UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: OTERO COUNTY HOSPITAL ASSOCIATION, INC., No. 11-11-13686 JL

Debtor.

	)	Misc. Proc. No. No. 13-00007
	)	(consolidated adversary proceedings)
Specifically, the following plaintiffs:	)	
	)	
EDNA O. CHAVEZ and JOHN I. CHAVEZ,	)	Adv. No. 12-1219
MARIE COYAZO,	)	Adv. No. 12-1208
JAMES CROSS and WANDA CROSS,	)	Adv. No. 12-1211
MARJORIE CURTIS,	)	Adv. No. 12-1222
JUDY ANN FERGUSON and OTIS FERGUSON,	)	Adv. No. 12-1278
DALE FOX and PHYLLIS FOX,	)	Adv. No. 12-1223
DARRELL GILMORE and SUSAN GILMORE,	)	Adv. No. 12-1220
MELISSA MACKECHNIE,	)	Adv. No. 12-1216
JOHN O'BYRNE and LAVERNE O'BYRNE,	)	Adv. No. 12-1218
BARBARA OLSON,	)	Adv. No. 12-1278
ESTATE OF SUSAN SCHWARZENEGGER,	)	Adv. No.12-1242
JAMES ROGERS, as Personal Representative of	)	Adv. No. 12-1245
The Estate of DAVID WARDEN,	)	
MARILYN WHITELEY and	)	Adv. No. 12-1247
RONALD WHITELEY	)	

v.

QUORUM HEALTH RESOURCES, LLC,

Defendant.

ORDER DENYING MOTIONS TO RECONSIDER

The members of the United Tort Claimants[1] against whom the Court entered summary judgment on June 30, 2015, who are the Plaintiffs in the adversary proceedings listed in the

[1] The United Tort Claimants ("UTC") consist of all plaintiffs in the adversary proceedings, including those identified in the caption above, that were consolidated for purposes of conducting the trials on certain elements of the UTC's claims common to all adversary proceedings. *See* Order Establishing master Docket for Consolidated Matters ("First Consolidation Order") – Docket No. 1; Order Consolidating Adversary Proceedings for 1) a Trial on Causation and Comparative Fault Issues; 2) Certain Pretrial Discovery; and 3) Certain Pretrial Matters Relating to Damages ("Second Consolidation

above caption (together, the "Movants"), request the Court to reconsider those summary judgments granted in favor of Defendant Quorum Health Resources, LLC ("QHR"). The Court concluded in its Memorandum Opinion and Order Granting, in Part, and Denying, in Part, Quorum Health Resources, LLC's combined Motion for Summary Judgment and Statement of Facts ("Order") that QHR's breach of duty could not have caused harm to any member of the UTC whose medical procedures at the Hospital occurred before July 21, 2007. *See* Memorandum Opinion, pp. 12 – 13. Docket No. 344.

PROCEDURAL HISTORY

In thirteen adversary proceedings Movants assert various negligence claims against QHR under New Mexico tort law. The Court consolidated those and other adversary proceedings for purposes of conducting separate trials on different elements of the claims. The applicable case management order, to which all parties consented, provided that the first trial was limited to Corporate Liability issues, as defined in an Order Resulting from Hearing on Motion to Establish Discovery and Case Management Procedure. *See*, *e.g.*, Adversary Proceeding No. 12-1204 – Docket No. 44.[2] At the request of the parties, the Court also decided at the first trial (hereafter, the "Corporate Liability Trial") whether the doctrine of joint and several liability or the doctrine of comparative negligence applies. A second consolidated trial on the causation element of the UTC's negligence claims (the "Causation Trial") is scheduled to begin on October 19, 2015

After the conclusion of the Corporate Liability Trial, the Court entered an Amended Memorandum Opinion and Order on March 18, 2015 (Docket Nos. 286 and 287). The Court determined that the Corporate Liability issues consisted of the duty and breach of duty elements

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Order") – Docket No. 297. The UTC includes the Movants as well as plaintiffs in other adversary proceedings consolidated under Misc. Proc. No. 13-00007.

