

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

JAMES D. HAGA, SR., ETC.,)	
)	
Plaintiff,)	Case No. 1:01CV00105
)	
v.)	OPINION AND ORDER
)	
L.A.P. CARE SERVICES, INC.,ETC.,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Paul R. Thompson, III, Michie, Hamlett, Lowry, Rasmussen & Tweel, P.C., Roanoke, Virginia, for Plaintiff; Gerald F. Ragland, Jr., Carter & Coleman, Alexandria, Virginia, for Defendant.

This is a wrongful death case under Virginia law, in which the plaintiff seeks damages because the decedent wandered away from the defendant's adult care home and was killed by a train. The parties have raised a number of pretrial issues, which were argued at a pretrial conference on July 23, 2002. This opinion and order resolves certain of those issues and memorializes the court's rulings on others made at the hearing for the reasons stated on the record at that time.

The parties agree that the basic facts at trial will show that the decedent, William Haga, was admitted to Maple Grove Village, an adult care residence operated by the defendant, on April 4, 2000. On April 6, he was observed wandering outside of the

building and heading away three times, and was therefore identified as a “wanderer.” On April 10, he was seen several times by staff members in the morning, but was missing at lunch and a search was begun. Thereafter he was struck and killed by a train while sitting on the tracks. Certain regulations of the Virginia Department of Social Services applicable to adult care homes impose special standards as to the care of persons with serious cognitive deficits, including door alarms or other security monitoring, and the plaintiff claims that the defendant failed to meet these standards.

1. For the reasons previously stated on the record, the Defendant’s Motion to Exclude or Limit the Testimony of Annette O’Brien (Doc. No. 85) is denied.

2. For the reasons previously stated on the record, the plaintiff’s various motions relating to Richard C. Haaser, M.D., and Rebecca R. Dolinger, R.N., and evidence relating to the decedent’s prior alcohol use (Doc. Nos. 86, 88, 94 and 95) are granted to the extent that in the liability phase of the trial, the defendant must not introduce expert opinion evidence that the decedent’s dementia or other incapacity was caused by his prior history of alcohol use. Otherwise, the said motions are denied.

3. In this case, the plaintiff intends to introduce expert testimony of Herman Hale, R.N., and Elizabeth Farnum, M.D. At the pretrial conference, the defendant objected to introduction of portions of such testimony because the plaintiff had not supplied a written disclosure prior to their depositions of certain opinions to be

expressed by these witnesses.¹ Dr. Farnum opined in her deposition about her treatment of the deceased. In addition, the plaintiff elicited testimony regarding the term “serious cognitive deficit,” the definition of which may have relevancy at trial. Similarly, Nurse Hale, an employee of the defendant, testified in his deposition as to the decedent’s records while in the defendant’s care, and also gave an opinion regarding the same term.

Federal Rule of Civil Procedure 26(a) requires the parties to exchange the names of testifying experts and if those experts are “retained or specially employed” the rule also requires submission of a written report detailing the expert’s opinion. *See* Fed. R. Civ. P. 26(a). Neither the rule nor the advisory committee’s notes defines the terms “retained or specially employed.” I have not been apprized of any financial arrangement in this case between the plaintiff and these witnesses in regard to their testimony.

The rule has been analyzed in two ways. One line of cases deals with the testimony of treating physicians and draws a distinction between testimony rendered based on the treatment of the patient and testimony that is based on factors that are outside of the treatment relationship. *See Hall v. Sykes*, 164 F.R.D. 46, 48-49 (E.D.

¹ It appears that these witnesses’ depositions will be used at trial in lieu of their actual appearances.

Va. 1995). In the former context, the expert is not considered “retained or specially employed,” but in the latter situation, Rule 26(a)(2) requires a written report of the expert’s opinion. *See id.*

The other line of cases deals with “retained and specially employed” experts from a financial standpoint. Under this rationale, an expert who receives only a statutory witness fee and mileage is not required to submit a report. *See Smith v. State Farm Fire & Cas. Co.*, 164 F.R.D. 49, 56 (S.D. W.Va. 1995). However, an expert who receives other types of remuneration is “retained and specially employed” and must submit a report. *See id.*

If a party does not disclose an expert report as required, the court may exclude the expert’s opinion from the proceedings. *See Fed. R. Civ. P. 37(c)(1)*. However, if the failure is harmless or the party has substantial justification for failing to submit the report, sanctions will not be imposed. *See id.*

Under the present circumstances, I will allow the disputed opinions, in spite of the fact that no prior disclose was made. It appears that the failure to disclose was unintentional. Moreover, the meaning of the term “serious cognitive deficit” has been an issue in this case from very early on, and thus the defendant was not placed at any disadvantage in cross examination or otherwise by the opinions expressed.

4. The plaintiff wishes to introduce statements by Cindy Colley, the manager of the adult home in question, made in response to certain administrative citations from the Virginia Department of Social Services. The plaintiff proffers that these statements involve plans to improve the security of the facility. The defendant objects to these statements as inadmissible subsequent remedial measures.

The Federal Rules of Evidence require the exclusion of certain otherwise relevant evidence, such as subsequent remedial measures, for policy reasons. Rule 407 provides that “[w]hen, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence” Fed. R. Evid. 407.

“The phrase ‘remedial measures’ brings within Rule 407 any kind of change, repair or precaution.” 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence*, § 407.02(3) (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2002). However, the rule requires that an action be taken that would have decreased the likelihood of the harm suffered. Some courts have held that an action that has merely been planned, but not yet implemented, is not a “remedial measure” and therefore evidence of the plan is admissible. *See Dow Chem. Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 487 (10th Cir. 1990). Commentators have expressed that while there is some

reason to support the Tenth Circuit's literal reading of the rule, "from a standpoint of policy, the issue is a toss-up." 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5284 (2d ed. 1980). The Fourth Circuit has not ruled on this question.

Because I do not presently know all of the facts surrounding these statements, I am not able to definitively rule on this question prior to the attempted introduction of this evidence, but I am inclined to adopt the Tenth Circuit's view.

5. The defendant requested the court to allow evidence concerning the negligence of a hospital in New York as a proximate cause of the decedent's death, on the ground that had the hospital not improperly discharged the decedent shortly before he was admitted to the defendant's facility, he could not have wandered away.

A federal court exercising diversity jurisdiction must apply the law of the state in which it sits, *see Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938), and thus Virginia tort law applies in this case. Under Virginia law, proximate cause is a cause "which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Wallace v. Jones*, 190 S.E. 82, 84 (Va. 1937). Although other events may take place between the breach of duty and the resultant harm, these so-called intervening causes

do not relieve liability if the events were reasonably foreseeable by the original wrongdoer. *See Jefferson Hosp. v. Van Lear*, 41 S.E.2d 441, 444 (Va. 1947).

On the other hand, a superseding cause breaks the causal chain. A superseding cause is an event that produces an injury without the original wrongdoer's negligence contributing to the injury "in the slightest degree." *Scott v. Sims*, 51 S.E.2d 250, 253-54 (Va. 1949).

Proximate cause is normally a jury question and should only be determined by the court as a matter of law when "the evidence is such that there can be no difference in the judgment of reasonable men as to the inference to be drawn from it." *Id.* at 253.

While it seems unlikely that the New York hospital's negligence could be a proximate cause in this case, because of the lack of a sufficient record to make a decision at this point, I will not preclude the defendant from introducing evidence in this regard.

6. The plaintiff has requested the court to require redaction of otherwise relevant medical records concerning the deceased, to remove any reference to his past alcohol dependency, which was in remission at the time of his death. In addition, he objects to deposition testimony to be used at trial concerning these records, in which the witnesses refer to these portions of the records. After examining the records in question, I do not find them unfairly prejudicial within the meaning of Federal Rule of

Evidence 403. The decedent's medical history is relevant to a determination of the defendant's duties, and the fact that the decedent had a past alcohol problem is not sufficiently prejudicial to justify redaction of otherwise relevant evidence. Accordingly, the plaintiff's request will be denied.

7. The defendant requests that it be allowed to introduce the written agreement (called the "Care Agreement") between the decedent's family and the defendant concerning the terms and conditions of the decedent's admission to the adult care home. The plaintiff objects, especially on the ground that the written document contains a provision arguably waiving any future negligence by the defendant.² Under Virginia law, such a waiver is void as against public policy. *See Hiatt v. Lake Barcroft Cmty. Ass'n*, 418 S.E.2d 894, 896 (Va. 1992). However, the contract may be relevant to the duties of the defendant, and I will permit it to be admitted, so long as the questioned waiver provision is redacted.

8. The defendant has requested the court to rule as a matter of law that the plaintiff can assert only a contract claim in this case, in view of the fact that in the Care

² The provision in question states as follows: "The HOME cannot be held responsible for someone leaving the building without supervision." (Care Agreement ¶ 13.)

Agreement the defendant assumed the duty of conforming to the applicable Virginia regulations in connection with the care and treatment of the decedent.³

I disagree with the defendant's argument. "[A] party can, in certain circumstances, show both a breach of contract and a tortious breach of duty." *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 507 S.E.2d 344, 347 (Va. 1998). The tort must be based on a separate legal duty and not one existing solely by contract. *See id.* In the present case, it is apparent that the plaintiff asserts such a separate legal duty, based on the defendant's duty to exercise ordinary care for the safety of its residents in connection with its premises.

It is so **ORDERED**.

ENTER: July 29, 2002

United States District Judge

³ The agreement provides that "[t]he HOME agrees to abide by all standards and regulations for Licensed Homes for Adults prescribed by the Code of Virginia, and the license issued thereunder." (Care Agreement ¶ 13.)