

ORIGINAL

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FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

HITENDRA B., individually and as parent and)
next friend on behalf of Chanse B., and)
FALGUNI B., individually and as parent and)
Next friend on behalf of Chanse B.,)
Plaintiffs,)

Civil Action No. 04-CV-79-D

v.)

ACCOR NORTH AMERICA, INC., a Delaware)
corporation, doing business as MOTEL 6, and)
DOES 1 THROUGH 20, inclusive)

Defendants.)

DEFENDANT'S SUPPLEMENTAL PRE-TRIAL MEMORANDUM

The Defendant, through its counsel of record, White and Steele, P.C., pursuant to the Court's Order, presents the following supplemental pre-trial memorandum.

(a) The Defendant believes the Court has jurisdiction of the parties and the subject matter in this negligence action.

(b) The Defendant believes the propriety of parties and the correctness of the legal identities are valid. There is no issue of mis-joinder or non-joinder of parties known to this Defendant.

(c) **Background**

This case involves claims by Plaintiff, C.B., for damages allegedly occurring as a result of the ingestion of a condom on May 26, 2003. The Plaintiff and his parents, H.B. and F.B., were overnight guests at Motel 6 in Casper, Wyoming, on May 25 and 26, 2003. As they were preparing to leave at approximately 10:00 a.m. on May 26, H. B. saw C.B. with something in his mouth. The father tried to remove the object but succeeded in removing only the ring portion of what appeared to be a condom. The remainder remained in the child's mouth. C.B. began to choke and then to cry. The entire event lasted less than 90 seconds.

Emergency medical personnel responded to the hotel, and C.B. was later admitted at the emergency room of the Wyoming Medical Center. At all times during admission, the child was calm and showed no sign of acute distress. An infectious disease specialist was consulted and gave the opinion that the chance of infection from the condom, even if it was used, was minimal. On January 8, 2004, blood tests were performed on C.B. which were positive for Hepatitis B surface antigens. Prior to that time and for that matter up to date, C.B. suffered no adverse effects from the choking nor did he exhibit any Hepatitis B symptoms. Follow-up blood testing was performed in October 2004 in Denver, Colorado pursuant to Court Order and follow-up blood tests were performed at the direction of Dr. Rose in Albuquerque, New Mexico. These two tests run in close proximity were negative for Hepatitis B establishing that C.B. never had the blood-borne Hepatitis B antibody, that he does not have Hepatitis B now and that he cannot develop Hepatitis B from this alleged exposure at the Motel 6.

Plaintiffs' experts have described C.B.'s medical condition currently as resolved transient Hepatitis B. They further will testify that based upon a reasonable degree of

medical probability, C.B. does not now have Hepatitis B and that he will never have chronic Hepatitis B from this incident. The expert testimony of Plaintiffs will also be that C.B. does not now suffer nor has he ever suffered from HIV infection. Defendant's expert will testify that C.B. probably never had Hepatitis B.

Factual Issues

1. Whether or not C.B. at any time since May 26, 2003, was infected with Hepatitis B.
2. If C.B. was exposed to Hepatitis B virus, the origin of that exposure.
3. Whether the condom allegedly found in Plaintiffs' motel room on the date in question was left by a preceding guest or by the Plaintiffs.
4. Whether or not the alleged condom was a "used" condom and whether or not it contained a Hepatitis B virus.
5. The claims of H.B. and F.B. for intentional and negligent infliction of emotional distress have been dismissed pursuant to the Court's Order of January 14, 2005. Consequently, the sole remaining damage claims are limited to plaintiff C.B.'s past medical expenses and future medical expenses, if any.
6. The damages of C.B. and the medical expenses of C.B.

(d) **Exhibits**

1. Incident Reports [Bates #s 00006-00007]
2. Employee Welcome Booklet [Bates #s 00008-00040]
3. Motel 6 Safety and Security Manual (relevant portions only, specifically, Chapter 1, section 2; Chapter 2, section 2; Chapter 7, section 1, pp. 1-5 and 9-10; Chapter 8, p. 1-4, 6 and 10; Chapter 12, section 3, p. 2; Chapter 17, p. 1-8 provided). [Bates #00041-00065]

