

Court to consider in determining the instant motion,² the Court converted the Motion to Dismiss into one for summary judgment and gave the parties an opportunity to submit additional evidence for the Court to consider in ruling on defendants' Motion to Dismiss/for Summary Judgment. See Order dated September 12, 2003/Docket No. 17. On September 23, 2003, defendants filed a Memorandum of Additional Evidence in Support of Defendant's Motion to Dismiss (filed September 23, 2003/Docket No. 20). Plaintiff filed no additional pleadings directed to defendants' Motion to Dismiss. On October 8, 2003, defendants filed a Motion for Summary Judgment (filed October 8, 2003/Docket No. 23). After seeking an extension of time, plaintiff filed a responsive pleading seeking leave to identify expert witness out of time (filed December 2, 2003/Docket Nos. 31 and 32) and defendants filed a reply thereto (filed December 9, 2003/Docket No. 33).

In the Motion to Dismiss, defendants seek dismissal of plaintiff's Petition, asserting that plaintiff's legal malpractice claims are time-barred by the five-year statute of limitations. Plaintiff denies the action is time-barred and argues that defendants incorrectly assert when his damages became ascertainable.

Defendants also move for summary judgment claiming that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. In particular, defendants seek summary judgment on the ground that plaintiff cannot prove his case as a matter of law because of his failure to timely name an expert. In response, plaintiff seeks leave to identify an expert witness out of time.

²A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) "must be treated as a motion for summary judgment when matters outside the pleadings are presented." Woods v. Dugan, 660 F.2d 379, 380 (8th Cir. 1981)(per curiam).

The Undisputed Evidence before the Court

Viewing the facts and inferences in the light most favorable to the plaintiff, the non-moving party, Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986), the Court sets forth the following facts:

Michael K. Blank, M.D., retained defendants Corboy & Demetrio, P.C., and Barry Chafetz³ (“Chafetz”) to represent him in the administrative proceedings involving the revocation of his staff privileges at Jefferson Memorial Hospital (“Jefferson Memorial”). (Pet. at ¶ 6). In particular, Jefferson Memorial sought to suspend and/or revoke Dr. Blank’s hospital staff privileges because of deficiencies in his patient care and treatment. (Pet. at ¶ 6; Chafetz Aff. at ¶ 3; Exh. B). In a letter dated April 24, 1996, Dr. Blank was apprised that his medical records were under observation and that if he failed to improve on the cited deficiencies, he could be suspended. (Def’t.’s Exh. C at 5). The Medical Executive Committee placed Dr. Blank on probationary status on June 25, 1996, and warned Dr. Blank that further irregularities would result in a modification of his clinical privileges. (Id. at 6). The Medical Executive Committee cited deficiencies in Dr. Blank’s progress notes in patient charts, discharge summaries and patient care and treatment. (Id. at 6-14).

The Medical Care Appraisal Committee met on May 9, 1997, to discuss certain surgical results of Dr. Blank and to review complaints and patient problems and expirations related to Dr. Blank’s patient care activity. (Def’t.’s Exh. C at 2). Thereafter, the Medical Care Appraisal Committee conducted a formal investigation of Dr. Blank’s patient activities. (Id. at 3). In a letter dated July 23, 1997, Dr. Britt, President of the Medical Executive Committee of Jefferson Memorial,

³In the Motion for Summary Judgment, defendants note that plaintiff incorrectly spelled defendant Chafetz’s last name.

set forth the intent of the Committee to take corrective action against Dr. Blank's medical staff privileges and/or membership. (Def't.'s Exh. C at 2).

On October 7, 8, and 29, 1997, Chafetz appeared on behalf of Dr. Blank at the revocation hearing before the Hospital Hearing Review Committee ("Committee"). (Chafetz Aff. at ¶ 4; Exh. B; Def't.'s Exh. C at 1). In the Findings, Conclusions and Decisions of Hearing Review Committee dated November 13, 1997, the Committee recommended the immediate revocation of Dr. Blank's clinical privileges and staff membership. (See Pltf.'s Exh.; Def't.'s Exh. C at 1, 17). In relevant part, the Committee determined that based on review of Dr. Blank's medical records and cases, Dr. Blank's performances fell below applicable and acceptable professional standards and were detrimental to patient safety and to the delivery of quality of patient care. (Def't.'s Exh. C at 17). The decision and recommendation of the Committee would become final within fifteen calendar days unless a written request for review was made. (Id. at 18).

