IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-01814-WDM-MJW

DEBBIE ULIBARRI, *et al.*,

Plaintiffs,

v.

CITY & COUNTY OF DENVER, *et al.*,

Defendants.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO STRIKE

Plaintiffs, through their attorneys, hereby submit their Reply Brief in Support of Their Motion to Strike.

Defendants' Response to Motion to Strike ("Response," Doc. No. 236) did not address the very basic arguments in Plaintiffs' Motion: that lay witnesses cannot testify to issues requiring specialized knowledge; that affidavits supporting a motion for summary judgment be made on personal knowledge, by individuals competent to make specific factual assertions; that new or different allegations, which could have been properly disclosed during 30(b)(6) testimony, cannot be made after the close of discovery; and that statements constituting hearsay are inadmissible.

Defendants attempt to excuse the lack of personal knowledge as evidence of "routine practices" under Rule 406, ignoring the Tenth Circuit's holding that such routine practices must also be based on personal knowledge. *United States v. Oldbear*, 568 F.3d 814, 822 (10th Cir.

2009). Instead of responding to Plaintiffs' arguments regarding improper expert testimony, Defendants make the unsupported assertion that the evaluation of the effectiveness of communications between a deaf inmate and a hearing corrections officer does not require expert knowledge. In response to hearsay arguments, they argue that the testimony is simply what is "documented in the . . . records," despite the fact that the records themselves constitute inadmissible hearsay. These responses cannot excuse Defendants' use of improper testimony. For the reasons discussed below and in their Motion to Strike, Plaintiffs respectfully request that the paragraphs listed on page 11, *infra*, be struck.

1. Defendants' Undisclosed Expert Medical and Communications Opinions Should be Struck.

a. The Medical Opinions in Paragraphs 17 and 19 of Dr. Crum's Affidavit Constitute Opinions, Not Descriptions of Routine Practice.

Defendants submitted the affidavit of Dr. Peter Crum opining that the Denver County Jail's ("DCJ's") nursing rounds "provided ample opportunity for [Mr.] Vigil to receive medical attention," Affidavit of Peter Crum, M.D. ("Crum Aff.," Doc. No. 197-9) ¶ 17, that "there was no evidence of high risk behavior that would have been a warning sign of suicide," *id.* ¶ 19, and that Mr. Vigil's "suicide was not preventable,"*id.* Defendants argue that these are not opinions but that the former "describe[s] routine practices of nurses at the county jail," Response at 14, and the latter "describes [Dr. Crum's] professional responsibility and involvement in the review of Shawn Vigil's suicide . . .." *Id.* at 14-15. Paragraphs 17 and 19 go far beyond descriptions of routines or file reviews and offer three distinct opinions, each of which requires specialized knowledge: (1) that Mr. Vigil had ample opportunity to receive medical attention, that is, that his

medical care was adequate; (2) that there were no warning signs of suicide; and (3) that his eventual suicide was not preventable.

Defendants cannot avoid the requirements of Rules 701 and 702 of the Federal Rules of Evidence ("FRE") by characterizing these opinions as descriptions.

b. Because Dr. Crum Was Not Mr. Vigil's Treating Physician, The Tenth Circuit Does not Permit Him to Offer Lay Testimony Under Rule 701.

Because Dr. Crum was not disclosed pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure ("FRCP"), if he is to offer opinion testimony, it must comply with FRE 701. Lay opinion testimony under FRE 701 must be "rationally based on the perception of the witness." *Id.* None of Dr. Crum's opinions meet this standard.