4. Motel 6 Guidelines (relevant portions only, specifically, Chapter 1, Sections 1 and 2 provided). [Bates #s 00066-00098]
5. Workplace Safety training CD. [Bates #00099]
6. Motel 6 Housekeeping video. [Bates #00100]
7. Motel 6 "Welcome Orientation" CD. [Bates #00101]
8. Bloodborne Pathogen Employee Training and Vaccination Record of H.B. [Bates #s00102-00103]
9. Employee Training Acknowledgements of Kelly Wallace. [Bates #00104]
10. Employee Training Acknowledgements of April Orner. [Bates #001152]
11. Dr. Caplan's medical records
12. Dr. Caplan's prescription of June 5, 2003
13. Photo of room 131 of the Casper Motel 6. [Bates #s 00105]
14. Photo of room 131 [Bates # 00106]
15. Photo of room 131 [Bates #00107]
16. Housekeeping reports for May 18 through May 26, 2003 [Bates #s00902-00912; 00918-01121]
17. October 2004 Tricor blood test results [Bates #s 01082-01121]
18. Quest Diagnostic blood test, Albuquerque, New Mexico [Bates #s 00199-00201]
19. October 29, 2004 blood test ordered by Dr. Rose and performed by New Mexico University [produced by plaintiffs in F.B.'s answers to defendant's requests for production]
20. New Mexico medical records of Dr. Rose [produced by plaintiffs in F.B.'s answers to defendant's requests for production]

21. Summary of Ed Gallant cashed payroll checks [Bates #s00202]
22. Cashed payroll checks payable to Ed Gallant endorsed to H.B. [Bates #s00203-00227]
23. Duplicate copies of photographs taken by Michael W. Anderson at the time of his site meeting with Attorney John Scipione on October 7, 2004. (Bates #s 00228-00241)
21. Quality Measurement Results for Motel 6 #404, Casper, Wyoming for April 17, 2002, October 2, 2002 and April 30, 2003. [Bates #s 00807-00876.]
22. Diagram to be prepared by Garth D. Ehlich, Ph.D. to demonstrate his opinion that there was no exposure or incident based on the mathematical probability.

(e) Discovery has been completed. There may be some preservation depositions taken within the timeframe prescribed by the Court.

(f) **Witnesses**

1. Deana Barnes, 455 Trasher Court, Wilmington, North Carolina, who was the general manager of the Casper Motel 6. She will testify in regard to the cleaning procedures and training procedures of Motel 6. She will identify the one year of audit packs prior to this incident as well as the audit packs for the seven days leading up to the incident and will explain the audit pack contents and the housekeeping records. She will also testify as to her observation of the child, C.B., and the parents' demeanor. Her preservation deposition will be introduced into evidence.

2. Charlotte Travitz, Motel 6, 1150 Wilkins Circle, Casper, Wyoming, was

the guest services representative on duty the morning of the incident. She will testify in regard to the audit pack contents and Motel 6 procedures and how these records are used and kept.

3. Shawn Welsbacher, Motel 6, 1150 Wilkins Circle, Casper, Wyoming, is the area maintenance person who went to Room 131 and observed the parents, and he will testify in regard to their calm demeanor.

4. Connie Klotz, Motel 6, 1150 Wilkins Circle, Casper, Wyoming, is co-head housekeeper and she will testify in regard to her cleaning training procedures, including inspections, her observations on May 26, 2003 and that both parents seemed unconcerned and more embarrassed than distraught.

5. Malinda Harris, Motel 6, 1150 Wilkins Circle, Casper, Wyoming, was the co-head housekeeper in the timeframe leading up to May 26, 2003. She will testify in regard to the fact that on May 25th and before that date, she inspected Room 131 to ensure that it met Motel 6's quality and cleanliness standards, and that it is her custom and practice to look under every bed at the same time she is inspecting the rest of the room for cleanliness and that she would have seen and did not ever see a condom under the beds in Room 131.

6. April Orner, 1947 South McKinley, Casper, Wyoming, will testify that she is careful in her housekeeping responsibilities and that she, from the records, was the individual who cleaned Room 131 on May 25, 2003 and she believes there was no condom under the beds in Room 131.

7. Jeff Martella, 12856 South 1980 West, Riverton, Utah, who will testify in

regard to the fact that he was a former area manager for the Motel 6 where H.B. was employed. Mr. Martella will testify in regard to his termination of H.B.'s employment and the fact that H.B. told him that he might sue Motel 6 in regard to the condom incident. Mr. Martella will testify that H.B. was utilizing Ed Gallant as a ghost employee and that this was discovered on H. B.'s return from Casper, Wyoming.

8. Connie Holzworth, Motel 6, 9201 East Arapahoe Road, Greenwood Village, Colorado is a Motel 6 employee who will testify in regard to her being present during an interview with H.B. in June, 2003 when H.B.'s employment with Motel 6 was terminated.

9. Michelaine Jean-Phillipe, 15265 E. Chenango Avenue, Aurora, CO 80015 who will testify that Ed Gallant did not perform the jobs for which he was paid at the Arapahoe Road Motel 6 in Colorado and that he did not perform maintenance work, night audit work and that he did not perform the amount of work for which he was paid by Motel 6 as authorized and under the supervision of H.B.

10. Dr. Thomas Winters, 1601 Trapello Road, Waltham, Massachusetts, the plaintiffs' expert, has testified and the Plaintiffs have stipulated to the fact that C.B. does not currently, nor will he in the future, have Hepatitis B symptoms or the illness, nor HIV symptoms or illness.

11. Dr. Souverin, Wyoming Medical Center, 1233 East Second Street, Casper, Wyoming, who will testify that he spoke to emergency room doctor, Dr. Iverson, and told him that it was unlikely that C.B. would be infected from that alleged contact due to the ingestion of the condom

12. Dr. Edward L. Rose, University of New Mexico, Carrie Tingley Hospital, 1127 University Blvd., NE, Albuquerque, New Mexico, Associate Professor of Pediatrics, Pediatric Gastroenterologist and treating doctor for C.B., who will testify that it would be unusual to acquire Hepatitis B from oral exposure to an infected material and as to his statement that nevertheless it would be possible and it is conceivable that one could contract the disease and then resolve it spontaneously. It is Dr. Rose's opinion that the blood tests done October 29, 2004 at his request are non-reactive and that C.B. does not have Hepatitis B as confirmed by the Court-ordered blood tests in October, 2004 and by Dr. Rose's testing.

13. Garth Ehrlich, Ph.D, 3319 Beechwood Boulevard, Pittsburgh, Pennsylvania. Dr. Ehrlich has a Ph.D. in human retrovirology from Syracuse University. He will give his opinions as expressed in his expert report. He will testify as to the length of time the Hepatitis B virus can exist outside the human body, including the half life of Hepatitis B virus. He will testify as to the incidents of Hepatitis B virus infection by age group, nation-wide and State of Wyoming and in the Shoshoni, Wyoming area. He will testify as to the improbability of Hepatitis B virus being present in the alleged condom and the improbability statistically of plaintiff being infected through oral ingestion of the alleged condom. He will testify as to the improbability that a vaccinated individual would be infected by Hepatitis B virus. He will testify as to the potential percentage of false positives returned in blood tests for Hepatitis B virus. It is Dr. Ehrlich's opinion that the child will not need blood testing for the hepatitis in the future.

In addition to his testimony on Hepatitis B, Dr. Ehrlich will further testify as to the statistical improbability of C.B. becoming infected by HIV and will testify as to the

half life of the HIV virus. Dr. Ehrlich may also be used to testify in rebuttal to plaintiffs' experts.

14. Terry Kirkum, 4130 North Black Canyon Highway, Phoenix, AZ 85717, former Area Manager for this Casper Motel 6 and current Motel 6 Area Manager for other properties who will testify in regard to the recordkeeping of Motel 6, his observations of Deana Barnes and his observation that Deana Barnes ran a very clean and proficient Casper Motel 6.

15. Tim Holzer, Wyoming Medical Center EMS, 1233 East Second Street, Casper, Wyoming, who responded to the 911 call on May 26, 2003 and will testify that he did not see any part of the condom and that the parents' demeanor was calm.

16. Stacy Jenne, Wyoming Medical Center EMS, 1233 East Second Street, Casper, Wyoming, who responded to the 911 call on May 26, 2003 and will testify that she did not see any part of the condom and that the parents' demeanor was calm.

17. Dr. Ronald Iverson, Wyoming Medical Center, 1233 East Second Street, Casper, Wyoming, the emergency room doctor who examined C.B., who will testify that he observed no symptoms and the fact that he called Dr. Souverin and conveyed to the parents Dr. Souverin's feeling that it was very unlikely that, because of the nature of the incident, there would be infection from that contact.

18. Nurse Karen Dutton, Wyoming Medical Center, 1233 East Second Street, Casper, Wyoming, observed C.B. and examined him and found no symptoms and was never told of and never saw any part of the condom.

19. Nurse Kay Herndon, Wyoming Medical Center, 1233 East Second Street, Casper, Wyoming, observed C.B. and examined him and found no symptoms and was never told of and never saw any part of the condom.

20. Susan Judy, 7310 South Tamarac Court, Centennial, Colorado, who will testify that she stayed in Room 131 on May 21, 2003 and checked out on May 22, 2003. She did not use a condom, does not have Hepatitis B and found the room to be clean.

21. Mr. and Mrs. George Herman, 4212 Cooper Lane, Cody, Wyoming, . This couple will testify they were 70 years old at the time of their stay in Room 131 the night before the B's stayed in that room, do not have Hepatitis B, do not use condoms and they felt that this room was clean and they had no complaints about the cleanliness of this room.

22. Dr. Murray Caplan, 7336 South Yosemite, Englewood, Colorado whose preservation deposition will be shown to the jury. Dr. Caplan will testify that his physician's assistant took the history the day after the incident that Chanse swallowed a used condom. Children's Hospital in Colorado was contacted as to the type of tests that would be required. When the family came to see Dr. Caplan on June 5, 2003, he felt that the child was in good health with no apparent medical problems. After the examination, Dr. Caplan asked his nurses to draw blood and was advised that there was difficulty in getting a sufficient amount of blood. He and his nurses told the family to return after lunch to see if more blood would be needed. Dr. Caplan will testify that the family never returned to obtain a prescription for a blood draw for their use at Children's Hospital or with their own doctors in New Mexico. Dr. Caplan states in his medical opinion that he

thinks with the 98 percent immunization effectiveness of hepatitis inoculations and given the fact that there are two negative blood tests in October and November, 2004, the child is “out of the woods” and does not have Hepatitis B. Dr. Caplan will testify that when he spoke to Mr. Bhakta two or three weeks after the blood draw, he was perturbed about the fact that the Bhaktas never came back but that he may or may not have mentioned that to Mr. Bhakta.

(g) **Laws Involved**

This Defendant believes the statutory and case law of the State of Wyoming will govern this case.

(h) **Amendments and Pleadings**

None.

(i) The Defendant has received a copy of Plaintiffs’ Pre-Trial Memorandum which appears to limit the issue of damages to “permanent stigma of Plaintiff as Hepatitis B carrier.” The Defendant assumes the Plaintiff referred to is C.B. and that the only potential damage would be future stigma which may attach to the alleged positive Hepatitis B test of January, 2004. Defendant is currently researching the viability of this claim and may submit special interrogatories thereon.

(j) The Defendant may file a trial brief of the alleged stigma of Plaintiff as an alleged Hepatitis B carrier.

(k) There probably will be a need on the verdict form to address the issue of non-parties (the Bhaktas), the origin and condition of the alleged condom, if any, and whether or not Plaintiff sustained damages because of the alleged stigma attached to being an alleged Hepatitis B carrier.

(l) **Settlement Possibilities**

Settlement appears remote at this point.

(m) Not applicable.

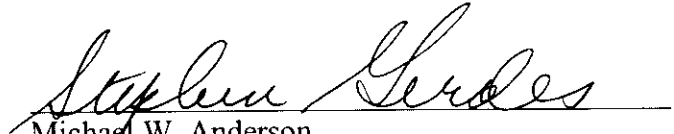
(n) It is Defendant's understanding from Plaintiff's Pre-Trial Memorandum that their only items of damages will be the alleged stigma attached to being an alleged Hepatitis B carrier.

Pending Motions

This Court has pending motions in regard to spoliation of evidence. Magistrate Judge Beaman has motions to extend discovery and defendant's motion to strike the expert testimony of Dr. Winters and plaintiff's liability expert.

Respectfully submitted this 4th day of February, 2005.

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ATTORNEYS FOR DEFENDANT
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CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 4th day of February, 2005, a true and correct copy of the foregoing was sent via First Class Mail, postage prepaid, addressed to the following:

Robert G. Pickering
Stephen Jouard
Ray, Jouard & Pickering, P.C.
2038 Caribou Drive, Suite 100
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Daniel J. Caplis
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A handwritten signature in cursive script, appearing to read "Stephen Jouard", written over a horizontal line.