

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

KENNETH GRAVES,)
)
Plaintiff,)
)
)
)
)
v.) C.A. No. N19C-12-133 WCC
)
MICHAEL GREEN, DELAWARE)
PARK LLC d/b/a DELAWARE)
PARK CASINO, John Does 1-10 and)
ABC Corps. 1-10, John Does 11-20)
and ABC Corps. 11-20,)
)
Defendants.)

Submitted: August 4, 2022
Decided: November 22, 2022

Defendants’ Motion for Summary Judgment – GRANTED

MEMORANDUM OPINION

Kenneth Graves, 145 Diminish Drive, Newark, Delaware, 19713. *Pro Se.*

Thomas J. Gerard, Esquire, MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, 1007 N. Orange Street, Suite 600, P.O. Box 8888, Wilmington, Delaware 19899. Attorney for Defendant.

CARPENTER, J.

Before the Court is Defendants Michael Green, Delaware Park, and Delaware Park Casino's ("Defendants") Motion for Summary Judgment against Plaintiff, Kenneth Graves ("Graves"). For the reasons set forth in this Opinion, Defendants' Motion for Summary Judgment is **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 15, 2017, Graves visited the Delaware Park Casino ("Casino") located at 777 Delaware Park Boulevard, Wilmington, Delaware, in New Castle County.¹ While on the premises, Graves participated in various table and slot machine games.² Graves was sitting at a slot machine when another patron ("Patron") of the Casino approached him.³ Surveillance video shows that Patron began to harass Graves and proceeded to throw a drink directly onto Graves.⁴ Patron then struck Graves multiple times and continued to attack him until bystanders intervened.⁵ During the altercation, Graves was knocked to the ground and lost approximately \$500 in Casino chips.⁶ Graves alleges he suffered significant and permanent physical and emotional injuries.⁷

¹ Compl., D.I. 1, 1 (Dec. 13, 2019).

² *Id.* ¶ 6.

³ *Id.* ¶ 7.

⁴ *Id.* ¶ 8.

⁵ *Id.* ¶ 8.

⁶ *Id.* ¶ 9.

⁷ *Id.* ¶ 11-12.

On December 13, 2019, Graves filed a Complaint alleging two counts of negligence against the Defendants.⁸ In Count I, Graves asserts that Defendants were negligent in failing to provide reasonable security to protect their guests from harm.⁹ In Count II, Graves repeats and realleges the previous count and adds that Defendants were grossly negligent because they acted in conscious willful, wanton, and reckless disregard of Graves's safety.¹⁰

Mr. Graves was represented by Christofer Johnson when the original Complaint was filed. After some discovery in the case, their relationship deteriorated to the point that Mr. Johnson filed a Motion to Withdraw as Counsel and that Motion was granted on October 8, 2021.¹¹ Although the Court granted Mr. Graves's multiple requests for additional time to retain new counsel, he has failed to do so and continues to represent himself.

During Mr. Johnson's representation he retained Mr. Jerry Izzard ("Izzard") as his expert on security issues.¹² Izzard is the President and CEO of Izzard Investigations & Security LLC.¹³ In his investigative report, Izzard opined that the Casino failed to promptly respond to Graves's attempts to seek help, and treated

⁸ *Id.* at 4-5.

⁹ *Id.* ¶¶ 15-20.

¹⁰ *Id.* ¶¶ 21-22.

¹¹ Proceeding Sheet, Pl.'s Mot. to Withdraw, D.I. 45 (10/8/2021).

¹² Pl.'s Ex. C, D.I. 34, at 1 (Izzard CV).

¹³ *Id.*

Graves and Patron differently in conflict with standard security practices.¹⁴ Izzard maintained that Casino's delayed and inadequate response permitted the altercation between Graves and Patron to occur.¹⁵ Additionally, Graves offers a letter from Dr. Keith Barley ("Dr. Barley") confirming that he treated Graves several months after the alleged incident. In the letter, Dr. Barley notes, "[i]t was apparent that [Graves] was the victim of some type of assault since his mouth was swollen, his teeth were knocked out, and he was bleeding profusely."¹⁶

Defendants now move for Summary Judgment arguing that Graves failed to provide requisite expert witnesses to support his claims and therefore they should be dismissed as a matter of law.¹⁷ A decision on the Motion for Summary Judgment has been delayed due to the limitations imposed during the COVID pandemic and more specifically to provide additional time for Mr. Graves to obtain new counsel. He has been unable to do so, and the Court finds sufficient time has passed and a decision on the merits of the Motion should be issued. This is the Court's decision.

II. STANDARD OF REVIEW

Summary judgment is appropriate if the moving party establishes there are no genuine issues of material fact in dispute and judgment may be granted as a matter

¹⁴ Pl.'s Ex. D, D.I. 34, at 7 (Mr. Izzard Investigative Report 4/16/2021).

¹⁵ *Id.*

¹⁶ Defs.' Mot. for Summ. J. Ex. E, 1, (Dr. Barley Letter 7/13/2019).

