FILED
United States Court of Appeals
Tenth Circuit

April 5, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KERRY PICKARD, as the Executor of the Estate of John Cedar and individually as the heir at law of John Cedar; SANDRA CEDAR, an incapacitated person, by and through her Next Friend, Kerry Pickard,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 21-3030
(D.C. No. 2:18-CV-02372-JWL)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES**, **EBEL**, and **EID**, Circuit Judges.

After John Cedar died during treatment from the United States Department of Veterans Affairs ("V.A."), Plaintiffs Kerry Pickard, individually and as executor for decedent John Cedar, and Sandra Cedar, through her next friend Kerry Pickard, brought a wrongful death action in federal district court in Kansas for medical malpractice against the United States. The district court granted summary judgment for the United States after determining that Dr. Joel Bartfield, a necessary standard-

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

of-care expert witness for Pickard, failed to satisfy Kan. Stat. Ann. § 60-3412's requirement that standard-of-care experts in medical malpractice cases engage in "actual clinical practice" for at least 50% of their professional time. (Aplt. App'x at 330.) Pickard now appeals to this court, arguing that summary judgment was improper because the district court's interpretation of "actual clinical practice" was too narrow. (Aplt. Br. at 32.) The government argued that Pickard failed to challenge the motion to strike her expert witness in her opening brief. We find that Pickard has not waived her challenge as to the exclusion of Dr. Bartfield, but ultimately AFFIRM.

I. BACKGROUND

John Cedar died after receiving medical treatment from the V.A. His daughter, Kerry Pickard, and his spouse, Sandra Cedar, brought a wrongful death action in federal district court in Kansas for medical malpractice against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 on July 18, 2018.

To demonstrate the standard of care in her malpractice action, Pickard sought to use the expert testimony of an emergency room physician, Dr. Joel Bartfield. At Dr. Bartfield's deposition, he testified that he spent only 20% of his time on "patient care" and the rest of his time "[d]oing non-direct clinical work" or "non-clinical work." (Aplt. App'x at 132, 134.) Based on his testimony, the United States filed a motion to strike plaintiff's expert witness and for summary judgment, arguing that Dr. Bartfield should be struck for failure to meet the 50% "actual clinical practice" qualification required by Kan. Stat. Ann. § 60-3412. Because Dr. Bartfield's

testimony provided Pickard's only means to prove a breach of the standard of care, the United States believed it was entitled to summary judgment.

In Pickard's response, she included an affidavit of Dr. Bartfield, which stated that he was unaware at the time of his deposition that "actual clinical practice" included his indirect patient care as well as his direct care. (Id. at 212.) Additionally, he noted: "[w]hen my activities considered indirect patient care are considered along my work in direct patient care, more [than] 50% of my professional time is spent in actual clinical practice." (Id. at 213.) Based on this affidavit, Pickard argued that Dr. Bartfield satisfied the Kan. Stat. Ann. § 60-3412 standard.

The district court entered a Memorandum and Order taking the expert witness issue under advisement pending an evidentiary hearing. After both parties and the court examined Dr. Bartfield at the evidentiary hearing, the district court granted the motion to strike and for summary judgment, finding that Dr. Bartfield only spent 12–15 hours out of his 40-hour work week on activities in "actual clinical practice." Pickard then filed a Rule 59 motion to alter/amend the judgment, which was denied by the district court. Pickard now appeals to this court.

In her opening brief, Pickard lists only one issue: "Whether the District Court erred in granting Defendant's Motion for Summary Judgment." (Aplt. Br. 6.) However, her brief specifically argues that summary judgment was improper because Dr. Bartfield satisfied the 50% "actual clinical practice" requirement of Kan. Stat. Ann. § 60-3412. (See Aplt. Br. at 17.)

II. DISCUSSION

A. Waiver

We reject the United States' contention that Pickard waived any challenge to the motion to strike her expert witness by failing to address it in her opening brief and instead framing the issue as a challenge to summary judgment. It is true that "[t]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue," Bronson v. Swensen, 500 F.3d 1099, 1104 (10th Cir. 2007), but Pickard's opening brief did not omit the issue as to her expert. In fact, the entirety of her opening brief—including both subheadings—is devoted to arguing with citations to the proper Kansas authorities that the district court should not have disqualified Dr. Bartfield under Kan. Stat. Ann. § 60-3412. This was more than sufficient to give the United States an opportunity to respond to her contentions and for this court to address her arguments. See Stump v. Gates, 211 F.3d 527, 533 (10th Cir. 2000). Her framing of the issue in terms of a challenge to the motion for summary judgment is likewise sufficient. The district court's order granting summary judgment depended entirely on its decision to strike Dr. Bartfield, and thus, Pickard's statement of the issue in terms of summary judgment should be read to include the embedded issue of the exclusion of her expert witness.

B. Kan. Stat. Ann. § 60-3412

We now turn to Pickard's contention that the district court improperly excluded the testimony of Dr. Bartfield. Kan. Stat. Ann. § 60-3412 requires that standard-of-care experts in medical malpractice cases must spend at least 50% of

their professional time in the two years preceding the injury in "actual clinical practice." Pickard argues that in disqualifying Dr. Bartfield the district court interpreted "actual clinical practice" too narrowly, excluding indirect patient care from its definition. In particular, Pickard points to Bartfield's testimony where he indicated that he spent 20% of his time (8 additional hours) advising residents on patient care. Pickard argues that this time was improperly excluded from the court's calculation. If those 8 hours are added to the 12–15 hours the district court already found, the tally reaches at least 20 hours out of the 40 total hours, and thus, Dr. Bartfield would qualify under the statute. We review de novo this question of whether the district court applied the proper legal test under Kansas law in excluding Dr. Bartfield's testimony. See Dodge v. Cotter Corp., 328 F.3d 1212, 1223 (10th Cir. 2003); Devery Implement Co. v. J.I. Case Co., 944 F.2d 724, 727 (10th Cir. 1991).

Pickard is incorrect that the district court failed to account for indirect care in its definition of "actual clinical practice." In its Memorandum and Order, the district court reviewed the relevant Kansas cases and correctly determined that "actual clinical practice" means "patient care" and that "[s]uch care is not limited to direct patient care, in the sense that the practitioner is physically with a patient; it can also include indirect patient care, such as when the practitioner advises or consults to benefit a patient." (Aplt. App'x 290 (citing Schlaikjer v. Kaplan, 293 P.3d 155, 165 (Kan. 2013)).) Contrary to Pickard's contentions, the district court excluded the eight hours Dr. Bartfield spent advising residents in the emergency department because he was not advising residents regarding the ongoing care of a specific

patient. Instead, Dr. Bartfield testified that this time was generally spent critiquing care already rendered to teach a lesson for potential and general future care.[1] This type of advising was retrospectively educational in nature and does not constitute "patient care" under Kansas law. Compare Endorf v. Bohlender, 995 P.2d 896, 903 (Kan. Ct. App. 2000) (excluding teaching and educational activities that did not involve care for a specific patient) with Schlaikjer, 293 P.3d at 165 (allowing educational activities regarding specific patients to count where the activities "were equivalent to hands-on apprenticeships" and the expert's "'classroom' was the operating theater"). We believe that the Kansas Supreme Court would agree. Clark v. State Farm Mut. Auto. Ins. Co., 319 F.3d 1234, 1240 (10th Cir. 2003) ("This court must determine issues of state law as we believe the highest state court would decide them.").

In response to the argument that this time did not benefit the care of specific current patients, Pickard points to a variety of instances in the record where Dr. Bartfield referred to his indirect care for specific patients.[2] (R. Br. at 18 (citing Aplt.

[1] When asked by the court whether the purpose of consulting and critiquing medical students and residents on care already rendered was to "affect the current existing care of that particular patient" or "to learn a lesson for future application," Dr. Bartfield responded "[g]enerally the latter." (Aplt. App'x at 322).

[2] Pickard also points to an unspecified period of time that Dr. Bartfield provided advice to medical students, and Dr. Bartfield's contentions that "[his] entire job involves indirect patient care," (Aplt. Br. at 34 (citing Aplt. App'x at 307)), and more than "50% of [his] professional time is spent in actual clinical practice." (Aplt. Br. at 10 (citing Aplt App'x at 212–213.) As the burden is on Pickard to demonstrate that her expert qualifies under the statute, Endorf, 995 P.2d at 903, it was not an abuse of discretion for the district court to conclude that the burden had not been met by an unspecified length of time. Broad, sweeping statements in testimony as to

App'x at 304, 307, 313–14).) This argument, however, takes us from a question of statutory interpretation—receiving de novo review—to a question of factual findings by the district court—reviewed for clear error. Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 964 (10th Cir. 2002). It was not clearly erroneous for the district court to find that Dr. Bartfield spent 12–15 hours a week on patient care consistent with his testimony after he was informed of the relevant legal definition of "actual clinical practice" notwithstanding Dr. Bartfield's earlier more generalized testimony. The district court properly interpreted and applied the statute. We AFFIRM.

CONCLUSION

Based on the foregoing, the district court's grant of summary judgment to the United States is AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

"actual clinical practice" are not dispositive on this issue; Schlaikjer directly advises to examine the specific qualities and nature of the activities rather than crediting an expert's conclusory statements. Schlaikjer, 293 P.3d at 165.