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' SUR-RESPONSE IN OPPOSITION TO PLAINTIFF'S SUR-REPLY (ECF 137-1)

Defendant, Jason Shutters, through his Attorneys, Hall & Evans, LLC, submits the following as his Sur-Response in Opposition to Plaintiff's Sur-Reply (ECF No. 137-1):

I. ARGUMENT

A. The Court may not take judicial notice of the International Classification of Diseases ("ICD")[1].

Federal Rule of Evidence 201(b) generally provides that a Court may take judicial notice of a fact if it is: "(1) generally known within the trial court's territorial jurisdiction or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b) (2019). Notice, however, is limited to "adjudicative" versus "legislative" facts. Adjudicative facts are the "facts of a particular case." (*See* Notes of Advisory Committee on

[1] During the hearing on Plaintiff's Motion for Leave to File a Sur-Reply (ECF Nos. 137 &137-1), the Court directed Defendant to file a brief addressing whether the Court can take judicial notice of the ICD.

Proposed Rules, Fed. R. Evid. 201), and which are generally known and accepted. ***Hunt v. Cent. Consol. Sch. Dist.***, 2016 U.S. Dist. LEXIS 51022 at *5, ftnt. 6 (D.N.M. April 14, 2016) citing ***Mills v. Denver Tramway Corp***., 155 F.2d 808, 811 (10th Cir. 1946). A fact which is generally known and accepted would, for example, be that a train has a bell and whistle. ***Mills***, 155 F.2d at 811.

Courts take judicial notice of matters of *common knowledge*. ***Ohio Bell Tel. Co. v. Public Utilities Com***., 301 U.S. 292, 301 (1937) (emphasis added) citing 5 Wigmore, Evidence, §§ 2571, 2580, 2583; Thayer, Preliminary Treatise on Evidence, pp. 277, 302. "A judge takes judicial notice when he recognizes the truth of a matter that is either generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ***United States v. Wolny***, 133 F.3d 758, 764 (10th Cir. 1998) citing Fed.R.Evid. 201(b).

The scope of what might be judicially noticed with respect to the ICD, has not been defined by the Court or the Plaintiff. Nonetheless, based on Plaintiff's arguments, it would appear the Court is asking for the propriety of taking judicial notice on the applicability of ICD Code 780.2 to the facts in this matter, versus the mere existence of the ICD. Plaintiff argues in his Sur-Reply that ICD Code 780.2 somehow supports the notion he suffered more than a de minimis injury. But, any such contention is disputed in particular based on the testimony of the treating physician assistant Erin Carnahan ("PA Carnahan") who found no evidence of trauma, swelling or redness in Plaintiff's wrists (**Movant's Appx. pp. 35 to 36-Deposition of Erin Carnahan, 30:13-25; 31:1-6**); no lacerations or abrasions (**Movant's Appx. pp. 36 & 37-Deposition of Erin Carnahan, 31:22-25;32:1-5**); full range of motion (**Movant's Appx. p. 37-Depositon of Erin Carnahan, 32:6-9**), and acknowledgment that in his mind "disturbance of skin sensation" was a

descriptor to identify a scratch (**Movant's Appx. p. 36-Deposition of Erin Carnahan, 31:7-19**). Judicial notice of the ICD Code, as a basis to overcome a de minimis injury, also ignores the differential diagnosis made by PA Carnahan of "malingering" (**Movant's Appx. p. 34-Deposition of Erin Carnahan, 17:12-23**) and his conclusion Mr. Anderson did not suffer any injury to his wrists (**Movant's Appx. pp. 38 & 39-Deposition of Erin Carnahan, 36:15-22; 37:2-7**). Furthermore, any inkling of judicial notice of Plaintiff's position ignores PA Carnahan's position he does not agree with Plaintiff's assessment of "severe nerve damage" (**Movant's Appx. p. 40-Deposition of Erin Carnahan, 40:12-16**).

The ICD is not the proper kind of fact by which the Court can take judicial notice, because it is in dispute. ***King v. Kramer***, 2014 U.S. App. LEXIS 13252 at *31 (7th Cir. 2014) referring to ***GE Capital Corp. v. Lease Resolution Corp***., 128 F.3d 1074, 1081 (7th Cir. 1997) ("in order for a fact to be judicially noticed, indisputability is a prerequisite").

Likewise, Plaintiff offers no expert testimony pursuant to 26(a)(2), or foundational basis pursuant to Fed. R. Evid. 602, to support application of the ICD codes or which might allow the Court to take judicial notice. Rather, Plaintiff offers nothing more than conclusory statements respecting application of the ICD to this matter and arguing that ICD Code 780.2 should suffice as the ultimate diagnosis, while at the same time ignoring the basic premises that the ICD and its codes are intended for billing purposes: "According to the AMA Evaluation and Management Services Guide, '[w]hen billing for a patient's visit, codes are selected that best represent the services furnished during the visit…The two common sets of codes used are: Diagnostic or International Classification of Diseases, 9th Revision, Clinical Modification codes [ICD-9-CM]; and Procedural or American Medical Association Current Procedural Terminology Codes [CPT

codes]." ***Sharp v. E. Okla. Orthopedic Ctr.***, 2013 U.S. Dist. LEXIS 27307 at *2 (N.D. Okla., February 28, 2013, Case No. 05-CV-572-TCK-TLW).

Here, the indicia which might allow the Court to take judicial notice is lacking, and the Court should decline to do so.

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

Plaintiff's second argument in the Sur-Reply 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 v. Burlington Northern & Santa Fe Ry***., 521 F. Supp. 1185, 1203 (D.N.M., August 3, 2007). 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,*** 521 F. Supp. at 1203 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) 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).

C. 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*.

II. CONCLUSION

For the foregoing reasons, Detective Shutters respectfully requests the Court grant his Motion for Summary Judgment, and for entry of any other relief deemed just.

Dated this 21st day of October 2019.

HALL & EVANS, L.L.C.

s/ Mark S. Ratner
Mark S. Ratner
1001 17th Street, Suite 300
Denver, CO 80202
Telephone: (303) 628-3300
Facsimile: (303) 382-4325
Email: ratnerm@hallevans.com
ATTORNEYS FOR DEFENDANT JASON SHUTTERS

CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 21st day of October 2019, I electronically filed the foregoing **DEFENDANT JASON SHUTTERS' SUR-RESPONSE IN OPPOSITION TO PLAINTIFF'S 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:

Attorneys for Plaintiff:

Alexandra L. Lakshmanan
Christopher J. Casolaro
FAEGRE BAKER DANIELS LLP-DENVER
allie.lakshmanan@faegrebd.com
christopher.casolaro@faegrebd.com

Heather C. Burgess
FAEGRE BAKER DANIELS LLP-CHICAGO
heather.burgess@faegrebd.com

s/ Robin Havens, Legal Assistant to
Mark S. Ratner
of HALL & EVANS, L.L.C.
1001 17th Street, Suite 300
Denver, CO 80202
Telephone: (303) 628-3300
Facsimile: (303) 382-4325
Email: ratnerm@hallevans.com
ATTORNEYS FOR DEFENDANT JASON SHUTTERS