50] Docket 44-1 at 4; Dreveskracht Decl., Ex. B, at 10.

[51] Again, much of this evidence is inadmissible pursuant to Fed. R. Civ. Proc. 56 (c)(1). *See supra* n.38.

[52] *Hitt v. Harsco Corp.*, 356 F.3d 920, 923–34 (8th Cir. 2004).

[53] Docket 39 at 13 (citing 45 C.F.R. § 80.7).

[54] 45 CFR § 80.1.

[55] *Milsap v. U.S. Dept. of HUD*, No. 89-0635, 1990 WL 157516, at 10 (D. Minn. Oct. 18, 1990); *see also Miener v. State of Mo.*, 673 F.2d 969, 978 (8th Cir. 1982); *Neighborhood Action Coalition v. Canton, Ohio*, 882 F.2d 1012, 1015 (6th Cir. 1989); *Chowdhury v. Reading Hospital and Medical Center*, 677 F.2d 317 (3rd Cir. 1982), *cert. denied*, 463 U.S. 1229 (1983).

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3. Defendants Are Not Entitled To Summary Judgment On Plaintiff's Outrage Claim.

In order to make a *prima facie* claim for intentional infliction of emotional distress, a plaintiff must show that a defendant committed "reckless" conduct: "'conduct which constitutes a deliberate disregard of a high degree of probability that the emotional distress will follow,'" and (2) that the defendant knew or had reason to know of facts which would lead a reasonable man to realize that such actions would create the harm that occurred.[56]

> It is for the trial court to determine, in the first instance, whether a defendant's conduct may be reasonably regarded as so extreme and outrageous so as to permit recovery, or whether it is necessarily so. When reasonable minds may differ, it is for the jury to determine whether the conduct has been sufficiently extreme and outrageous to result in liability.[57]

Here, Plaintiff has submitted evidence that an extreme and outrageous act was committed against him by, at least, a male nurse who may be named "George."[58] Defendants admit that "[t]here can be no dispute that, if true, the conduct of which Plaintiff complains is horrendous."[59] Indeed, Defendants quote extensively from Plaintiff's evidence to demonstrate exactly how extreme and outrageous the acts are.[60] Defendants then submit roughly 8 pages of diatribe, with little to no admissible evidence,[61] to explain why they believe this Court should weigh

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[56] *Petersen v. Sioux Valley Hosp. Ass'n*, 486 N.W.2d 516, 518 (S.D. 1992) (quoting *Wangen v. Kuudson*, 428 N.W.2d 242, 248 (S.D. 1988)).

[57] *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419, 429 (S.D. 1994).

[58] Dreveskracht Decl., Ex. B, at 5-6, 10-11, 15. Defendants also claim that there is no evidence that the scars resembling three letters "K" were intentionally placed on Plaintiff and that, therefore, Plaintiff cannot sustain an outrage claim. Docket 39 at 11-12. Dr. McGrann has surmised that the Ks may well have been caused intentionally. *See* Dreveskracht Decl., Ex. C, at 4 (the KKK scars "could be explained on the basis of some kind of inadvertent injury, . . . but it could also be caused by an intentional injury of a superficial pattern"). If at trial it is determined that a particular person caused the scars, it will be up to the jury to determine whether that person intended to cause the scars or was merely negligent. As it is, though, a particular person has not been determined—hence the *res ipsa loquitur* inference.

[59] Docket 39 at 16.

[60] Id. at 15-16.

[61] *See supra* n.39.

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Defendants' evidence against Plaintiff's and rule in Defendants' favor.[62] But this is a question for the jury.[63] Defendants are not entitled to summary judgment on Plaintiff's outrage claim.

4. Defendants Are Not Entitled To Summary Judgment On Plaintiff's Battery Claim.

A defendant is subject to liability for battery if: "(a) he acts intending 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."[64] "[T]he victim need not show a specific intent or design to cause the contact or to cause any singular and intended harm. What is forbidden is the intent to bring about the result which invades another's interests in a manner that the law forbids."[65]

Here, Plaintiff has submitted evidence that he was battered by, at least, a male nurse who may be named "George."[66] Like Defendants' outrage argument, Defendants submit roughly 8 pages of diatribe, with little to no admissible evidence,[67] to explain why, they believe, this Court should weigh Defendant's evidence against Plaintiff's, and rule in Defendant's favor.[68] But, again, this is a question for the jury.[69] Defendants are not entitled to summary judgment on Plaintiff's battery claim.

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[62] Docket 39 at 16-24.
[63] *French v. Dell Rapids Community Hosp., Inc.*, 432 N.W.2d 285, 389 (S.D. 1988).
[64] Restatement (Second) of Torts § 18 (1965); *see also Stratmeyer v. Engberg*, 649 N.W.2d 921, 925-26 (S.D. 2002) (the tort of battery in the State of South Dakota is governed by the Restatement (Second) of Torts § 18).
[65] *Reeves v. Reiman*, 523 N.W.2d 78, 82 (S.D.1994).
[66] Dreveskracht Decl., Ex. B, at 5-6, 10-11, 15. Like Plaintiff's outrage claim, Defendants also claim here that there is no evidence that the scars resembling three letters "K" were intentionally placed on Plaintiff and, therefore, Defendant was not battered. Dr. McGrann has surmised that the Ks may well have been intentionally placed on Plaintiff. *See* Dreveskracht Decl., Ex. C, at 4 (the KKK scars "could be explained on the basis of some kind of inadvertent injury, . . . but it could also be caused by an intentional injury of a superficial pattern"). If at trial it is determined that a particular person caused the scars, it will be up to the jury to determine whether that person intended to cause the scars or was merely negligent. As it is, though, a particular person has not been determined—hence the *res ipsa loquitur* inference.
[67] *See supra* n.39.
[68] Docket 39 at 16-24.
[69] *French v. Dell Rapids Community Hosp., Inc.*, 432 N.W.2d 285, 389 (S.D. 1988).

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IV. CONCLUSION

Plaintiff respectfully requests that this Court find that genuine issues of material fact exist in all claims presented herein, and deny Defendants' Motion for Summary Judgment.

DATED this 31st day of January, 2014.

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CERTIFICATE OF SERVICE

I, Chase Iron Eyes, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness. I am employed with Iron Eyes Law Offices, PLLC.

2. On January 31, 2014, I caused to be served via email:

Jeffrey G. Hurd	jhurd@bangsmccullen.com, lsmith@bangsmccullen.com, sleetch@bangsmccullen.com
Lonnie R. Braun	lbraun@tb3law.com

The foregoing statement is made under penalty of perjury and under the laws of South Dakota and is true and correct.

Signed at Bismarck, North Dakota, this 31st day of January 2014.

s/ Chase Iron Eyes

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