The Tenth Circuit permits treating physicians to testify under Rule 701. *See Davoll v. Webb*, 194 F.3d 1116, 1138 (10th Cir. 1999); *Weese v. Schukman*, 98 F.3d 542, 550 (10th Cir. 1996). Although there is no evidence that Dr. Crum ever treated Mr. Vigil, and Defendants admit that "he is not a treating physician in a strict sense," they nonetheless ask this Court to consider Dr. Crum to be a treating physician for purposes of Rule 701. Response at 15. The Tenth Circuit has, however, limited this principle to *actual* treating physicians. In *Parker v. Central Kansas Medical Center*, 57 Fed. Appx. 401 (10th Cir. 2003), that court addressed the plaintiff's attempt to rely on *Weese* for the admission of opinion testimony from a doctor who was not directly involved in the challenged treatment. The *Parker* court held that *Weese* was distinguishable because the defendant doctor in *Weese* was permitted to testify concerning "the standard of care and causation regarding *his treatment of the plaintiff*." *Id.* at 404 (emphasis added). In contrast, the doctor whose testimony the plaintiff sought to admit was offering an

opinion concerning another physician's treatment decisions. This doctor, the Tenth Circuit held, "should have been identified as an expert witness." *Id.*

This is a sensible outcome in light of the requirement that lay opinion testimony be "based on the perception of the witness." FRE 701. As the *Davoll* court held, "A treating physician is not considered an expert witness if he or she testifies about *observations* based on personal knowledge, including the treatment of the party." *Id.* 194 F.3d at 1138 (emphasis added). Dr. Crum was not a treating physician, made no "observations," and can offer no evidence "based on [his] perception." Because Defendants failed to disclose Dr. Crum as an expert, the rules of evidence require that his testimony be struck.

c. Defendants' Opinions Concerning Communication with Deaf Inmates Must Be Struck.

Plaintiffs objected to the portions the affidavits of Dr. Crum, Sgt. John Romero, and Maj. Gary Wilson in which they offered testimony concerning "communications" with deaf inmates, *see* Crum Aff. ¶ 14; Affidavit of Sgt. John Romero ("Romero Aff.," Doc. No. 197-8) ¶¶ 11, 17, 19, 20; Affidavit of Gary Wilson ("Wilson Aff.," Doc. No. 197-10) ¶ 14, on the grounds that this testimony required "scientific, technical, or other specialized knowledge" and thus placed it outside the scope of FRE 701.

Defendants respond that no expert testimony is required, as "the issues of whether communication occurs, and whether it is effective, are generally best assessed by the two people who are having the communication, not by an expert witness who has had no opportunity to observe the communication." Response at 6. Defendants provide no support for this assertion. When both parties to the communication are available to testify to its effectiveness, this may be

the case.[1] When one party is both deaf and unavailable to testify -- for example, Mr. Vigil, who is dead, or the unnamed inmates referenced in the testimony cited above, whom Defendants have elected not to present as witnesses -- it is quite another matter. It is impossible for an untrained hearing (*i.e.*, non-deaf) person to assess whether communication with a deaf person has occurred. Instead, as Plaintiffs' expert Dr. Jean Andrews opined, "[a]ssessment of written and manual comprehension can only be assessed by an individual with specialized knowledge, such as an experienced certified sign language interpreter." Decl. of Jean Andrews, Ph.D. (Docket No. 229-24) ¶ 5.[2] Again, Defendants provide no authority contrary to Dr. Andrews's opinion.

A good example of this phenomenon is the interaction between Plaintiff Sarah Burke and the police officer who arrested her, Joseph Merino. Officer Merino testified, and Defendants contend, that his communications with Ms. Burke during her arrest were effective, because notes were written, her young children were used for sign language interpretation, and at no point did she protest in front of her children and husband. *See* Mot. for Summ. J. (Doc. No. 197) at 27, 47-48; Dep. of Joseph Merino (Doc. No. 197-20) 15:13-14; 22:3-5; 23-25. However, Ms. Burke -- the other "person having the communication" -- had a different view. Both she and her husband requested an interpreter on multiple occasions, as she did not understand what was happening to her or why she was being arrested. Dep. of Sarah Burke ("Burke Dep.," Doc. No.

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[1] Even if this were the case, Defendants have not provided testimony from *either* of "the two people who are having the communication," Response at 6, but rather from a doctor and two corrections officers who don't claim to have witnessed much less participated in the conversations in question. This lack of personal knowledge is addressed in Section 2 below.