[2] An identical Case Management Order was entered in each of the forty-seven adversary proceedings initiated upon removal of the individual state court lawsuits.

of UTC's negligence claims. Amended Memorandum Opinion, pp. 3 – 4. The causation and damages elements of the claims were reserved for later trials, except for the issue of whether the doctrine of joint several and liability or the doctrine of comparative negligence applies. *Id.*

The Court decided based on evidence and argument at the Corporate Liability Trial that QHR owed a duty of care to UTC, and breached that duty of care in two, and only two, respects. First, QHR breached its duty when the QHR-employed chief executive officer of Gerald Champion Regional Medical Center (the "Hospital") granted temporary privileges to Dr. Christian Schlicht to perform procedures on the Hospital's patients. Second, QHR breached its duty in reacting to a July 21, 2007 letter written by Dr. Schlicht responding to Dr. David Masel's assertion that Dr. Schlicht was performing experimental surgery on the Hospital's patients by: 1) failing to inform the Hospital's board or its executive committee of the experimental surgery assertion made by Dr. Schlicht's proctor, Dr. Masel; 2) failing to involve the Hospital's medical staff by requesting the Hospital's Medical Executive Committee ("MEC") to conduct a focused review of Dr. Schlicht pursuant to the Hospital's Medical Staff Bylaws; and 3) failing to inform the Hospital's board or its executive committee that such a request had been made. *See* Amended Memorandum Opinion, pp. 80 – 81 and 92. The Court also found that Dr. Schlicht did not perform any procedures on any members of the UTC under his temporary privileges. *Id.* at 77.

Following issuance of the Amended Memorandum Opinion, QHR filed a combined motion for summary judgment with respect to the claims of: 1) members of the UTC whose medical procedures were performed at the Hospital before July 21, 2007; and 2) members of the UTC who did not undergo percutaneous disc arthroplasty, also referred to as PDA. *See* Docket No. 317. In their Response, Movants requested an extension of time under Fed.R.Civ.P. 56(d),

made applicable by Fed.R.Bankr.P. 7056, to conduct additional discovery on causation issues in order to be given a meaningful opportunity to put material facts in genuine dispute. *See* Docket No. 334. The Court denied the Rule 56(d) motion and entered summary judgment against each Movant. *See* Docket Nos. 344 and 345.[3] Movants then timely filed motions to alter or amend the judgments, pursuant to Fed.R.Civ.P. 59, made applicable by Fed.R. Bankr.P. 9023, each entitled Motion for Reconsideration of Final Judgment. [4]

STANDARD FOR CONSIDERING A MOTION TO ALTER OR AMEND JUDGMENT

Movants request the Court to alter or amend the judgments, or, in the alternative, to grant a new trial, pursuant to Fed.R.Bankr.P. 9023 and Fed.R.Civ.P. 59. A motion seeking to alter or amend a judgment entered by the bankruptcy court or for a new trial before the bankruptcy court, pursuant to Fed.R.Civ.P. 59, must be filed within fourteen days after the date of entry of the judgment. *See* Fed.R.Bankr.P. 9023 (making Fed.R.Civ.P. 59 applicable to bankruptcy cases and providing that "[a] motion for a new trial or to alter or amend a judgment shall be filed . . . no later than 14 days after entry of judgment."). The Motions for Reconsideration were timely filed within 14 days after entry of the judgments.[5] Although styled Motions for Reconsideration instead of motions to alter or amend judgment, the motions are in fact motions to alter or amend and will be treated as such.[6]

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[3] Separate judgments were entered in each of the Adversary Proceedings identified in the caption above. *See, e.g.,* Adversary Proceeding No. 12-1219 – Docket No. 62.

[4] *See* Docket Nos. 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, and 396 (together, the "Motions for Reconsideration").

[5] The judgments were entered on June 30, 2015. The Motions for Reconsideration were filed on July 10, 2015.

[6] Movants alternatively request that "a new trial on the Motion for Summary Judgment should be granted . . . " *See, e.g.,* Motion for Reconsideration, p. 2 – Docket No. 396. In their prayer for relief, Movants pray "in the alternative, [that the Court] grant a new trial, so that the unresolved factual and legal issues can be properly resolved and that a judgment can be entered that conforms with all factual and legal issues which they are properly entitled to present before the court." *Id.* at p.3. The purpose of a motion

Appropriate grounds upon which a court may grant a request to alter or amend a judgment pursuant to Rule 59 include "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citation omitted). A motion to reconsider made pursuant to Rule 59 is also "appropriate where the court has misapprehended the facts, a party's position or the controlling law." *Id.* A Rule 59 motion "is not appropriate . . . to advance arguments that could have been raised in prior briefing." *Id.* (citation omitted). In other words, a Rule 59 motion is an "inappropriate vehicle[] . . . when the motion merely advances new arguments[.]" *Id.*[7] With these standards in mind, the Court will review the Motions for Reconsideration.

DISCUSSION

Movants assert two grounds in support of their Motions for Reconsideration. First, they argue that there exists a disputed and unresolved fact issue as to when Dr. Masel sent his letter asserting that Dr. Schlicht was performing experimental surgery on patients at the Hospital and when the Hospital received such letter so as to put QHR on notice of the experimental surgery assertion. Second, Movants argue that they were prevented at the Corporate Liability trial from presenting expert testimony regarding why the QHR-employed chief executive officer's grant of

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for summary judgment is to decide a dispute *without* the need for a trial. *See* 10A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure §2712 (3d ed. 1998) ("The summary-judgment procedure authorized by Rule 56 is a method for promptly disposing of actions in which there is no genuine issue as to any material fact or in which only a question of law is involved. Thus, parties need not wait until a case is fully tried but may seek a final adjudication of the action by a motion under Rule 56."). That is precisely what QHR did – it requested summary judgment *before* the Court tried the remaining elements of Movants' negligence claims. Because the Court granted QHR's motion for summary judgment, finding no material fact requiring a trial, the alternative relief Movants seek is simply unavailable.

