IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JESSIE RIVERA,

Plaintiff,

v.

DR. RAVI GUPTA,

Defendant.

OPINION AND ORDER

13-cv-056-wmc

This case is set for a bench trial the week of April 16, 2018. In advance of the final pretrial conference, scheduled for April 10, the court issues the following opinion and order addressing two pending motions. For the reasons that follow, the court finds that: (1) defendant's undue delay in seeking leave to amend prejudices plaintiff, and, regardless such an amendment is futile; and (2) plaintiff's challenges to Dr. Alan David's report go to the weight the court may place on his testimony and are not a basis for excluding it.

OPINION

I. Motion for Leave to Amend Answer

Dr. Ravi Gupta seeks leave to amend his answer to add an affirmative defense, that plaintiff's § 1983 Eighth Amendment claim is barred by the FTCA's so-called "judgment bar," which provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim." 28 U.S.C § 2676. As context, the court initially screened then *pro se* plaintiff Jessie Rivera's

complaint as an FTCA claim asserted against the United States. In that opinion and order, dated June 24, 2014, the court concluded that plaintiff's FTCA claim was barred by the Inmate Accident Compensation Act, 18 U.S.C. § 4126(c)(4), and denied him leave to proceed on that claim. (12/18/13 Op. & Order (dkt. #5).) Plaintiff then amended his complaint to assert the present claim against Dr. Gupta and Medical Administrator Lopez, for which he was granted leave to proceed (6/24/14 Op. & Order (dkt. #7)), but ultimately lost on summary judgment (10/7/15 Op. & Order (dkt. #49)). On October 7, 2015, the court entered judgment in favor of all defendants, including the U.S. Department of Justice Federal Bureau of Prisons, the defendant named in his original complaint. (10/7/15 Judgment (dkt. #50).) On appeal, the Seventh Circuit reversed the judgment in favor of Dr. Gupta and remanded the case for further proceedings. *See Rivera v. Gupta*, 836 F.3d 839, 841-42 (7th Cir. 2016). (11/1/16 Mandate (dkt. #65.)

On February 27, 2018, some 41 months after he originally answered and approximately six weeks before trial, defendant filed the present motion to amend his pleading to add this defense.[1] Leave to amend a pleading is to be "freely given when justice so requires." Fed. R. Civ. P. 15(a). "Even so, leave to amend is not automatically granted, and may be properly denied at the district court's discretion for reasons including undue delay, the movant's bad faith, and undue prejudice to the opposing party." *Crest Hill Land*

[1] Defendant also filed a motion for leave to file a reply brief in support of its motion (dkt. #100), which the court will grant. The court has reviewed and considered the reply in deciding defendant's motion.

Dev., LLC v. City of Joliet, 396 F.3d 801, 804 (7th Cir. 2005) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Here, plaintiff opposes defendant's motion on two bases: (1) defendant unduly delayed in seeking leave to amend his answer to add this defense; and (2) the proposed amendment is futile. The court agrees with plaintiff on both counts. *First*, as to the timing of defendant's request and the prejudice to plaintiff, defendant should have recognized the possibility of this defense at the time defendant filed his original answer in September of 2014, the court having already determined that plaintiff could not proceed on an FTCA claim, and certainly by the time the court entered judgment in favor of the federal government on that claim, which was in October 2015, two and a half years ago. Even giving defendant the benefit of the doubt, defendant should at least have asserted the defense at the time the case was remanded by the Seventh Circuit in November 2016 and this case was reset for a second round of summary judgment briefing and a trial date.

Instead, defendant waited until *six weeks* before trial to seek leave. Critically, as plaintiff explains in his opposition, the motion was filed after the dispositive motion deadline and on the eve of the discovery deadline. While the court credits defendant's argument that this defense is purely legal, not necessitating any fact discovery, defendant fails to explain in its reply brief how plaintiff is not prejudiced by not being able to move for summary judgment on the defense. *See Gandhi v. Sitara Capital Mgmt., LLC*, 721 F.3d 865, 868–69 (7th Cir. 2013) ("[C]ourts may deny a proposed amended pleading if, for example, the moving party unjustifiably delayed in presenting its motion to the court[.]").

Second, as plaintiff points out, the proposed amendment would be futile under a relatively recent opinion of the United States Supreme Court, which held the FTCA's judgment bar does *not* apply to cases brought against individuals that fall within one of the exceptions of the FTCA. *See Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016). While the court credits defendant's argument that the Supreme Court in *Simmons* was considering an exception not at issue here, the reasoning, in particular the analogy to the doctrine of claim preclusion, applies with equal force here. As the Court explained,

> The dismissal of a claim in the 'Exceptions' section signals merely that the United States cannot be held liable for a particular claim; it has no logical bearing on whether an employees can be held liable instead. To apply the judgment bar so as to foreclose a future suit against that would be passing strange.

Simmons, 136 S. Ct. at 1849-50; *see also id.* at 1849 n.5 (explaining that the "judgment bar provision 'functions in much the same way' as [the claim preclusion] doctrine" (quoting *Will v. Hallock*, 546 U.S. 345, 354 (2006))).

