

(My copy)

Michael Elberg
C57634
SOC Prison #406
12 Administration Rd.
Bridgewater MA
1/02304
J-28-01

Clerk - U.S. D.C. Mass.
1 Court Street Way
Boston, Mass. 02101

RE: Elberg v. Skeletor 98-1063 MCA

Dear Clerk:

Please find for immediate filing and review

"Plaintiff's Reply to Defendant's Opposition"

Thank you.

With thanks

(2) United States District Court
for the
District of Massachusetts

Elbery

Civil Docket
98-10163MGLA

Stekeloff et al.

Plaintiff's Reply
to
Defendant's Opposition
to
Plaintiff's Motion for Summary Judgment

The plaintiff submits this Reply to the Defendant's Opposition to the Plaintiff's Motion for Summary Judgment. It was the plaintiff's intent to submit this Reply and argue the issues, herein, at the 2-26-01 hearing that was held on this case's Summary Judgment but the plaintiff was not allowed to attend in violation of Due Process of Law.

I. Timing of Standard of Care - "Matter of Law"

Per the defendant's Opposition to this Plaintiff's Motion for Summary Judgment their only argument against this plaintiff's malpractice count is that the plaintiff must provide an expert witness to testify as to the standard of care which Shekett should have taken regarding defense of the underlying gun charges.

The plaintiff presents the following Mass. law to show the issue of the finding of the Standard of care Shekett should have taken is "an issue of law" per the Mass. Rules of Criminal Procedure.

Per M.R.C.P. - Rule 13c2 a defendant should raise a defense or objection which is capable of determination without trial of the general issue before trial by motion. Blumenson, Mass. Criminal Practice, Vol. I s. 152c p. 371 ('78).

As a result, contrary to what the defendant states in his Opposition and Motion for Summary Judgment, the standard of care that Shekett should have taken regarding the defense of

this plaintiff in the underlying criminal gun case was to obey this plaintiff's orders, see plaintiff's Motion for Summary Judgment, p. 47, and immediately present the plaintiff's F.T.D. and Motion for a dismissal.

This plaintiff, via his Supplemental Motion for Summary Judgment, has already set out additional reasons why the "Standard of care" for Skeletor regarding the defense of the underlying gun charges should be decided by the Court as a matter of law.

As above, Standard of care, as well as, its timing are issues of law in this case to be decided by the Court. Mullen & Smith, Vol. 4 p. 182 (R) (Issues of law are decided by the Court).

H. Sheketoff's Admissions - No Need for Expert

Per the plaintiff's Motion for Summary Judgment I-C-2-e and Ex-D, Sheketoff stated in Worcester Superior Court that this plaintiff "was not guilty of the underlying gun charges because he had a valid F.I.D." Sheketoff, as a result, provides no dispute for trial regarding the issue of standard of care to prove his negligence at trial. Sheketoff, in essence, agrees with the plaintiff that he should have followed the plaintiff's orders, as per p. 47 of the plaintiff's Motion for Summary Judgment, to present this plaintiff's F.I.D. to dismiss the charges.

Gross & Obvious Exception

In addition, by making those "Sheketoff statements," as above, on 8-10-94 at the Bail Revocation Hearing, Sheketoff is agreeing with the verdict of not guilty on the gun charges by Worcester District Judge-Zide.

The basis for this plaintiff's claim that no expert is needed to testify to the standard of care, due to the 1st Circuit's "gross and obvious exception" is that had Sheketoff followed the plaintiff's orders (presented the F.I.D. to the judge as early as possible) the gun charge would have been dismissed as a "matter of law" due to Judge Zide's not guilty finding. The only procedure taken at that trial before Zide was to present proof of the plaintiff's valid F.I.D. at 8-5-99, See Ex. C to plaintiff's Summary Judgment and p. 3.

Plaintiff will introduce "Sheketoff Statements" as Expert testimony & show "Gross and Obvious" Standard of Care.

Further, the plaintiff can use those "Sheketoff Statements" as expert testimony to support his claim of malpractice due to negligence against Sheketoff, Sheketoff by making these "Sheketoff Statements" of

(6)

play had no fit of cold.
 changes of tissue by prevent this process
 play was found not guilty of the
 most of common Judo, that the
 heat & a decomposition, ex. B. of the play
 plain heat and the former a hollow, hollow
 would be followed by the Judo by this
 evidence of the effects of the effects,
 as above, and played off the fit of
 should have followed the plain heat, or
 of care is in this case, or the heat
 only how "good and obvious," the standard
 shape of fit as a sufficient also of show a
 both this our direct testimony and by calling
 "shape of fit of part," of 8-10-99 through
 the plain heat will interfere these
 in passing.

will be called as a fit of the plain heat
 the defense of the our charges, shape of fit
 care that should have been before regarding
 expert (but a hollow) of the standard of
 8-10-99 is in essence to justifying as a

7

Shektoft Cannot Present Expert Testimony

By making the above "Shektoft statements" at Worcester Superior Court on 8-10-94, Shektoft supports this plaintiff's position as to the verdict and standard of care and to M.G.L.C. §69 10a & 10b at 1994. Shektoft cannot introduce expert witness testimony contrary, as planned, to those "Shektoft statements."

Shektoft's Expert Affidavits Must Be Stricken

Shektoft's affidavits #36-37 in support of his Motion for Summary Judgment and any other affidavits purporting to be expert evidence as to standard of care must be stricken. Shektoft cannot present these affidavits because they are contrary to his "Shektoft statements," as above. Therefore

8

Shobert presents no dispute as to his standard of care in this case.

Judicial Notice

The plaintiff will request Judicial Notice on M.R.Cr.P. 13c2 and M.G.L. (c. 269) 10a & 10b and supporting cases regarding the facts of the underlying gun case. Mass. Practice Vol. 17B S. 1630 p. 116 (judge is required to take judicial notice of Mass. General laws).