¹⁷ Defs.' Mot. for Summ. J. ¶ 4.

of law.¹⁸ All facts are viewed in the light most favorable to the non-moving party to determine if there is any dispute of material fact.¹⁹ Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.²⁰ The non-movant cannot create a genuine issue of material fact with bare assertions or conclusory allegations, but must produce specific evidence that would sustain a verdict in their favor.²¹

III. DISCUSSION

Under Delaware law, negligence requires the showing of four elements: (1) a duty; (2) a breach of that duty; (3) causation; and (4) damages.²² In order to survive a motion for summary judgment, Graves must adequately establish that he is prepared to present evidence to meet the four requirements.²³

First, Defendants contend they are entitled to summary judgment because Graves failed to provide expert evidence on the Casino's standard of care and how it breached that standard.²⁴ Defendants assert the report proffered by Izzard fails to satisfy the expert requirements under Delaware law and Delaware Superior Court

¹⁸ Del. Super. Ct. Civ. R. 56.

¹⁹ *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005) (quotations omitted).

²⁰ *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979).

²¹ *Williams v. United Parcel Serv. of America, Inc.*, 2017 WL 10620619, at *2 (Del. Super. Nov. 9, 2017) (citing *Citimortgage, Inc. v. Stevenson*, 2013 WL 6225019, at *1 (Del. Super. 2013)).

²² *Hall v. Dorsey*, 1998 WL 960774, at * 2 (Del. Super. Nov. 5, 1998).

²³ *Roache v. Charney*, 38 A.3d 281, 286 (Del. 2012).

²⁴ Defs.' Mot. ¶ 10.

Rule 34.²⁵ Second, Defendants argue that Graves failed to produce medical expert testimony necessary to establish causation and damages, and that the letter from Plaintiff's dentist, Dr. Barley, is an insufficient expert report.²⁶

Conversely, Graves argues that Izzard satisfies the five-step admissibility test for experts,²⁷ and that Izzard did not violate Rule 34 because his investigation was non-intrusive.²⁸ Additionally, Graves asserts that Dr. Barley's report does opine on causation and the totality of the evidence supports a finding that Plaintiff suffered injuries that were caused by the assault at the Casino.²⁹

The core of Plaintiff's claim is that Casino owed a duty to Plaintiff to protect against foreseeable third-party criminal acts. The Supreme Court of Delaware has articulated that a proprietor's duty to protect patrons against the acts of third parties arises from prior "incidents of criminal activity."³⁰ Such prior occurrences may

²⁵ *Id.* ¶ 14.

²⁶ *Id.* ¶ 15.

²⁷ The Delaware Supreme Court has established a five-step test to determine admissibility of scientific or technical expert testimony: (1) the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the evidence is relevant; (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (4) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury. *Hynson v. Dover Downs, Inc.*, 2015 WL 5168353, at *3 (Del. Super. Sept. 2, 2015) (citing *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 795 (Del. 2006)).

²⁸ Pl.'s Resp. at [unpaginated] 3-4.

²⁹ *Id.* at [unpaginated] 4-5.

³⁰ *Hynson v. Dover Downs, Inc.*, 2015 WL 5168353, at *5 (Del. Super. Sept. 2, 2015) (citing *Jardel Co. v. Hughes*, 523 A.2d 518, 525 (Del.1987)).

make it foreseeable that further third-party criminal activity may occur, and proprietors are to take reasonable care to prevent it.³¹

The adequacy of Casino's security measures and the causal link between those measures and Graves's injuries require specialized knowledge and skill acquired through special training and experience.³² Therefore, Graves must proffer expert testimony to establish the applicable standard of care and that the violation of that standard was the proximate cause for the alleged injuries.

First, Graves offers Izzard as an expert on the standard of care Casino owed to Graves. According to his CV, Izzard is a licensed and bonded Private Investigator with seventeen years of law enforcement experience.³³ Izzard currently works with the Philadelphia Police Department as a fingerprint technician and previously recruited and trained police officers.³⁴ Presently he operates his own investigation and security company and has served as an expert witness in both federal and state courts.³⁵ Izzard produced an expert report contending that Defendants did not provide adequate security measures to prevent the alleged criminal act by a third

³¹ *Id.*

³² *Small v. Super Fresh Food Markets, Inc.*, 2010 WL 530071, at *3 (Del. Super. Ct. Feb. 12, 2010).

³³ It is not a requirement that an expert be licensed in the state in which he will testify, as Defendant asserts. *See Talley v. Tri-State*, 2007 WL 1816356, at * 2 (Del. Super. June 25, 2007).

³⁴ Pl.'s Ex. C at 1.