Here, the court did not reach the merits of Rivera's FTCA claim. To the contrary, the court denied Rivera leave to proceed on his FTCA claim altogether. To allow a decision denying him leave to proceed as a bar to a separate claim under the Eighth Amendment against an individual certainly strikes this court as "passing strange," especially in the context of a *pro se* litigant who is unfamiliar with the law. As such, the amendment would be futile. Accordingly, defendant's motion for leave to amend his answer is denied.

II. Motion in Limine to Exclude Defendant's Expert

The standard for reviewing this challenge is a familiar one, principally governed by Federal Rule of Evidence 702, as elucidated by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
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> (c) the testimony is the product of reliable principles and methods; and
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> (d) the expert has reliably applied the principles and methods to the facts of the case.

In applying Rule 702, a district court is to function as a "gatekeeper," determining whether a party's proffered expert testimony is relevant and reliable. *Daubert*, 509 U.S. at 589; *see also United States v. Johnsted*, 30 F. Supp. 3d 814, 816 (W.D. Wis. 2013) (expert testimony must be "not only relevant, but reliable"). Although "liberally admissible under the Federal Rules of Evidence," *Lyman v. St. Jude Med. S.C., Inc.*, 580 F. Supp. 2d 719, 723 (E.D. Wis. 2008), expert testimony must, therefore, satisfy the following three-part test:

> (1) the witness must be qualified "as an expert by knowledge, skill, experience, training, or education," Fed. R. Evid. 702;
>
> (2) the expert's reasoning or methodology underlying the testimony must be scientifically reliable, Daubert, 509 U.S. at 592-93; and
>
> (3) the testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. Fed. R. Evid. 702.

Ervin v. Johnson & Johnson, Inc., 492 F.3d 901, 904 (7th Cir. 2007). Still, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

As detailed in his extensive curriculum vitae, Dr. David is a board-certified family medicine physician; he has served as the Chairman of Family Medicine at the Medical College of Wisconsin and Froedert Hospital since 1998; and he is past president of the Wisconsin Academy of Family Physicians, as well as a past board member of the American Board of Family Medicine. Dr. David also has experience treating inmates. There is no credible argument that he is not qualified to render an expert opinion in this case, nor does plaintiff challenge his testimony on that basis.

Instead, plaintiff argues that his report should be stricken and his testimony excluded because "he failed to explain the basis for his conclusion, did not identify any support for his conclusion, and perhaps most egregiously he failed to give any consideration to what treatment or pain management options could have been offered by Dr. Gupta to Mr. Rivera." (Pl.'s Br. (dkt. #106) 1.) In his report, Dr. David summarized Rivera's medical record, and then answered the question "[w]as the care Dr. Gupta provided to Rivera on February 13, 2012, consistent with accepted medical judgment, practice, and standards?" (David Rept. (dkt. #106-1) 4.) After reviewing Dr. Gupta's version of the February 13th appointment, Dr. David opined, "It is my opinion that Dr. Gupta's method of evaluation and conclusions on February 13, 2012, were consistent with accepted

professional judgment, practices, and standard expected of an average competent primary care physician under the same or similar circumstances." (*Id.*)

While the court agrees with plaintiff that this opinion is quite thin, the brevity of the opinion does not render it inadmissible, though Dr. David in testifying will be limited to the opinion contained in his report. *See Mosby v. Silberschmidt*, No. 08-cv-677-wmc, 2010 WL 453699, at *2 (W.D. Wis. Nov. 2, 2010) (rejecting similar challenge to expert's opinion based on review of medical record). As to plaintiff's concern that the opinion lacks any discussion of other available treatments for pain, this concern certainly is one that plaintiff may explore in cross-examination, but does not go to the *admissibility* of Dr. David's opinion; rather, it simply goes to the weight the court may place on it. *See Weir v. Crown Equip. Corp.*, 217 F.3d 453, 465 (7th Cir. 2000) (rejecting Daubert motion when challenge went to weight of opinion not its admissibility).[2]

[2] Defendant also opposes plaintiff's motion on the basis that it is an untimely challenge to the adequacy of Dr. David's disclosure as required under Federal Rule of Civil Procedure 26(a)(2), and that plaintiff failed to meet and confer as required under Federal Rule of Civil Procedure 37(a)(1). If plaintiff had framed his challenge as an inadequate or untimely disclosure under Rule 26, this argument -- and defendant's reliance on the *Mosby* case -- may have traction. Here, however, plaintiff simply relies on Rule 702 in asserting his challenge. These *Daubert* motions are frequently brought as motions in limine. The court sees no reason to upset that practice. Regardless, the court rejects plaintiff's motion on its merits.

ORDER

IT IS ORDERED that:

1) Defendant Dr. R. Gupta's motion for leave to amend his answer (dkt. #97) is DENIED.

2) Defendant's motion for leave to file a reply brief in support of motion for leave to amend answer (dkt. #100) is GRANTED.

3) Plaintiff Jessie Rivera's motion in limine to exclude the opinions of defendant's expert Dr. Alan K. David (dkt. #105) is DENIED.

Entered this 6th day of April, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge