

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
and THE STATE OF WISCONSIN,
ex rel. DR. TOBY TYLER WATSON,

Plaintiffs,

v.

Case No. 11-CV-236

JENNIFER KING VASSEL,

Defendant.

**DEFENDANT JENNIFER KING VASSEL'S RESPONSE
TO THE JOINT PRETRIAL REPORT**

Defendant Jennifer King Vassel (Dr. King), by her attorneys, Gutglass, Erickson, Bonville & Larson, S.C., respectfully submits the following response to the joint pretrial report.

Before providing a response to the joint pretrial report, some background is required. The plaintiff first provided the proposed joint pretrial report on November 22, 2013, where the plaintiff alleged completely new theories of liability:

1. He dropped all claims based on the prescription of medication to N.B., with the exception for Risperdal;
2. He added new claims based on Dr. King's alleged prescription of Risperdal to patients other than N.B. This is *after* this Court's October 23, 2012 decision that dismissed all claims; and
3. He added a new medication, Geodon, which he alleged Dr. King prescribed to patients other than N.B., of which notice was never provided in the complaint, until he provided the proposed pretrial

report.

Moreover, on November 25, 2013 the plaintiff provided proposed jury instructions, but did not provide his final version until just before 6 p.m. yesterday. Three substantive instructions were changed, without notice to the defense. Further, the plaintiff's proposed special verdict was not provided until last night, November 26, 2013, at approximately 7 p.m.

Even today when the joint pretrial report was filed, the plaintiff has placed Dr. King on notice for the first time that he is not going to pursue 14 Risperdal prescriptions allegedly written after October 23, 2012. This notice was buried on page seven of his memorandum. (Document 172-10, p. 7).

Of note, based on the defense's examination of the plaintiff's exhibits, the plaintiff has failed to present any damages calculations based on the N.B. Risperdal claims, and thus any claim for damages based on those claims must be struck.

This context is provided to demonstrate the shifting nature of the plaintiff's theories, making it impossible for the defense to enter into a joint pretrial report. Despite this, as noted by the plaintiff in footnote one of the joint pretrial report, the parties were able to agree on some issues.

RESPONSE TO THE JOINT PRETRIAL REPORT

E. Exhibits.

The defense objects to exhibits 1-7, and 14-29. Exhibit number one purports to be a demonstrative exhibit, but is not demonstrative. It inaccurately presents the law. Exhibits 2-7 are newspaper articles or news releases, several of which refer to settlements. These exhibits are not relevant, are unfairly prejudicial, and will not assist the jury. Fed. R. Evid. 403.

The reference to Geodon and Risperdal prescriptions that were never alleged in the

complaint, noted in exhibits 14-16, is addressed in separate motion in limine briefing. Exhibit 17 has no relevance given that the State of Wisconsin operates the Medicaid program, as noted in extensive briefing on this topic.

As to Exhibit 18, this newspaper article should not be introduced for the same reasons as other newspaper articles noted above. Exhibit 19 has displayed at the bottom, “confidential/produced in litigation pursuant to protective order” so it is unknown how the plaintiff obtained this information, unless a court’s protective order was violated. Moreover, it is hearsay, as the plaintiff has not named anyone to provide the foundation for the admission of the exhibit.

As to the medical information contained in exhibits 20-29, the plaintiff has not named any expert to discuss this information, and it is likewise not admissible due to lack of foundation. Moreover, the plaintiff never presents any information for any of the compendia for the years when N.B. was prescribed Risperdal, 2005-2008. Dr. King cannot be held to provisions of the compendia outside the time frame she prescribed medication to N.B.

Last, as has been described in recent briefing, Dr. King objects to any claim relating to Geodon. Dr. King further objects to any claim based on Risperdal as a result of this Court’s summary judgment decision.

G. Estimate of Time Needed to Try the Case.

Dr. King objects to the admission into evidence of exhibits 15 and 16 based on motion in limine briefing, and thus the trial should not needlessly be lengthened, as the plaintiff states would occur.

J. Response to the Plaintiff’s Proposed Jury Instructions, Special Verdict, and Memorandum in Support.

1. Response to the Plaintiff’s Disputed Issues.

The plaintiff's theories continue to change, even as of today. Just two days ago, the plaintiff contended that he will dismiss the State's claims. *Plaintiff's Opposition to Dr. King's Motion in Limine* (Document 158, p. 2). Today, the plaintiff in his memorandum stated that he "will not be pursuing false claims on behalf of the State of Wisconsin," but would not dismiss the State claims. *Joint Pretrial Report* (Document 172-10, p. 2). This is a change in position, again, but regardless, if the plaintiff is not pursuing claims against the State, his claims must be dismissed, as Dr. King has contended in recent motion in limine briefing.

The plaintiff contends, in his memorandum, that whether prescriptions are written for a medically accepted indication "for the facts in this case" is a question of law. (Document 172-10, p. 2). Thus after all of the trial preparation has occurred, the plaintiff is advocating that a trial need not occur.

The remainder of the plaintiff's memorandum attempts to apply Risperdal and Geodon to his interpretation of medically accepted indications. His reading of the law is based on his interpretation of drug labeling and the compendia (that does not cover the time period in which Dr. King was alleged to have prescribed the medication), yet he does not provide any indication of how he will lay a foundation for its admission. The plaintiff cannot discuss the use of psychotropic medications within the practice of psychiatry, nor can any other witness he has named. This issue is the subject of another motion in limine.¹ Moreover, as noted by the plaintiff, even he does not understand the prescription of Risperdal to a patient diagnosed with Tourette's syndrome. (Document 172-10, p. 7) ("The one exception is I.B., who was diagnosed with Tourette's syndrome to whom Dr. King

¹And thus it is unknown what was the purpose of the Declaration of his attorney filed recently. *See* (Document 157).

wrote 14 Risperdal prescriptions. It is not know by Dr. Watson², however, for what use those prescriptions were written.”)

2. Response to the Plaintiff’s Jury Instructions.

The jury instructions with which Dr. King does not agree are based on Dr. King’s position, since the remand of this case, that the plaintiff is not correctly interpreting the law. Moreover, any jury instruction involving Geodon should be struck, as outlined in this response to the joint pretrial report and also in motion in limine briefing filed under separate cover. Any instruction based on the alleged prescription of Risperdal after the issuance of this Court’s opinion that *dismissed this case* should be struck.

With the ability to review the instruction again after being submitted last night, the defense does not object to the “Statutes-Generally” instruction. This also applies to the “causation preponderance of the evidence instruction,” as long as the word “causation” is removed from the title.

The essential elements that the plaintiff must prove are disputed as the defense has a different interpretation of the statutes than the plaintiff.

The following instructions are also objected to as not accurately stating the law, as Dr. King has stated throughout her briefing.

- Essential Elements of the Plaintiff’s Claim - Authorization to violate law;
- Provider’s Obligation to Know Law;
- Prescriptions to Wisconsin Medicaid are Claims Against the United States Government;
- Causation - Generally;
- Medically Accepted Indication - It does not accurately

²As raised in a motion in limine, Dr. Watson is not a physician and has conceded his lack of competence on the prescription of medications.

state the law that off-label prescription of an FDA approved medication by a physician is legal and accepted, and is also reimbursable under Medicaid;

- Geodon Medically Accepted Indications;
- Risperdal Medically Accepted Indications;
- Deliberate Ignorance Knowledge- Submission of Prescriptions for Payment to United States Government;
- Recklessly Indifferent Knowledge - Submission of Prescriptions for Payment to United States Government
- Defenses- Generally
- Damages-Generally. The difference between the two versions is the last word: the plaintiff inserts “proper,” while Dr. King uses the word “truthful,” which is referenced in the O’Malley’s model jury instruction.

As to the special verdict, the plaintiff does not establish the proper elements of liability, causation, and damages. Moreover, he asks the jury to award damages twice; once for the amount of damages that the government sustained, and also for the plaintiff personally. *See* (Document 172-8) (asking the jury to assess his actual or compensatory damages). As the Court noted in its October 23, 2012 summary judgment decision, the plaintiff only solicited N.B.’s mother in order to prosecute this case. He has no personal damages.

Dated at Milwaukee, Wisconsin this 27th day of November, 2013.

GUTGLASS, ERICKSON, BONVILLE & LARSON, S.C.

s/ Bradley S. Foley

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