

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 MOTION IN LIMINE
TO PRECLUDE CERTAIN WITNESSES OF THE PLAINTIFF FROM TESTIFYING
ABOUT LIABILITY, CAUSATION, OR DAMAGES**

Defendant Jennifer King Vassel (Dr. King), by her attorneys, Gutglass, Erickson, Bonville & Larson, S.C., respectfully submits the following motion in limine to preclude the following witnesses named by the plaintiff from testifying at trial about liability, causation, or damages: the plaintiff, Toby Tyler Watson; Kimberly Smithers; Monica Yeazel; and Matt Joy.

ARGUMENT

I. THE PLAINTIFF LACKS FOUNDATION TO TESTIFY ABOUT LIABILITY, CAUSATION, OR DAMAGES.

The plaintiff lacks the foundation to provide any evidence about liability, causation, and or damages.

- *The plaintiff has never treated N.B.* The plaintiff never treated N.B., and therefore cannot discuss treatment of N.B. *Deposition of the Plaintiff* (Document 148-3, p. 7). In fact he has never met N.B. *Id.*, p. 10. *See Fed. R. Evid. 602.*

- *The plaintiff is not a psychiatrist, and is not a physician.* The plaintiff is not a medical

doctor; he is not a psychiatrist; and he is not a forensic psychologist, nor does he meet the qualifications to be a forensic pathologist. *Deposition of the Plaintiff*, pp. 16, 20, and 21. He does not have nor has he ever had the legal ability to prescribe medication. *Id.*, pp. 16, and 23-24. He received a doctorate in psychology in 2002. *Id.*, p. 14. The plaintiff does not prescribe medications for mental health issues. *Id.*, p. 23.

- *The plaintiff has no experience with Medicaid billing and reimbursement.* His experience with billing Medicaid was in 2001 and 2002 when he was an intern at a clinic. *Id.*, p. 19. He would provide therapy for Medicaid patients, but the receptionist would take care of coding the services for Medicaid, and submitted the billing to Medicaid. *Id.*, pp. 19-20. The plaintiff has never billed Title 19. (Document 148-3, p. 18).

Q: Were you responsible for submitting the billing or did someone else?

A: Someone else.

[. . .]

Q: They would code it for you?

A: Correct.

(Document 148-3, p. 19). Similarly, Dr. King never submitted prescription medications for reimbursement. *Affidavit of Dr. King* (Document 30, ¶ 4) (Dr. King “did not submit the cost of prescription medications for patient N.B. for reimbursement through the Medicaid program.”) He does not know if BadgerCare (the Medicaid program) has a different formulary than the three publications listed in the compendia. (Document 148-3, p. 42). The plaintiff is not aware of any billing records for Dr. King. *Id.*, p. 66.

- *The plaintiff agrees that off-label prescribing is often done and almost customary.* *Deposition of the Plaintiff* (Document 148-3, p. 52).

Q: It’s done very often and, in fact, some off-label uses of

prescription medication are actually more common and more widely utilized by physicians than the approved FDA purpose; is that true?

A: Correct.

Q: Because the way the law works in the United States is once the FDA approves a medication for use in the United States, physicians have the ability to prescribe that medication for other reasons?

A: Correct.

(Document 148-3, 52).

- *The plaintiff has no knowledge whether Dr. King would have been reimbursed regardless whether she prescribed medications for N.B. **Id.**, pp. 53-54. The plaintiff does not know for what services the plaintiff received reimbursement. **Id.**, p. 53.*

- *The plaintiff did not have any involvement in creating the PsychRights chart, upon which the plaintiff relies to explain the compendia. **Id.**, p. 59.*

- *The plaintiff knows that physicians use formularies. “I do know that certain practitioners are given formularies that they are allowed to use or not use certain medications. And so pharmacies, in their systems, they have things that will ping and say, hey, this doctor wrote a prescription for this medication, it’s a Medicaid patient, and it will flag saying we can’t bill it, don’t; the pharmacist will call back to the doctor at the clinic [. . .] and say, hey you wrote this prescription for this, it’s not authorized through the program, what else do you want to do. They’ll send a new order over and do that. *That happens routinely. That happens a lot.*” **Id.**, p. 69 (emphasis added). The plaintiff understands that the formularies say what medications a physician is permitted to use. **Id.**, p. 70.*

As he is not a psychiatrist, is not a physician, and never treated N.B., the plaintiff lacks the factual foundation to provide any testimony critical of Dr. King. The plaintiff has never billed Title 19, and does not have experience with Medicaid billing and reimbursement. Thus the plaintiff cannot

provide any testimony to support his burden of proof on the two legal questions that he believes govern this case: whether off-label use of an FDA approved prescription medication is Medicaid fraud, and whether Dr. King had any knowledge that she was causing to be submitted a claim to Medicaid that was fraudulent. *See* (Document 145, p. 7). In other words, his testimony will not assist the trier in fact in resolving any disputed issue in this case. He must be precluded from providing any testimony on liability, causation, or damages.

II. PLAINTIFF’S LAY WITNESS KIMBERLY SMITHERS AVERS SHE WILL NOT TESTIFY ABOUT LIABILITY, CAUSATION, OR DAMAGES.

Ms. Smithers was named by the plaintiff as a lay witness in his second supplement to his initial disclosures, received on or around November 2, 2013. *Affidavit of Bradley S. Foley, Exhibit A*. She was named to “testify as to Wisconsin Medicaid drug coverage for prescriptions not for a medically accepted indication [. . .]” *Id.* She cannot, however, provide this testimony as she admits that she lacks a foundation to provide it.