[7] *See also In re Sunflower Racing, Inc.*, 223 B.R. 222, 223 (D.Kan. 1998) ("A party cannot invoke Rule 59(e) to raise arguments or present evidence that should have been raised in the first instance . . .").

temporary privileges to Dr. Schlicht was causally related to the injuries Movants suffered. Movants state they understood this testimony would be presented at the Causation Trial.

A. When QHR first learned of Dr. Masel's assertion has already been litigated

Movants assert that fact issues remain to be litigated at the Causation Trial regarding when QHR was first put on notice of Dr. Masel's assertion that Dr. Christian Schlicht was performing experimental surgery on patients at the Hospital. Movants maintain that these fact issues were not resolved by the Corporate Liability Trial, and that evidence of when QHR was so put on notice bears directly on whether Movants' claims are casually related to QHR's breach of duty found by the Court.

In some sense, all evidence of breach of duty bears on causation, for if there is no breach of a duty, there necessarily cannot be a breach of duty that caused harm. However, the relationship between a breach of duty and causation does not mean that in a bifurcated trial on the issues of duty and breach of duty, all fact issues can be re-litigated in the causation phase of the trial.

To establish breach of duty on the part of QHR in how it reacted to Dr. Masel's assertion that Dr. Schlicht was performing experimental surgery, Movants needed to show when QHR became aware or should have become aware of that assertion. If QHR did not learn of Dr. Masel's assertion until after Dr. Schlicht performed a medical procedure on a Movant, then QHR necessarily could not have breached a duty to that Movant by how it responded after gaining such knowledge.[8] When QHR first became aware of Dr. Masel's experimental surgery assertion was, therefore, at issue in the Corporate Liability Trial.

[8] The Court used July 21, 2007, the date on the letter addressed to "administration" sent by Dr. Schlicht as his second response to Dr. Masel's letter (the "July 21, 2007 Letter"), as the cut-off date for the UTC's claims, concluding that QHR's breach of duty relating to the July 21, 2007 Letter could not have caused

This conclusion, that when QHR first became aware of Dr. Masel's experimental surgery assertion was at issue in the Corporate Liability Trial, is further supported both by the pre-trial order and the evidence elicited at the trial. In the Pre-Trial Order for the Corporate Liability Trial, the UTC identified the following fact issues for trial relating to QHR's knowledge of Dr. Masel's assertion:

> QHR negligently failed to act upon, and negligently failed to investigate, the professional peer evaluation/complaint regarding Schlicht submitted on July 10, 2007 by Schlicht's board-approved proctor, spine surgeon Dr. David Masel.
>
> QHR negligently failed to inform the Hospital Board and others, about the negative "one-year evaluation" submitted on July 10, 2007 by Schlicht's board-approved proctor, spine surgeon Dr. David Masel.
>
> QHR negligently failed to communicate to the Hospital Board, or any other Hospital groups, that Schlicht's proctor, Dr. David Masel, had informed QHR by letter that Schlicht was performing "experimental surgery."
>
> QHR negligently failed to inform the Hospital Board that the reason QHR fired Ms. Sue Johnson-Phillippe, a QHR employee who served as the Hospital CEO, on Friday, July 13, 2007, was because of proctor Dr. David Masel's letter earlier that week that Schlicht was performing experimental surgery.
>
> Less than 2 months after neurosurgeon Masel's allegation of "experimental surgery" being done at the hospital, and the challenge by Molina Healthcare regarding the actions of Dr. Schlicht, QHR failed to have a proper clinical investigation into the procedures. All of these actions were done by the QHR CEO and CFO at GCRMC.
>
> Pre-Trial Order, pp. 5-6, ¶¶ U, V, W,Y, and Z – Docket No. 224.

QHR also placed the question of who knew of the assertion of experimental surgery at issue in the Corporate Liability Trial:

> The medical staff leadership were aware of Dr. Masel's allegations regarding Dr. Schlicht in 2007.
>
> Pre-Trial Order, p. 18, ¶ T – Docket No. 224.

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any injury to members of the UTC whose medical procedures occurred before that date. *See* Memorandum Opinion, p. 11 – Docket No. 344.

Consistent with the Pre-Trial Order, Movants' counsel, Greg W. