Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-078

SEPTEMBER TERM, 2017

Jeffrey and Kristen Trudeau	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
v.	}	Civil Division
	}	
Eric Vitali, Jeremy Peters and State of Vermont	}	DOCKET NO. 80-2-14 Bncv
		Trial Judge: John W. Valente

In the above-entitled cause, the Clerk will enter:

Plaintiffs, a retired state trooper and his wife, appeal the superior court's summary judgment ruling in favor of defendants with respect to their tort suit arising from injuries the defendants allegedly caused plaintiff during a Taser training.[1] The trial court ruled that defendants were entitled to summary judgment based on the exclusivity provision of the workers' compensation act and plaintiffs' failure to provide the opinion of an expert to support its claims. We affirm on the basis that plaintiffs failed to submit sufficient evidence that his injuries were caused by a breach of an applicable standard of care.

In reviewing summary judgment decisions, we apply the same standard as the trial court: we will grant summary judgment " 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " Gauthier v. Keurig Green Mountain, Inc., 2015 VT 108, ¶ 14, 200 Vt. 125 (quoting V.R.C.P. 56(a)). "In determining whether there is a genuine issue as to any material fact, we will accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356. We consider "the facts presented in the light most favorable to the nonmoving party." Vanderbloom v. State, Agency of Transp., 2015 VT 103, ¶ 5, 200 Vt. 150.

The material facts in the summary judgment record, viewed in the light most favorable to plaintiffs, are as follows. On March 29, 2011, defendant state troopers Eric Vitali and Jeremy Peters conducted a training session on the use of Tasers. Plaintiff, a sergeant in the Vermont State Police, participated in the training as a trainee. Prior to the training, there was an environment of peer pressure within the department that troopers should submit to being "tased." Before the training, defendant Vitali stressed to plaintiff that there were many benefits to being tased, and during the training both individual defendants stressed their strong recommendation that trainees undergo a Taser exposure because it would benefit the State in lawsuits brought by those being

[1] When referring to a singular plaintiff throughout the narrative, we are referring to the retired state trooper who was injured during the incident that led to the lawsuit.

tased by troopers. Plaintiff consented to being tased under the belief that the instructors would follow "standard procedure."

Following a presentation, including several videos, defendants gave the trainees an opportunity to be "tased." Defendants told the group that every trainee would have to sign a waiver regardless of whether they were going to be tased. Plaintiff signed the waiver, disclosed on it that he had screws in his left knee from a prior injury, verbally told defendants of the preexisting injury, and consented to being tased. Plaintiff also told Vitali and Peters directly that he had had reconstructive knee surgery and that he had metal screws in his left knee. The first two trainees to undergo Taser exposure were standing when exposed, and spotters assisted them to the floor. One was shot with the probes in her back/buttocks area, and another was hooked up with only one lead in his back.

When plaintiff's turn came, he was instructed to lay face down on the mat. He reminded Peters about the knee injury and asked if he could receive a one-second burst instead of the specified five-second burst. Vitali responded that it would be beneficial to have the five-second burst. With Peters looking on, Vitali placed two alligator clips connected to the Taser in each of plaintiff's hands, had plaintiff lie face down with his arms stretched forward beyond his head in a "Superman" pose, and then tased him. Vitali tased him for five seconds rather than one. The pain of the exposure was excruciating, and the shock from the Taser caused both of plaintiff's shoulders to dislocate, causing significant pain and resulting in serious injuries that required surgery.

Plaintiff applied for and received workers' compensation benefits for his injuries resulting from the Taser training incident. The State of Vermont no longer allows its employees to be tased. Plaintiffs' original complaint alleged gross negligence or willful conduct against not only Vitali and Peters but also the State of Vermont. In May 2014, the superior court granted judgment for the State on the basis of workers' compensation exclusivity, but denied it as to Vitali and Peters to allow time for discovery.

In September 2016, the remaining individual defendants, Vitali and Peters, moved for summary judgment on five grounds: (1) the exclusivity provision of the workers' compensation act; (2) plaintiffs' failure to provide an expert to establish defendant's duty of care and a breach of that duty; (3) the lack of gross negligence as a matter of law; (4) qualified official immunity; and (5) plaintiff's signing of a waiver. The superior court granted defendants summary judgment on the first two grounds without addressing the other three grounds. Regarding the first ground, the court ruled that because defendants were acting within the scope of their role as supervisors at the time of the incident in question, plaintiff was foreclosed from suing them after accepting workers' compensation benefits. With respect to the second, the court concluded that evaluating plaintiff's specific claim in this case—that placing him in the position he was in constituted a breach of the applicable duty of care—required scientific, technical or other specialized knowledge that is not so apparent that it may be understood by a lay trier of fact without the aid of an expert.

We affirm on this latter basis. Plaintiffs argue that Vitali and Peters were grossly negligent insofar as they failed to comply with the Taser training protocol. They identify three aspects of defendants' conduct that they allege breached the applicable standard of care: (1) Vitali refused plaintiff's request for a one-second blast versus a five-second blast; (2) the trainers tasered plaintiff despite his disclosure of screws in his knee from a prior injury; and (3) the position they placed him in was not authorized by Taser training materials and specifically violated a training directive to place the subjects' arms at their sides.

To survive summary judgment, after an adequate time for discovery, plaintiffs must produce sufficient admissible evidence to establish the existence of every element essential to their case on which they have the burden of proof at trial. Poplaski v. Lamphere, 152 Vt. 251, 254-55 (1989); see also Fritzeen v. Gravel, 2003 VT 54, ¶ 7, 175 Vt. 537 ("[W]e will accept as true all allegations made in opposition to the motion for summary judgment, so long as they are supported by admissible evidence."). Where the subject presented is "so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman," expert testimony is typically required to establish the standard of care and breach thereof. Coll v. Johnson, 161 Vt. 163, 165 (1993) (quotation omitted). On the other hand, expert testimony "is not generally required where the alleged violation of the standard of care is so apparent that it may be understood by a lay trier of fact without the aid of an expert." Id. (quotation omitted).

In this case, plaintiffs have not proffered expert testimony, but have attempted to establish the standard of care, and that defendants breached that standard, through evidence concerning defendants' own training to prepare as instructors, and the standards of care reflected in that training. We do not categorically reject this method of establishing a standard of care in the proper case, but conclude that, without the aid of an expert, plaintiffs' admissible evidence in this case is insufficient to establish that defendants breached an applicable standard of care.

Plaintiffs' first theory is the most straightforward: plaintiff asked to be shocked for only one second rather than five, and defendant Vitali did not honor his request. Plaintiffs' evidence that this violated the applicable standard of care consists of two answers Vitali gave in a deposition. Plaintiffs' counsel showed him a document that counsel represented to be from Taser, copyrighted in 2010, titled "Voluntary Exposure Guidelines." In response to counsel's questions, Vitali acknowledged that the document said "[s]trict adherence to all safety guidelines contained in the syllabus is mandatory" and "[s]tudents may elect to have a full five-second deployment or a shorter exposure." Although Vitali acknowledged that the document said what it said, he maintained that he had never seen it before. This record is insufficient to establish a standard of care with respect to shortened voluntary exposures. Vitali did not validate the document from which plaintiffs' counsel read as a source of applicable standards, and the document itself was not included in the summary judgment record. This exchange is insufficient to establish duty and breach with respect to the duration of the blast.[2]

Plaintiffs' second theory is that defendants should not have subjected him to a voluntary exposure at all because he had notified them of a screw in his knee. Their theory is that administering a shock to a trainee with that condition deviates from the applicable standard of care. In support of this theory, plaintiffs cite a 2011 email from the director of recruiting and training to taser instructors, including defendants, instructing them not to administer voluntary exposures to people with "any type of medical condition." Even assuming this email could potentially establish a standard of care, rather than a departmental policy, the definition of "any type of medical condition" in the context of plaintiff's prior knee injury, repaired with screws, is not so apparent on the face of the document that a lay person could reasonably divine the standard of care governing this situation. Had defendant reported a heart condition, and then suffered heart injury

[2] Even if the evidence were sufficient to show that Vitali's failure to honor plaintiff's request for a shorter blast deviated from an applicable standard, plaintiffs have not pointed to any evidence that the extent of plaintiff's injuries was a function of the duration of the blast. In other words, plaintiffs have not pointed to any evidence that had the blast lasted only one second, he would not have suffered the same injuries.

as a result of the shock, that would present a different question; whether a prior knee injury repaired with screws is a "medical condition" is less clear. The 2011 email is insufficient to establish a standard of care without expert testimony.

The other sources plaintiffs cite do not support their theory. They cite the reported opinion of the captain, who appears to have conducted a post-incident investigation, that the instructors failed to follow state police specific directives regarding exposing members with pre-existing medical issues. But, other than the email noted above, the source and content of these purported standards is unclear. The report itself quotes various people who conducted or participated in the instructors' training as saying that the protocol for dealing with reported injuries was to direct the voluntary exposure to a different area of the body rather than decline the voluntary exposure altogether. Defendant Vitali testified likewise in his deposition. And the PowerPoint presentation used to train the defendants contains no such proscription. Instead, it directs instructors to position volunteers face down and administer the hit to the legs, "or other areas of the body if necessary to avoid pre-existing injuries, medical conditions, or individual susceptibilities." Insofar as plaintiffs seek to rely on the materials and information used to train the defendants to establish a standard of care regarding delivery of Taser shocks to trainees with pre-existing injuries, those materials do not support plaintiffs' position.

Plaintiffs' final theory presents the closest case. They argue that positioning plaintiff in the way that defendant Vitali did, without acquiescence by defendant Peters, deviated from the applicable standard of care. They rely heavily on the absence of any instructions in the training protocols taught to defendants calling for them to position trainees prone on the floor with their hands stretched forward, grasping alligator clips to receive the shocks. They also cite two post-incident statements by defendant Peters to third parties that he should have stopped Vitali from proceeding the way he did. And they point to a hearsay statement reported in the post-incident investigation report in which defendants' trainer opined that individuals should not be positioned the way defendant Vitali positioned plaintiff because doing so poses a risk to their joints.

At the outset, we agree with the trial court that an average juror is not in a position to assess the dangers of the particular position assumed by plaintiff during the voluntary administration of the shock. There is a difference in the danger of shooting prongs into a trainee's head or eye, for example, and the danger of placing Taser clips in an individual's hands with body parts in specific positions. We conclude that the record evidence cited by defendants is insufficient to overcome this fact.

The training materials used in defendants' own training do not expressly include the position set up by defendant Vitali as one of the positions for voluntary exposures. They do provide that after demonstrating certain specified examples of exposures, trainers should perform the remaining hits "with the volunteer lying face down targeting the legs, or other areas of the body if necessary to avoid pre-existing injuries, medical conditions, or individual susceptibilities." They do not specifically indicate that the only prone position that is permissible is with the individuals' arms at the side, rather than extended forward, and do specifically contemplate administration of shocks to places other than the legs or back, if required to avoid pre-existing injuries. In this case, without expert testimony, the absence in the training materials of any instruction to position trainees in the manner plaintiff was positioned is not enough to support the inference that doing so deviates from the standard of care. To the extent that plaintiffs seek to rely on defendants' training materials in lieu of expert testimony, they have not identified in those materials a clear standard violated by defendants.

Nor do the reported hearsay statements by defendant Peters to the effect that he should have stopped defendant Vitali establish a deviation from the standard of care. By emphasizing the inadequacy of both defendants' training, plaintiffs call into question whether either defendant's statements can be considered reliable on the question of the standard of care. More to the point, defendant Peters' statements of regret following a serious injury are not enough to establish that he, or defendant Vitali, deviated from an applicable standard of care.

Finally, plaintiffs cite a statement, in what appears to be a post-incident investigative report, attributed to the trainer who had trained the defendants. The trainer reportedly told the investigator that "it was clear during his training delivery that the subject receiving a Taser hit should have their arms at their side and not in an outstretched or 'superman' position when they are exposed to a Taser hit." That trainer explained that the position placed increased stress on the joints when an exposure occurs. Plaintiffs did not cite to any direct testimony by this trainer (or the investigator), and did not identify any non-hearsay testimony to this effect. Even assuming that a jury could infer a standard of care from this statement, plaintiffs cannot rely on the hearsay statement at this stage of the litigation. See Ross v. Times Mirror, Inc., 164 Vt. 13, 22-23 (1995) ("[H]earsay statements contained in deposition not supported by specific facts admissible in evidence are insufficient to raise genuine issues" (quoting 10A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2738, at 489-94 (1983))).

Because we conclude that plaintiffs failed to present sufficient evidence to establish each element of their claims, we need not address the applicability of workers' compensation exclusivity to plaintiffs' claims against the individual defendants here.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice