

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 1:11-CV-22026-COOKE/TURNOFF

DR. BERND WOLLSCHLAEGER, *et al.*,

Plaintiffs,

v.

FRANK FARMER, *et al.*,

Defendants.

**REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS'
SUPPLEMENTAL STATEMENT OF UNDISPUTED FACTS**

Defendants' Response to Plaintiffs' Motion for Summary Judgment ("Response") (DE 98) contests Plaintiffs' Supplemental Statement of Undisputed Facts ("PSSUF") (DE 88).

Defendants do not challenge the veracity of any of Plaintiffs' asserted facts; rather, they object only on the grounds that the asserted facts are irrelevant or improper opinion testimony.

Defendants' objections are misplaced.

Paragraph 1: Defendants argue that the Board of Medicine's complaint policy is not relevant. They are incorrect. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." *See* Fed. R. Evid. 401. "The standard for what constitutes relevant evidence is a low one," *United States v. Tinoco*, 304 F.3d 1088, 1120 (11th Cir. 2002), and "[t]he district court possesses broad discretion to admit evidence if it has *any* tendency to prove or disprove a fact in issue." *United States v. Terzado-Madruga*, 897 F.2d 1099, 1117 (11th Cir. 1990) (emphasis added).

The Board of Medicine's complaint form states in bolded lettering that "[b]edside manner or rudeness of practitioners" is not a basis for lodging a complaint. The Firearm Owners' Privacy Act, however, makes "unnecessary[y] harass[ment]" an actionable basis for patient complaints—but only with respect to speech regarding firearms. As a result, the complaint form tends to prove that the statute created a content-based speech restriction targeting a particular disfavored subject matter. The complaint form also tends to prove that the Act changed the *status quo* regarding physicians' speech. *See* 6/13/11 Hearing Transcript (DE 19); Pl. Supp. Memo. 2–8 (DE 73). The form is therefore relevant and admissible.

Paragraphs 2 and 3: Defendants object to Paragraph 2 and 3 on the ground that "the matter asserted is not based on personal knowledge, is speculative, and is inadmissible opinion." Paragraphs 2 and 3 merely describe Plaintiffs' personal opinions that having a complaint filed against them or being called before the Board of Medicine could result in various harms, and because of this possibility, their speech has been chilled. Those opinions fall directly into the realm of admissible opinion testimony by lay witnesses. *See* Fed. R. Evid. 701:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Notably, Defendants do not offer actual evidence that would raise doubts about Plaintiffs' beliefs. If Defendants had wished to do so, they could have deposed Plaintiffs on these issues.

Defendants do not contest the following material fact in Paragraph 3: "Even if a physician believes that questions about firearms are relevant to a patient's care, the patient could file a complaint with the Board of Medicine. *See* Fla. Stat. § 456.073(1)." *See* PSSUF ¶ 3.

Because that fact was not controverted by Defendants, it should be deemed admitted. *See* S.D. Fla. Local Rule 56.1(b) (“All material facts set forth in the movant’s statement filed and supported as required above will be deemed admitted unless controverted by the opposing party’s statement, provided that the Court finds that the movant’s statement is supported by evidence in the record.”)

This 5th day of December, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 5, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF filing system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties on the Service List below in the manner specified, either via transmission of Notices of Electronic Filing generated by the CM/ECF system or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ Edward M Mullins
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