IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-CV-00884-CMA-STV

CHAYCE AARON ANDERSON,

Plaintiff,

vs.

JASON SHUTTERS,

Defendant.

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR LEAVE TO FILE SURREPLY

Plaintiff Chayce Aaron Anderson ("Mr. Anderson"), by and through undersigned counsel, submits this Reply to Defendant's opposition to Mr. Anderson's motion for leave to file a surreply.

I. INTRODUCTION

Jason Shutters ("Defendant") filed his motion for summary judgment (Dkt. 128) ("Motion for Summary Judgment") on July 5, 2019, and Mr. Anderson filed his response in opposition to Defendant's Motion for Summary Judgment (Dkt. 133) ("Response") on July 26, 2019. On August 7, 2019, Defendant filed his reply in support of the Motion for Summary Judgment (Dkt. 136) ("Reply"). While Defendant's Motion for Summary Judgment heavily relies on his own mischaracterization of a *disturbance of skin sensation* diagnosis to dismiss Mr. Anderson's injury as de minimis because there was purportedly no visible injury, Defendant took a new step in his Reply of asserting that the basis for his Motion for Summary Judgment is that Mr. Anderson's only injury was a "scratch."

It is well-settled that new issues are not appropriate for the Reply. Similarly, it is axiomatic that the Motion for Summary Judgment be based on facts and here, whether intentional or not, Defendant's Reply mischaracterizes certain facts about Mr. Anderson's injuries, which warrant correction. Accordingly, Mr. Anderson respectfully requests leave to file the Surreply to fairly rebut Defendant's new arguments and correct the mischaracterized facts. In the alternative, Mr. Anderson asks that this Court strike Defendant's new arguments because they were raised for the first time in the Reply and are founded on mischaracterizations in the record.

II. ARGUMENT

The Court Should Allow Mr. Anderson to File a Surreply or Strike Defendant's New Information.

Granting leave to file a surreply at the summary judgment stage is a question of "supervision of litigation" within the district court's discretion. *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1192 (10th Cir. 2006). In deciding whether to grant a Surreply, courts consider whether (i) the movant's reply contained new information for which the opportunity to respond is needed or (ii) there is justification for the filing of the materials outside the normal course of briefing. *See Lopez v. Garcia*, 1 F.Supp.2d 1404, 1406 (D.N.M.1997); *see also Wright ex rel. Trust Co. of Kansas v. Abbott Laboratories*, 62 F.Supp.2d 1186, 1187 n. 1 (D.Kan.1999). For purposes of this framework, "new information" includes newly-presented reasons, evidence or legal arguments in support of a motion for summary judgment. *See Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998) (quoting *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 410 (1st Cir. 1985) (holding that nonmoving party should be granted an opportunity to respond when the movant's reply "advanced new reasons justifying

summary judgment in its favor"); *Green v. New Mexico*, 420 F.3d 1189, 1196 (10th Cir. 2005) (stating that "new material" includes new evidence or legal arguments).

Likewise, new information that supports previously-made legal arguments may also facilitate an opportunity for the nonmoving party to respond. *See Doebele v. Sprint/United Mgmt. Co*., 342 F.3d 1117, 1139 (10th Cir. 2003) (holding that the court incorrectly distinguished *Beaird* on the ground that it applied only to new legal arguments supported by new information, whereas *Beaird* speaks to either new information *or* arguments). Accordingly, when a district court accepts a reply brief with new information, it must either (i) permit the nonmoving party to file a Surreply or (ii) disregard the new information in deciding the motion. *Beaird,* 145 F.3d at 1163-65. As a result, Mr. Anderson respectfully asks this Court to either grant leave to file the Surreply or strike the new information from Defendant's Reply.

1. **Defendant's Reply advances a new theory about Mr. Anderson's injuries to support his Motion for Summary Judgment.**

"Rule 56(c) requires the nonmoving party to be given notice and a reasonable opportunity to respond to the movant's summary judgment materials." *See Beaird,* 145 F.3d at 1159. Defendant's Motion for Summary Judgment advanced a single theory for why the court should grant his motion based on Mr. Anderson's injuries. Defendant noted that Mr. Anderson was diagnosed with *disturbance of skin sensation* and then mischaracterized that diagnosis to assert Mr. Anderson suffered no visible "trauma, swelling, redness, lacerations or abrasions." *See* Motion for Summary Judgment at 8. Defendant therefore contended that his injuries must be de minimis based on this

purported lack of visible injury.[1] *Id*. However, Defendant's Reply advanced *two* theories for why the court should grant his motion: (1) as in his initial Motion, Defendant claimed Mr. Anderson suffered a de minimis injury because there was no visible "trauma, swelling, redness, lacerations or abrasions;" and (2) under a new line of reasoning, Defendant claimed Mr. Anderson's "only injury was a scratch," which is allegedly de minimis. *Id*.; *see* Reply at 9. Mr. Anderson had no notice of this second alleged argument until Defendant's Reply, and as such, Mr. Anderson's Response did not address this new theory of a purported de minimis injury.

Thus, in his initial Motion, Defendant claimed that Plaintiff's injury was de minimis because he allegedly had no visible injuries based on a *disturbance of skin sensation* diagnosis. But in his Reply, Defendant attempted to equate this diagnosis with a superficial *visible* injury, such as a scratch.[2] Defendant's position in his Motion and in his Reply are inherently inconsistent because scratches are visible abrasions or lacerations. Mr. Anderson cannot lack all characteristics of an injury (as Defendant asserted in his initial Motion) and simultaneously *only* suffer from a "scratch" (as Defendant exclusively asserted in his Reply). Mr. Anderson should be permitted to address the second, new line of reasoning and provide the Court a fair summary of what the medical records actually say: a final diagnosis of *disturbance of skin sensation*, two differential diagnoses of "wrist

[1] Defendant's claim that injuries without visible symptoms are de minimis injuries, by default, is not supported by the law and such a finding would lead to unconscionable results.

[2] The physician assistant who saw Mr. Anderson testified only that a disturbance diagnosis generally *could* include a scratch—nowhere did the physician assistant state that Mr. Anderson did have "nothing more than a scratch." Dkt. 133-9 at 13:22-25. Critically, there are no medical notes about a scratch or a diagnosis (differential or otherwise) of the same.

numbness" and "wrist trauma," and discharge instructions for *paresthesia* that states the numbness and tingling "can become permanent when there is nerve damage." *See* Movant's Appx., pp. 22 to 32, UC Health Medical Records, Anderson 013.

Mr. Anderson recognizes that Defendant referenced "scratches" in his Motion for Summary Judgment, but these references appear as exaggerated expressions of Mr. Anderson's injury rather than as the basis for Defendant's claim that Mr. Anderson's injury was de minimis. Only in his Reply did Defendant unequivocally assert that Mr. Anderson's "only injury was a scratch" and attempt to use that (false) claim to contend that Mr. Anderson's injury was de minimis. Had Mr. Anderson known Defendant was going to assert two contradictory theories about the severity of Mr. Anderson's injuries, Mr. Anderson would have addressed them accordingly in his Response.

2. Defendant's Improper Definition of Mr. Anderson's Diagnosis Demands Consideration of ICD Code Definitions.

Throughout the Reply, Defendant interchangeably uses the word "scratch" to describe the *disturbance of skin sensation*, ICD-9-CM Code 782.0, diagnosis. To the contrary, the American Medical Association states the description of the diagnosis under Code 782.0 as an "anesthesia of skin, burning or prickling sensation, hyperesthesia, hypoesthesia, numbness, paresthesia, tingling." *See* Surreply at Supplemental Ex. 1; AAPC, *ICD-9 Code 782.0 – SYMPTOMS (780-789)*, https://coder.aapc.com/icd9-codes/782.0 (date accessed August 16, 2019). Because of Defendant's mischaracterization, Mr. Anderson sought to correct the record in his Surreply by showing how the International Classification of Diseases, Ninth Revision, Clinical Modification ("ICD-9-CM") defines the diagnosis—in other words, the *actual*, publicly-available definition of the diagnosis. Defendant alleged in his opposition that Mr. Anderson cannot

correct his improper definition of *disturbance of skin sensation* because (1) Defendant did not discuss the ICD-9-CM and because (2) the ICD-9-CM is not "supported anywhere in the record." Both are untrue. The medical records to which Defendant cites in his Motion *explicitly* refer to ICD-9-CM codes, namely, Mr. Anderson's "Final Diagnoses" under "ICD-9-CM Code 782.0." *See* Motion at 6, 8; Reply at 5; *see also* Movant's Appx., pp. 22 to 32, UC Health Medical Records, Anderson 013. Any reference to Mr. Anderson's diagnosis, which was categorized under ICD-9-CM codes, inherently incorporate the ICD-9-CM.[3] Mr. Anderson simply provides the official definition for his diagnosis to avoid any confusion and correct Defendant's mischaracterization of that diagnosis. It is telling that Defendant now asks the Court to ignore the actual definition of a diagnosis—and consider only his own made-up definition—that he claims proves Plaintiff's injury was de minimis. In the

[3] While Defendant attempts to characterize Mr. Anderson's references to ICD codes as improper expert evidence, the following is indisputably true and Mr. Anderson requests judicial notice of these facts: (1) at the time of Mr. Anderson's injuries, the ICD-9-CM was the standard medical code used in the United States (*see* 45 C.F.R. § 162.1002); (2) Mr. Anderson was diagnosed with *disturbance of skin sensation* under ICD-9-CM Code 782.0 *(see generally*, Movant's Appx., pp. 22 to 32, UC Health Medical Records, Anderson 013); (3) the American Medical Association describes a *disturbance of skin sensation* diagnosis as an "anesthesia of skin, burning or prickling sensation, hyperesthesia, hypoesthesia, numbness, paresthesia, tingling" (*see* Surreply at Supplemental Ex. 1); and (4) a *disturbance of skin sensation* diagnosis does *not* describe a scratch or any other type of superficial injury. *Id; see also* "anesthesia", "hyperesthesia," "hypoesthesia" and "paraesthia," Merriam-Webster's Dictionary (2019), *available at* https://www.merriam-webster.com/dictionary.

Mr. Anderson respectfully requests the Court take judicial notice of these facts. *See* F.R.E. 201(b) (A fact may be judicially noticed if "it is not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably by questioned."); *see also* F.R.E. 201(f) ("judicial notice may be taken at any stage of the proceeding"); F.R.E. 201(d) ("court shall take judicial notice if *requested by a party and supplied with the necessary information*")(emphasis added).

interest of justice, the Court should fully evaluate Defendant's Motion based on accurate information.

III. CONCLUSION

In his Reply, Defendant supplied a new line of reasoning to support his contention that Mr. Anderson's wrist injuries were de minimis. Accordingly, in the interest of fairness, the Court should either permit Mr. Anderson to file his Surreply or strike Defendant's new argument (and his mischaracterizations of the record supporting it). Because Mr. Anderson's Surreply is limited to responding to Defendant's new arguments—and correcting the record in doing so—consideration of Mr. Anderson's Surreply will help the Court more fully and fairly evaluate the pending Motion for Summary Judgment.

Dated this 29th day of August 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 29, 2019, a true and correct copy of the foregoing **PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR LEAVE TO FILE SURREPLY** was served on the following counsel of record via the Court's CM/ECF e-file system:

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