IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-00884-CMA-STV

CHAYCE AARON ANDERSON,

Plaintiff,

v.

JASON SHUTTERS

Defendant.

DEFENDANT JASON SHUTTERS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO FOR LEAVE TO FILE A SUR-REPLY (ECF No. 137)

Defendant, Jason Shutters, through his Attorneys, Hall & Evans, LLC, submits the following as his Response in Opposition to Plaintiff's Motion for Leave to File a Sur-Reply (ECF No. 137):

I. INTRODUCTION

Plaintiff seeks leave to file a sur-reply, purportedly to address Defendant Shutters' Reply in support of his Motion for Summary Judgment. The basis for Plaintiff's request is the notion the record presented in the Reply is somehow incorrect. He also argues, in a conclusory fashion, that Detective Shutters raises arguments for the first time in the Reply brief (ECF No. 137 at para. 3).

Plaintiff's sur-reply is the proverbial "second bite at the apple," based on nothing more than conclusory arguments and statements unsupported by personal knowledge or expert testimony. Plaintiff's request for leave should be denied.

II. STANDARD

The Local Rules of Practice for the United States District Court, District of Colorado, contemplate only a motion for summary judgment, a response, and a reply. *See* D.C.Colo.LCiv.R. 56.1. A sur-reply is not permitted unless specifically authorized by this Court, and is based on new material or arguments in a motion or pleading related to an earlier-filed motion, such as a reply brief. *See* e.g. ***Farmer v. Colo. Parks & Wildlife Comm'n***, 2016 COA 120 at *8.

III. ARGUMENT

A. Plaintiff does not identify any new arguments or material raised in Defendant's Reply brief.

In seeking leave to file a sur-reply, the Plaintiff argues: (1) there is objective medical evidence supporting more than a de minimis injury (ECF No. 137-1 at 1); (2) Defendant's method of arrest was excessive (ECF No. 137-1 at 3), and; (3) Defendant squeezed Mr. Anderson's handcuffs too tightly (ECF No. 137-1 at 4). Plaintiff's request for leave to file a sur-reply should be denied as each of these arguments were previously rasied in both the initial Motion for Summary Judgment as well as Plaintiff's Response. Furthermore, the Plaintiff does not identify any "error" in the record.

i. Plaintiff does not establish anything more than a de minimis injury.

The issue with respect to a de minimis injury is not new, as the Defendant raised the argument in the original Motion for Summary Judgment (*See* ECF No. 128 at 2 and 8. *See also* **Movants Appx. at p. 36-Deposition of Erin Carnahan**, 31:7-19; p. 35-36, 30:10-25, 31:1-6, 31:22-25, 32:1-5; p. 38 & 39, 36:15-22, 37:2-7). The initial Motion directly addressed the undisputed testimony and material evidence of the treating physician's assistant, Mr. Erin Carnahan, who noted no evidence of trauma, swelling, redness, lacerations, or abrasions. The

Motion also addressed Mr. Carnahan's assessment that Plaintiff did not suffer *any* injury to his wrists and acknowledgment that the diagnosis of "disturbance of the skin" is another way of saying Plaintiff suffered nothing more than a scratch. These arguments are not new or in error. In fact, Plaintiff addressed the citations to the record in his Response. *See* ECF No. 133 at 8 ("Contrary to Defendant's categorical dismissal of Mr. Anderson's injuries, there is a genuine dispute of material fact that Mr. Anderson suffered greater than de minimis injury").

Plaintiff's request to file a sur-reply also attempts to utilize the International Classification of Diseases-9-CM ("ICD") to support his argument (ECF No. 137-1 at 1-2). Detective Shutters, however, did not raise the ICD classification in his Motion or Reply. Instead, reference to the ICD is made by the Plaintiff, for the first time, in his sur-reply. If the Plaintiff thought reference to the ICD was important enough to warrant consideration, the argument should have been developed in his Response brief.[1]

ii. The issue concerning the method of handcuffing was first raised by the Plaintiff.

Plaintiff next posits that Defendant's argument with respect to the method of handcuffing utilized by Detective Shutters is somehow erroneous (ECF No. 137-1 at 3). Again, this is an attempt to rehash an argument first raised by the Plaintiff in the Response brief (*See* ECF No. 133 at 3, 8 and10). Merely because the Defendant addressed the argument in the Reply, as it was raised by the Plaintiff for the first time in his Response, does not satisfy any basis for the filing of a sur-reply. There is no misstatement of the record-rather it is merely a difference of opinion between

[1] As argued below, even if Plaintiff had raised reference to the ICD in his Response brief, any such citation is improper as it is not supported anywhere in the record.

two parties-which is certainly common in litigation. In addition, the Plaintiff does not offer any new evidence, but rather cites to material already available as part of the litigation and the record.

iii. No new evidence or material is presented regarding the argument Detective Shutters "squeezed Mr. Andersson's handcuff's too tightly."

The last basis for Plaintiff's request for leave is the notion Detective Shutters had knowledge the handcuffs were tightened excessively. This conclusory statement does not present any new evidence or material, but instead merely disputes Defendant's arguments in an attempt to create a question of fact.

As such, Plaintiff's sur-reply brief fails to identify any new arguments or material which might form a proper basis for leave to file an additional brief, and his request should be denied.

B. The arguments presented in Plaintiff's sur-reply are conclusory and unsupported

i. Plaintiff's reference to ICD codes and his contentions contrary to the established diagnosis are improper.