Chafetz filed an appeal of the recommendation on behalf of Dr. Blank and represented Dr. Blank via telephone before the Board of Directors of Jefferson Memorial serving as the Appeal Board on December 30, 1997. (See Pltf.'s Exh.; Chafetz Aff. at ¶¶ 7-8). Dr. Blank continued to practice medicine at Jefferson Memorial during the pendency of his appeal from the Committee's recommendation of revocation. (See Pltf.'s Exhs.). After the appellate review on December 30, 1997, the Board of Directors "ordered Dr. Blank's clinical privileges and staff membership be revoked upon its finding that there was substantial evidence to support the recommendation of the Hearing Committee." (See Pltf.'s Exhs.; Def't.'s Exh. B). In the Adverse Action information section of the Adverse Action Report received by the Board of Healing Arts on January 15, 1998, it is noted that the effective date of Dr. Blank's revocation of his clinical staff privileges and staff membership

at Jefferson Memorial is December 30, 1997, following the appellate review by the Board of Directors. (See Pltf.'s Exhs.).

On December 30, 2002, plaintiff filed the instant Petition in state court contending that defendants were negligent in their representation of him. Specifically, plaintiff alleges that defendants failed to adequately represent Dr. Blank during the administrative revocation hearings before the Committee and the Board of Directors. (Pltf. Pet.). In particular, plaintiff alleges that Chafetz failed to adequately prepare both himself and Dr. Blank for the staff privileges hearings and also failed to adequately represent Dr. Blank at the hearings before the Committee. Defendants removed the underlying action to this Court on February 11, 2003. (Notice of Removal/Docket No. 1).

The Case Management Order required plaintiff to disclose all expert witnesses and provide the reports as required by Rule 26(a)(2)⁴, no later than July 15, 2003, and make expert witnesses available for depositions no later than August 15, 2003. See Case Management Order (filed April 18, 2003/Docket No. 13). Defendants requested identification of plaintiff's expert witnesses and production of the expert witness reports but plaintiff never supplemented his responses by identifying expert witnesses. (Def't.s' Exhs. E, F, G, H and I). Defendants opined in the correspondence to plaintiff's counsel how they would be prejudiced in preparing their defense without such information being disclosed. (Def't.s' Exh. E).

On September 12, 2003, the Court granted defendants' unopposed Motion to Compel

⁴In accordance with Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, a party shall disclose the identity of his expert witness, along with the expert's signed written report, which contains his opinions, data and information considered by the expert, any exhibits, the expert's qualifications and publications, compensation to be paid and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the last four years. Fed. R. Civ. P. 26(a)(2)(B).

and ordered plaintiff to file complete responses to defendants' discovery requests no later than September 19, 2003. See Order dated September 12, 2003/Docket No. 16. On September 25, 2003, the Court entered a show cause order directing plaintiff to show cause why the undersigned should not impose sanctions on counsel for her failure to comply with the September 12, 2003, court order. See Order dated September 25, 2003/Docket No. 21. In Response to the Show Cause Order, plaintiff's counsel provided completed discovery responses and produced all requested documents to defendants' counsel on October 10, 2003. See Plaintiff's Response to Show Cause Order (filed October 10, 2003/Docket No. 24). The Case Management Order further set October 20, 2003, as the completion date for all discovery. See Case Management Order (filed April 18, 2003/Docket No. 13). A review of the record shows that plaintiff first requested amendment to the Case Management Order and relief from the deadline identifying expert witnesses on December 2, 2003. See Motion to Allow Identification of Expert Witness Out of Time and Plaintiff's Response to Opposing Defendants' Motion for Summary Judgment, filed December 2, 2003/Docket Nos. 31 and 32. To date, plaintiff has not filed a Rule 26(a)(2) expert disclosure.

Standard for Ruling on Summary Judgment

This Court must grant summary judgment if, based upon the pleadings, admissions, depositions and affidavits, there exists not genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In ruling on a motion for summary judgment, the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a

genuine issue of material fact and his entitlement to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita, 475 U.S. at 586-87; Fed. R. Civ. P. 56(c). Once the moving party has met his burden, the non-moving party may not rest on the allegations of his pleadings but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e). Rule 56(c) “mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which the party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. See Crain v. Board of Police Comm’rs, 920 F.2d 1402, 1405-06 (8th Cir. 1990).

Discussion

In the Motion to Dismiss, defendants contend that plaintiff’s legal malpractice claims are time-barred by the Missouri five-year statute of limitations. Mo. Rev. Stat. § 516.120 (2000). The limitations period begins running when the cause of action accrues. Jepson v. Stubbs, 555 S.W. 2d 307, 311 (Mo. banc 1977). Section 516.100 governs when a cause of action accrues. In particular, §516.100 provides, in relevant part, as follows:

[T]he cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

Mo. Rev. Stat. § 516.100. The Missouri courts have determined that the statute of limitations begins to run when the fact of damage is capable of ascertainment, although not actually discovered or ascertained. Zero Mfg. Co. v. Husch, 743 S.W.2d 439, 441 (Mo. Ct. App. 1987). The test of

whether a cause of action is capable of ascertainment is an objective test to be decided as a matter of law by the judge. Anderson v. Griffin, Dysart, Taylor, Penner & Lay, P.C., 684 S.W.2d 858, 861 (Mo. Ct. App. 1984). The damage is sustained and capable of ascertainment when a plaintiff could discover the damage despite his remaining ignorant of the extent of the damage. Jordan v. Willens, 937 S.W.2d 291, 294 (Mo. Ct. App. 1996); M & D Enterprises, Inc. v. Wolff, 923 S.W.2d 389, 394 (Mo. Ct. App. 1996).

Defendants contend that plaintiff's malpractice claim accrued on either October 7 or 8, 1997, the dates Chafetz appeared at the revocation hearing before the Committee on behalf of plaintiff, or on November 12, 1997, the date the Committee recommended that plaintiff's staff privileges be revoked. Defendants argue that because plaintiff's damages were capable of ascertainment on November 12, 1997, the instant cause of action is time-barred by the Missouri five-year statute of limitations.

On the undisputed evidence before the Court, Dr. Blank has admitted that his malpractice claim accrued on either October 7 or 8, 1997, as contended by defendants. In interrogatory number two, defendants requested that Dr. Blank "[s]tate the exact date, time, and location of each incident in which you claim you were damaged as the result of defendants' negligence or fault. ..." (Supp. Defts.' Motion for Summary Judgment Exh. B at 2). In his answer to the interrogatory, Dr. Blank averred that he "was damaged on a continuing basis from the time Defendant entered, his appearance in this matter, Hearing of October 7, 8 & 29, 1997 until and including December 30, 1997. ..." (Supp. Defts.' Motion for Summary Judgment Exh. C at 2). The undisputed evidence before the Court shows plaintiff was damaged as early as October 7, 1997, and that the instant petition is time-barred by the Missouri five-year statute of limitations. As such,

defendants are entitled to judgment as a matter of law.

Assuming arguendo, however, that plaintiff's claims are not time-barred, a review of the evidence before the Court on defendants' Motion for Summary Judgment shows that plaintiff's failure to timely disclose an expert witness precludes plaintiff from proving his case. Specifically, defendants note that plaintiff failed to disclose an expert witness and provide the reports required by Rule 26(a)(1) by July 15, 2003, as mandated by the Case Management Order, and that plaintiff never requested an extension from the deadline until after defendants filed the summary judgment motion. See Case Management Order - Track 2: Standard (filed April 15, 2003/Docket No. 13). Indeed, in the discovery responses provided by plaintiff on October 10, 2003, after the filing of defendants' Motion for Summary Judgment, plaintiff responded in interrogatory answer numbers eight and nine that he did not expect expert testimony at trial. (Def't.s' Supp. Exh. C). Likewise, in response to the request for production of documents numbers seven and eight, plaintiff responded that no expert had been identified or expected to testify. (Def't.s' Supp. Exh. E). Moreover, discovery closed no later than October 20, 2003. See Case Management Order - Track 2: Standard (filed April 15, 2003/Docket No. 13). Defendants contend that plaintiff's failure to timely disclose an expert witness bars plaintiff from producing an expert at trial and therefore, as a matter of law, plaintiff cannot prove his case. In opposition, plaintiff seeks leave to name an expert witness out of time. As good cause, plaintiff notes that Dr. Blank insisted on personally obtaining the expert witness and other extraordinary circumstances, such as Dr. Blank's chronic health problems, impeded plaintiff's ability to timely name the expert witness. To date, a review of the record shows that plaintiff's Rule 26(a)(2) expert disclosure has not been filed.

To make a submissible case for legal malpractice, plaintiff must show: 1) an attorney-

client relationship existed; 2) the attorney acted negligently or in breach of contract; 3) such acts were the proximate cause of the client's damages; and 4) but for the attorney's conduct the client would have been successful in the prosecution of the underlying claim. Suelthaus & Kaplan, P.C. v. Byron Oil Indus., 847 S.W.2d 873, 876 (Mo. Ct. App. 1992). To determine if defendants were in fact negligent, the jury would have to determine the appropriate standard of care for an attorney representing a doctor at a revocation hearing and determine if defendants breached that standard of care. Plaintiff does not have expert testimony to support his claims. "[E]xcept in clear and palpable causes (such as the expiration of a statute of limitation), expert testimony is necessary to establish the parameters of acceptable professional conduct, a significant deviation from which would constitute malpractice." Cooper v. Simon, 719 S.W.2d 463, 464-65 (Mo. Ct. App. 1996) (quoting Hughes v. Malone, 146 Ga.App. 341, 247 S.E.2d 107, 111 (1978)). "In other words, expert testimony is necessary if the type of negligence alleged is not so clear that it could be assessed without the aid of expert testimony and, consequently, a jury would have to resort to pure speculation in order to find negligence on the part of an attorney." Viehweg v. Mello, 5 F. Supp.2d 752, 761 (E.D. Mo. 1998), aff'd by Viehweg v. Mello, 198 F.3d 352 (8th Cir. 1999). In the instant case, the negligence or breach of duty alleged by plaintiff is not so clear and palpable that it can be assessed without the aid of expert testimony. Therefore, inasmuch as plaintiff has failed to disclose an expert witness, plaintiff cannot prevail on his underlying legal malpractice claim and defendants are entitled to judgment as a matter of law. On December 2, 2003, plaintiff for the first time requested leave to identify an expert witness out of time in his motion lodged with the Court in response to defendants' Motion for Summary Judgment, four months after the deadline for expert disclosure pursuant to Rule 26(a)(1) and one month after the closure of discovery. Cf. Firefighters' Institute for Racial Equality v. City of St.

Louis, 220 F.3d 898, 902-03 (8th Cir. 2000); Hammack v. Lieber, Jr., 210 F.3d 378, 2000 WL 420001 (8th Cir. 2000). Likewise, the Court further notes that plaintiff has still not filed a Rule 26(a)(2) expert disclosure. Accordingly,

IT IS HEREBY ORDERED that plaintiff's Motion for Substitution of Party (filed December 2, 2003/Docket No. 30) is granted.

IT IS FURTHER ORDERED that defendants' Motion to Dismiss (filed March 21, 2003/Docket No.11) is granted.

IT IS FURTHER ORDERED that defendants' Motion for Summary Judgment (filed October 8, 2003/Docket No. 23) is granted.

IT IS FURTHER ORDERED that plaintiff's Motion to Allow Identification of Expert Witness Out of Time (filed December 2, 2003/Docket No.31) is denied.

Dated this 24th day of March, 2004.

/s/ Terry I. Adelman

UNITED STATES MAGISTRATE JUDGE