Ms. Smithers is employed by the state Department of Health Services as the Pharmacy and Quality Section Chief in the Bureau of Benefits Management, Division of Health Care Access and Accountability. *Affidavit of Kimberly Smithers*, ¶ 2. She is not a physician or pharmacist. *Id.*, ¶ 3. She cannot provide any opinion about what is the policy of the State to pay for psychotropic medications. *Id.*, ¶ 4. The State only applies the regulations, and does not interpret them. *Id.*

Further, Ms. Smithers cannot provide any opinion about whether a prescription is medically indicated for a patient. *Affidavit of Kimberly Smithers*, ¶ 5. She cannot testify about how a prescription medication is used, as it is beyond her competence. *Id.*; *See* Fed. R. Evid. 602. Mr. Smithers also averred that a state board’s review of medical literature is beyond her knowledge. *Affidavit of Kimberly Smithers*, ¶ 6.

Ms. Smithers cannot provide any testimony to assist the plaintiff prove causation, as she cannot determine, and does not determine in her position, whether a claim is fraudulent. *Affidavit of Kimberly Smithers*, ¶ 7. She stated that if a claim is filed by a pharmacy for Medicaid reimbursement of a Medicaid-covered outpatient prescription drug, then the State will pay it, which is what Dr. King has been asserting. *Id.*, ¶ 8. The approval to pay is based on the information submitted by the pharmacy. *Id.*

As Ms. Smithers stated, and what Dr. King has contended throughout this case, is that a physician does not have anything to do with submitting a claim for reimbursement. *Id.*, ¶ 9. It is up to the pharmacy to determine whether the claim should be submitted, and the Medicaid Management Information System confirms whether it is covered and payable. *Id.*, ¶ 10. The system goes through algorithms for decision making. *Id.*, ¶ 11. This includes information such as whether it is a valid National Drug Code; whether Medicaid coverage of the drug is subject to a diagnosis restriction; or whether Medicaid coverage of the drug requires prior authorization. *Id.*

Prior authorization is defined as an electronic or written authorization issued by Medicaid to a provider prior to the provision of a service. *Id.*, ¶ 12. Prior authorization is a permitted process within a state's Medicaid Management Information System that is permitted under federal Medicaid law. *Id.*

Ms. Smithers unequivocally states that she cannot assist the plaintiff in establishing liability, causation, or damages. She is not a physician or pharmacist. She cannot testify whether a prescription is medically indicated for a patient. She cannot testify about how a prescription medication is used, as it is beyond her competence. She does not interpret Medicaid regulations, and cannot testify as to whether a claim for reimbursement from Medicaid is fraudulent. Ms. Smithers

will not assist the plaintiff in meeting his burden of proof. Ms. Smithers must be precluded from providing any testimony on liability, causation, or damages.

III. PLAINTIFF'S REBUTTAL LAY WITNESS MONICA YEAZEL AVERS SHE WILL NOT TESTIFY ABOUT LIABILITY, CAUSATION, OR DAMAGES.

The plaintiff named Monica Yeazel in his third supplement to his initial disclosures, received on or around November 11, 2013. *Affidavit of Bradley S. Foley, Exhibit B*. Ms. Yeazel was named to discuss the role and activities of the state drug utilization board. *Id.* This is not entirely accurate, as will be shown below. Ms. Yeazel performs services for the state *retrospective* drug utilization board.

Ms. Yeazel is employed by a subcontractor, Health Information Designs, LLC, for the state Medicaid program's fiscal agent. *Affidavit of Monica Yeazel*, ¶ 1. Health Information Designs performs retrospective drug utilization review services for the state Department of Health Services. *Id.*, ¶ 2. She is a registered pharmacist, but has not been named as an expert and has yet to be contacted by the plaintiff's attorneys. *Id.*, ¶¶ 2 and 5. Health Information Design's services for the state Department of Health Services include reviewing certain subsets of claims after payment or reimbursement for prescription medication occurs. *Id.*, ¶ 3.

Ms. Yeazel's involvement with the retrospective drug utilization board is to present information regarding retrospective drug review and various administrative support duties. *Affidavit of Monica Yeazel*, ¶ 3. She does not draft any policies for the State. *Id.*, ¶ 4. In fact before being named as a witness, she informed the plaintiff, who had contacted her, that how prescription medications are covered and how claims are paid are outside the scope of her knowledge. *Id.*

Ms. Yeazel will not provide any opinions to assist the plaintiff meet his burden of proof on liability, causation, and damages. Her involvement with the drug utilization board consists solely of

administrative support. Ms. Yeazel must be precluded from providing any testimony on liability, causation, or damages.

IV. PLAINTIFF'S LAY WITNESS MATT JOY CANNOT PROVIDE TESTIMONY ABOUT LIABILITY, CAUSATION, OR DAMAGES.

The plaintiff named Mr. Joy as a lay witness in his third supplement to initial disclosures. *Exhibit B*. Mr. Joy “may be called to testify as to the contents of the State of Wisconsin’s electronic discovery production.” *Id.* Mr. Joy is employed in the information technology field by a computer and Internet commerce consulting firm based in Anchorage, Alaska. *Affidavit of Bradley S. Foley, Exhibit C, Background of Matt Joy*. To the extent that Mr. Joy will testify about anything other than his compilation of data from documents produced from other sources (which may be the State’s production), he should be precluded from providing testimony about liability, causation, and damages.

CONCLUSION

Based on the foregoing arguments, defendant Jennifer King Vassel respectfully requests that the Court grant her motion.

Dated at Milwaukee, Wisconsin this 26th day of November, 2013.

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

s/ Bradley S. Foley

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