When responding to a motion for summary judgment, a non-moving party must submit evidence admissible at trial, pursuant to the Federal Rules of Evidence. "(T)he nonmovant must set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." ***Vigil v. Burlington Northern & Santa Fe Ry***., 521 F. Supp. 1185, 1203 (D.N.M., August 3, 2007) citing ***Adler v. Wal-Mart Stores, Inc***., 144 F.3d 664, 671 (10th Cir. 1998). "A party relying on only conclusory allegations cannot defeat a properly supported motion for summary judgment." ***Vigil***, 521 F. Supp. At 1203 citing ***White v. York Int'l Corp***., 45 F.3d 357, 363 (10th Cir. 1995). "Only admissible evidence may be reviewed and considered on summary judgment." ***Vigil***, 521 F. Supp. At 1203 citing ***Gross v. Burggraf Constr. Co.***, 53 F.3d 1531, 1541 (10th Cir. 1995). Here, Plaintiff cites to and relies on ICD codes

to contend that the final diagnosis somehow supports Plaintiff's allegations in his Complaint that he suffered a severe injury. Plaintiff's argument, however, not only ignores the testimony of Erin Carnahan, it flatly contradicts the deposition testimony in a conclusory fashion without offering any basis to do so (*See* **Movants Appx. at p. 36-Deposition of Erin Carnahan**, 31:7-19; p. 35-36, 30:10-25, 31:1-6, 31:22-25, 32:1-5; p. 38 & 39, 36:15-22, 37:2-7). This approach merely offers Plaintiff's version of what he believes his diagnosis *should* have been. His argument is conclusory, inadmissible at trial and improper to consider when deciding Detective Shutters' Motion for Summary Judgment. ***Vigil**, supra.*

Furthermore, any argument with respect to the medical diagnosis and the ICD codes, is subject matter for which: (1) Plaintiff is not qualified to render an opinion on; (2) no opinions, expert or otherwise, have ever been disclosed by Plaintiff with respect to ICD codes, and; (3) there is no deposition testimony on the subject. Plaintiff's attempt is, therefore, also inadmissible pursuant to Fed R. Evid. 702, Fed. R. Civ. P. 26(a)(2), and Fed. R. Evid. 602, respectively. Any such argument in contravention to the established testimony that Plaintiff suffered a scratch, or that ICD codes somehow belie any such notion, should not be properly considered. ***Vigil**, supra*.

ii. Plaintiff's opinions concerning Detective Shutters' handcuffing technique are precluded.

Plaintiff's second argument addresses Detective Shutters' "method of arrest" as being 'higher impact". But, Plaintiff does not offer any citation to the record wherein anyone explicitly identifies or defines the way Plaintiff was handcuffed as "higher impact" or how any such approach was improper when arresting Plaintiff. The argument is again conclusory, and inadmissible pursuant to Fed. R. Evid. 602 and ***Vigil**, supra*. Furthermore, police handcuffing techniques are outside the knowledge of a lay person, and therefore subject to expert testimony. There is no

indication Plaintiff is qualified to render any such opinions or that any proper expert disclosures were made. Plaintiff's argument is also precluded pursuant to Fed. R. Evid. 702 and Fed. R. Civ. P. 26(a)(2).

iii. Plaintiff's argument that Detective Shutters squeezed the handcuffs too tight is conclusory.

Lastly, Plaintiff states Detective Shutters knew he squeezed Mr. Anderson's handcuffs too tightly (ECF No. 137-1), in an attempt to overcome the notion that he must establish personal knowledge on the part of Detective Shutters. "(I)n this circuit…(t)o trigger liability for unduly tight handcuffs…the plaintiff must show…the officer's knowledge that the handcuffs were too tight." ***Zartner v. Miller***, 760 Fed. Appx. 558, 561 (10th Cir. 2019) (unpublished) (footnotes omitted,) referring to ***Cortez***, 478 F.3d at 1129 and ftnt. 24, and ***Scott v. Hern***, 216 F.3d 897, 911 (10th Cir. 2000). *See also* ***Fisher v. The City of Las Cruces***, 584 F.3d 888, 896 (10th Cir. 2009) referring to ***Rodriguez v. Farrell***, 290 F.3d 1341, 1352-53 (11th Cir. 2002). *See also* ***Silvan W. v. Briggs***, 309 Fed. Appx. 216, 224 (10th Cir. 2009) citing ***Vondrak v. City of Las Cruces***, 535 F.3d 1198, 1208-09 (10th Cir. 2008) ("And because there is no evidence that Cory [Plaintiff]…notified the officers that his handcuffs were painful, he cannot maintain an excessive force claim based on unduly tight handcuffing.").

Plaintiff's statements are conclusory as there is no evidence to support any such argument. The statement is therefore inadmissible pursuant to Fed. R. Evid. 602 and ***Vigil***, *supra*.

IV. CONCLUSION

For the foregoing reasons, Detective Shutters respectfully requests the Court deny Plaintiff's Motion for Leave to File a Sur-Reply and for entry of any other relief deemed just.

Dated this 26th day of August 2019.

HALL & EVANS, L.L.C.

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ATTORNEYS FOR DEFENDANT JASON SHUTTERS

CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 26th day of August 2019, I electronically filed the foregoing **DEFENDANT JASON SHUTTERS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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