[2] Plaintiffs cited to the Declaration of Jean Andrews in their Motion to Strike. *See id.* at 8. Defendants complain that Dr. Andrews's declaration was not attached to the motion. Response at 6 n.2. Dr. Andrews's declaration was Exhibit 23 to Plaintiffs' Combined Response to Defendants' Motions for Summary Judgment. Plaintiffs apologize for any confusion.

229-17) 29:15-23; 30:16-18. Indeed, this principle is not limited to deaf inmates. What Defendants are arguing is like having a deputy hand a written document to an illiterate inmate and then testify that, because the inmate looked at the document, effective communication occurred.

To be clear, but for the complete lack of personal knowledge, Plaintiffs would have no objection if Defendants asserted that jail personnel "attempted" to communicate with deaf inmates. That is not what Defendants -- through their affiants -- are saying. Instead, Defendants contend that "effective communication" occurred whenever they or their staff interacted with any one of the three deaf Plaintiffs or any other deaf inmate. Thus, Plaintiffs object, under Rule 701, to any testimony by Dr. Crum, Sgt. Romero, or Maj. Wilson that communication with deaf inmates actually occurred or was effective.

2. A Number of Defendants' Affiants' Statements Should Be Struck for Lack of Personal Knowledge.

Affidavits supporting a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." FRCP 56(e)(1). Defendants' affiants provide insufficient foundation to demonstrate personal knowledge of many of the facts to which they testify. In their Response, Defendants merely recite the inadequate foundational testimony; they do not provide any further evidence or explanation supporting personal knowledge of the challenged facts.

For example, the only foundation offered for Sgt. Romero's alleged knowledge is that he was assigned to Building 6, supervised deputies there, and had daily interaction with inmates and

medical staff. Romero Aff. ¶ 1, *cited in* Response at 2-3. Defendants add -- in their Response brief -- that this supervisory role provided personal knowledge of various things, *id.* at 3; those additional assertions are, however, unsupported by affidavit or other evidence.

These very conclusory statements cannot support, for example, personal knowledge of a meeting of the Administrative Review Board ("ARB") that Sgt. Romero himself testified he did not attend. With respect to Paragraphs 19, 20 and 21, Plaintiffs challenged Sgt. Romero's personal knowledge of the ARB during the week of August 28, 2005, a week during which Sgt. Romero testified in deposition that "it looks like . . . I wasn't there. I could have been in training, vacation." Romero Dep. 142:4-6 (Decl. of Amy F. Robertson in Support of Pls.' Mot. to Strike (Doc. No. 224-2) Ex. 3). Despite this clear evidence of lack of personal knowledge, Sgt. Romero testifies in Paragraphs 19, 20 and 21 as to what occurred in the ARB that week.

Similarly, Maj. Wilson testifies to the presence of a TDD (text telephone for the deaf) in the Pre-Arraignment Detention Facility ("PADF") starting in 2000, Wilson Aff. ¶¶ 9, 10, despite the fact that there is no evidence that he was familiar with the PADF until July, 2006, when he became the Division Chief of that facility. *Id.* ¶ 2. Defendants attempt to justify this as testimony concerning "routine practices of the Denver Sheriff Department." *See* Response at 8. It is not. It is very specific testimony concerning the presence and availability of a specific piece of equipment in a place with which there is no evidence Maj. Wilson was familiar. This testimony must be struck for lack of personal knowledge.

Sgt. Romero testified that two of his deputies knew sign language and that deputies would communicate with deaf inmates by exchanging notes. Romero Aff. ¶ 11. Putting aside the fact, discussed above, that Sgt. Romero lacks the expertise to determine who "knows" sign

language and when "communication" is occurring with a deaf inmate, there is no evidence that Sgt. Romero ever observed deputies attempting to communicate with deaf inmates using either sign language or notes. The mere fact that Sgt. Romero supervised all of the various deputies in Building 6 does not demonstrate personal knowledge of this very specific factual assertion.

The remainder of the assertions Plaintiffs challenge on personal knowledge grounds may be closer calls. Paragraphs 15, 16, and 17 of the Romero Affidavit, paragraphs 4, 5, 6, 7, 9, 13, and 15 of the Crum Affidavit and paragraphs 4, 5, 8, 11 and 13 of the Wilson Affidavit are all conclusory assertions concerning the behavior of various inmates and employees at the facilities at issue. Defendants seek to justify this as evidence of routine practices, admissible under FRE 406. Applying the label "routine practice" to testimony does not, however, obviate the need for personal knowledge. *See United States v. Oldbear*, 568 F.3d 814, 822 (10th Cir. 2009) (requiring personal knowledge of routine practices). Here, Defendants' affiants provide very little detail concerning the basis for their knowledge of the alleged routines. For example, the support for Maj. Wilson's extensive testimony concerning practices in the PADF is simply that he has been employed by the Denver Sheriff Department since 1992 and was Division Chief of the PADF from 2006 to 2009. Wilson Aff. ¶¶ 1-2, *cited in* Response at 7. Defendants provide no additional foundational information concerning Maj. Wilson's duties, activities, or observations that permit the inference that he had personal knowledge of such specific facts as, for example, that "[e]very inmate brought into PADF is triaged and medically screened by the medical staff in as timely a manner as possible after book-in." Wilson Aff. ¶ 5. Paragraphs 1 and 2 of Sgt. Romero's affidavit, and Paragraph 1 of Dr. Crum's similarly do not provide sufficient foundation for the extensive testimony of specific practices each one proffers.

This testimony does not, in any event, satisfy FRE 406, which states that evidence of "the routine practices of an organization . . . is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the habit or routine practice." *Id.* The Tenth Circuit has held that a habit, under this rule, is "a semi-automatic act" and that "'the very nature of habit evidence is that it is done reflexively.'" *Oldbear*, 568 F.3d at 822 (internal quotations omitted). To satisfy Rule 406, the Tenth Circuit "require[s] the proponent to offer evidence of numerous, consistent occurrences of the act." *Id.* Defendant does not do this. Furthermore, given that there are no citations to the challenged "routine practices" testimony of Dr. Crum, Sgt. Romero or Maj. Wilson in the argument sections of Defendants' motions for summary judgment, *see* Doc. No. 197 at 38-63; Doc. No. 198 at 38-55, it is impossible to determine on which "particular occasions" Defendant is attempting to prove it acted in conformity with which alleged "routine practices." Defendants thus appear to be using this extensive, unsupported, and highly conclusory testimony of "routine practice" to try to establish that they generally comply with the law. This is not a proper use of FRE 406. *Cf. Rivera v. Union Pac. R.R. Co.*, 868 F. Supp. 294, 299 (D. Colo. 1994) (holding that a railroad could not introduce evidence of its general practice to try to show that it had the habit of being non-negligent).

Defendants have provided no foundation of either personal knowledge or relevance under Rule 406. These paragraphs should be struck.

3. Paragraphs 19 and 20 of Sgt. Romero's Affidavit Contain Inadmissible Hearsay.

Sgt. Romero testified that Deputy Roy Line asked Mr. Vigil whether he wanted to see the ARB, Romero Aff. ¶ 19, and that Mr. Vigil "declined to meet with the board, just prior to the

meeting" during the week of September 18, 2005, *id.* ¶ 20.[3] Defendants attempt excuse this by asserting that it is "simply what is documented in the Administrative Review Board records." Response at 5. This does not solve the problem: the records themselves constitute inadmissible hearsay to the extent they purport to quote Deputy Line or Mr. Vigil. Sgt. Romero's paragraph 20 also badly distorts the document, which does not state that Mr. Vigil "declined to meet with the board, just prior to the meeting," but rather simply states, "Declined - ?" -- importantly, with a question mark. *See* Romero Aff. Ex. 4 at 001338. Paragraphs 19 and 20 of Sgt. Romero's Affidavit should be struck.

4. Testimony that Goes Beyond Defendants' FRCP 30(b)(6) Testimony Must be Struck.

Plaintiffs moved to strike the testimony of Dr. Crum in paragraphs 4, 5, 6, 9, 14, 15, and 17 of his affidavit to the extent they contained "new or different allegations that could have been made at the time of the 30(b)(6) deposition." *See Rainey v. Am. Forest and Paper Ass'n*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998).

Plaintiffs challenged Dr. Crum's testimony concerning the provision of medical services and mental health screening to inmates and detainees at the PADF and DCJ on the grounds that it went far beyond that of Sgt. Romero, who was the City's FRCP 30(b)(6) designee on this topic. Defendants respond that Maj. Philip Deeds was also designated to testify on that topic. Response at 11. However, Maj. Deeds testified that his knowledge was limited to deputies, and that he could not "answer in respect to medical staff." Dep. of Philip Deeds (Doc. No. 236-3) 47-48.

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[3] Plaintiffs also challenge Paragraph 16 of the Crum affidavit, which recites Mr. Vigil's medical record. This continues to be improper hearsay. Plaintiffs rest on their opening brief with respect to this paragraph.

Dr. Crum, in contrast, testifies exclusively about provision of medical and mental health services by medical staff. *See* Crum Aff. ¶¶ 4, 5, 6, 9, 14, 15, 17. As demonstrated in Plaintiffs' Motion to Strike, Defendants cannot designate FRCP 30(b)(6) witnesses without complete knowledge and later supplement their testimony through affidavits at summary judgment. *See Rainey*, 26 F. Supp. 2d at 94-95 & n.3; *Caraustar Indus. v. N. Ga. Converting, Inc.*, 2006 WL 3751453, at *7 (W.D. N.C. Dec. 19, 2006). Defendants declined to designate a witness with knowledge of provision of services by medical personnel; they cannot now rely on Dr. Crum.

Defendants argue that they could not have designated Dr. Crum to testify pursuant to FRCP 30(b)(6) because he is not a City employee and did not consent to testify on behalf of the City. Response at 13-14. The latter assertion is directly contradicted by reality: Dr. Crum consented to testify on behalf of the City by signing an affidavit, a form of testimony that permitted him to say what the City wanted him to say, unencumbered by cross-examination. The Tenth Circuit has, in any event, made clear that this is not an excuse: the duty to designate a knowledgeable person "is not negated by a corporation's lack of control over potential Rule 30(b)(6) deponents." *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1146 (10th Cir. 2007).

The remainder of Defendants' response to Plaintiffs' FRCP 30(b)(6) argument consists of assertions that Dr. Crum's testimony did not conflict with or contradict that of the City's designees. *See* Response at 11-12. This is beside the point. As the *Rainey* and *Caraustar* cases make clear, it is not merely contradictory testimony that must be struck, but supplemental testimony. *Rainey*, 26 F. Supp. 2d at 94 (striking testimony that was "new or different" from the designee's); *Caraustar*, 2006 WL 3751453, at *5-7 (striking new testimony concerning a test that

had been performed since the FRCP 30(b)(6) deposition). The City had the obligation to designate someone to testify concerning medical services and mental health screening to inmates and detainees at the PADF and DCJ as well as training provide to deputies concerning inmates with diabetes -- including services, screening and training provided by City contractors. Having failed to do so during discovery, the "new and different" testimony offered by Dr. Crum must be struck.

CONCLUSION

For the reasons set forth above and in Plaintiffs' Motion to Strike, Plaintiffs respectfully request that this Court strike:

Paragraphs 4, 5, 6, 7, 9, 13, 14, 15, 16, 17, and 19 of the Affidavit of Peter Crum, M.D.;

Paragraphs 11, 15, 16, 17, 19, 20, and 21 of the Affidavit of John Romero; and

Paragraphs 4, 5, 8, 9, 10, 11, 13, and 14 of the Affidavit of Gary Wilson.

Respectfully submitted,

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Dated: February 26, 2010

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2010 I electronically filed the foregoing document with Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email address:

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