(8)

III. As a "matter of law" a layman's (juror's) everyday knowledge and experience is enough to recognize Shekloff's "Standard of care" and breach to determine negligence and causation.

Almost a million citizens had licensed guns in Mass. in 1984 and they were presumed by the government to understand the gun laws. They were expected to know what to do if they were in the same position as Elberg found himself at E-2 on 8-5-84. Just as Elberg ordered Shekloff, the average citizen was presumed to know that under the same set of facts Elberg faced at E-2 on 8-5-84 (guns in a garage under their exclusive control) all that was legally required ^{was} ~~was~~ to present an FID card. The government presumed that faced with the same set of facts, as above, the citizenry would know they were violating no law and that an FID was only required.

Shekloff, via his representation of Elberg on 8-5-84 put himself in Elberg's position and was required, like a citizen,

to know that Elbony was violating no
law and all that was required under the
circumstances at Elbony was to present
the FID or if arrested falsely alert
the court of jurisdiction to the FID.

As a result the jury is presumed by
Mass. law to be able to recognize the standard
of care in this instant case and its breach,
in order to determine negligence and if
necessary causation (as per the plaintiff's
motion for Summary Judgment causation should be one
of law for the court).

The question in this instant case is
not what a juror would understand
about the law and facts of this but
why Shekett did not know.

IV "Gross & Obvious" - Elbery v. Wagenmann

The Wagenmann case (Wagenmann v. Adams 889 F² 196, 219 (1st Cir. '87)) establishes the U.S. 1st Circuit's standard for determining the exception to the need for an expert witness in a legal malpractice case. The U.S. 1st Circuit gave various factual reasons that surrounded Attorney Healy's representation of Wagenmann that caused them to decide a jury could rely on their "common knowledge and experience" to recognize negligence rather than requiring an expert witness.

The malpractice facts a jury would be faced with in this instant case, Elbery, are much more "grossly obvious," narrower, and exact than the ones in the Wagenmann case.

There are many similarities, both Elbery and Wagenmann were targets of Worcester State actors' conspiracies. Below is a comparison of the factual issues of the two cases that show Elbery's

case to be much easier for a jury to understand as to the issue of standard of care and breach.

Time

Attorney Healy (Wagenmann's counsel) represented, via court appointment, Wagenmann less than a day. This compared to Elberg when Shekoff represented him for a fee for a duration of 3 months.

Wishes v. Orders

Wagenmann wanted a hearing before Worcester's Judge Libby regarding his mental competency that Dr. Meyerson found adequate. Healy declined to ask for the competency hearing and Wagenmann remained in jail about a day.

Elberg, as per his Motion for Summary Judgment, presented Shekoff with numerous orders, repeatedly, that it obeyed.

would have resulted in dismissal of the charges against Elberg, immediately, as a 'matter of law.' Instead Elberg was ticked by Shekoff to stay in jail 8 months.

Twig's Standard of Proof

The U.S. 1st Circuit allowed the jury to find "more likely than not" that had Attorney Healy applied for a competency hearing and had Dr. Meyerson testify that Judge Luby would have released Wagenmann. This determination in light of the Worcester P.D. conspiracy which would have obliged the corrupt Judge Luby to keep him in jail.

The jury was allowed to probe Judge Luby's mental process which is strictly forbidden. Glen v. Aiken, 409 Mass. 699, 569 NE² 783 ('91).

Elberg's case is much more obvious for a jury to understand for ③ reasons,

- Shekoff per his statement (Shekoff

Statements") of 8-10-94 at Worcester Superior Court, per plaintiff's Motion for Summary Judgment I-C-2-e, p 13, instructs a jury exactly what Shekettoff should have done regarding the defense of Elberg. The jury would be informed by the expert witness Shekettoff that due to Elberg having a valid F.I.D. on 8-5-94 that Elberg was innocent of the charge. Shekettoff confirms he knew that Elberg had a valid F.I.D. because he saw it.

2. Elberg ordered Shekettoff, repeatedly, to take certain actions that would have resulted in an immediate dismissal and Shekettoff admits to these orders. Amongst those "Elberg orders" was for Shekettoff to present the F.I.D. and get the gun charges dismissed as a "matter of law".
3. Elberg was found not guilty at trial by a judge as a "matter of law" on the underlying gun charges, after hiring a

now lawyer by exactly the same procedure Elberg ordered Skelton to take - Present the F.I.D. license to the judge. See plaintiff's Motion for Summary Judgment for #s 2 and 3.

"Standard of Care" & Breach

The above ③ pieces of evidence can be introduced to the jury by this plaintiff and would be "grossly obvious" that Skelton breached his Standard of care and was negligent. There would be nothing to guess there would be no defense as above, it was all decided by a Worcester Judge in '95 for the jury. In fact, "Standard of care" and breach should be decided by the Court in this instant case since it's an "issue of law".

Mike power
Nichael Elberg
SPLC Lawyer

12 Administration Rd.
Bridgeport, Ct. 06604 (B)

16

Certificate of Service

I the plaintiff, Michael Elbery, sent this 'Reply-Toff' to the Clerk - U.S.A.T.C.
Mass., 1 Cornhill Way, Boston, Mass.
02110 via U.S. First Class (again certified
mail) and to Attorney Daigler via 1st
class U.S. mail at 101 Harrison St.,
Boston, Mass. on on 2-28-01 pre-paid
from SECC Prison.

Will pay

I certify under the pains & penalties of perjury the above is true and correct
on this 28th day of February, 2001.

Michael Elbery

Sent Clerk 7099 3400 0010 7041 6364
⑧ 1st class mail

(2)