³⁵ *Id.* Izzard makes this claim in his company's promotional material but has failed to set forth what areas he has testified in.

party against Graves.³⁶ He opines that Casino security favored the other patron over Graves and that the altercation was foreseeable because Casino was aware of a history between the two men.³⁷ Izzard contends that Casino breached the standard of care by failing to prepare for, or prevent, this foreseeable altercation.³⁸

The Court agrees that Izzard does not have particularized experience in providing security to casinos. However, it is not a limitation that would prevent his testimony and is simply a fair area for cross-examination. The Court is concerned about Izzard and Graves's prior counsel failing to notify Defendants regarding an on-site visit. While this should not have occurred and is a violation of the Court's rules, it appears that Izzard's testimony is limited to three factors: (a) his interview of Graves; (b) his review of a videotape of the incident; and (c) his observations when he visited the Casino on April 2nd and 4th of 2021. To avoid any prejudice to Defendants, the Court will not allow Izzard to testify as to any conversations he had with employees of the Casino during his two visits and his testimony will be limited to the above three areas.

Defendants also assert that Izzard's report failed to set forth the standard of care or legal duty that Casino owed Graves. While this is true, it appears common sense without an expert opinion would support the proposition that Casino owes a

³⁶ Pl.'s Ex. D at 7.

³⁷ *Id.*

³⁸ *Id.*

duty to its patrons to take reasonable action to prevent them from being assaulted. The Court is confident that even Defendants would agree with that statement. Therefore, the Court finds Izzard is a sufficient expert that may testify from a security perspective as to the standard of care that the Casino owed Graves.

While Izzard provides a basis to find Casino had a duty of care to Graves and it breached that duty, he is not qualified to connect which of Graves's injuries were proximately caused by this breach.

It appears that Graves has offered Dr. Barley in an attempt to fill this gap. However, Graves fails to provide the Court with adequate information to find that Dr. Barley is qualified. Dr. Barley is the owner and operator of Smile Again Dental Lab located in Upland, Pennsylvania and was Grave's treating dentist in early February of 2018.³⁹ Graves provides no information regarding Dr. Barley's knowledge, skill, experience, training, or education to properly qualify him as an expert.

Further, under Delaware law, a doctor cannot base his expert medical opinion on speculation or conjecture.⁴⁰ "A doctor's opinion about 'what is possible is no more valid than the jury's own speculation as to what is or is not possible.'"⁴¹ Delaware case law is clear that a medical expert such as Dr. Barley should state his

³⁹ Def.'s Ex. E at 1.

⁴⁰ *O'Riley v. Rogers*, 69 A.3d 1007, 1011(Del. 2013).

⁴¹ *Id.*

expert opinion in “terms of ‘a reasonable medical probability or ‘a reasonable medical certainty.’”⁴²

In this case, Dr. Barley’s “expert report” is titled “invoice” and states that “[i]t was immediately apparent that [Graves] was the victim of some type of assault since his mouth was swollen, his teeth were knocked out, and he was bleeding profusely.”⁴³ This statement does not provide information helpful to the trier of fact, nor an opinion based upon medical probability or certainty. Dr. Barley does not offer a diagnosis or provide specificity regarding the injuries suffered by Graves. Rather, Dr. Barley speculates that Graves appeared to have been assaulted which is no more helpful than the jury’s own sensible logic.

In the Complaint filed in this action, Graves asserts that as a result of the assault he suffered:

“ . . . severe and permanent physical injuries; emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem and other psychological injuries.”⁴⁴

There is no expert report that reflects the permanency of the injuries nor one that identifies the emotional distress suffered by Graves or “other” psychological injuries. Certainly, a dental lab is unable to provide such testimony.

⁴² *Id.*

⁴³ Def.’s Ex. E at 1.

⁴⁴ Compl. ¶ 20.

Additionally, Dr. Barley states he examined Graves in February of 2018, nearly two months after the incident at the casino. It is difficult to conclude the injuries noted by Dr. Barley would have related to the assault in December if Graves was bleeding profusely when examined by Dr. Barley. As such, Dr. Barley is neither qualified as an expert to establish Graves's injuries as alleged in the Complaint nor does he provide a medical expert opinion on proximate cause. Because these are essential elements for Graves to establish and are not supported by the evidence, Graves fails to make out a prima facie case of negligence against Defendants.

IV. CONCLUSION

The Court appreciates that it will be difficult for Graves to accept or understand this decision. From his point of view, he was assaulted, and Defendants should pay for the injuries he sustained. Unfortunately, litigation of this kind requires more. It requires medical testimony connecting Graves's injuries to the assault and expert testimony as to the significance of those injuries. Mr. Graves's case fails miserably in this area. The Court has exhibited extreme patience in providing significant latitude to Mr. Graves to obtain the required expert testimony. As late as the hearing on this Motion in August of this year the Court again explained to Mr. Graves what was required. This is a case where self-representation was not in Graves's best interest. Graves's expert reports were due on December 4, 2020, and Graves has had nearly two years to correct this situation and obtain qualified

experts and reports. He has failed to do so, and at some point, the litigation must end. As a result, Defendants' Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr. _____
Judge William C. Carpenter, Jr.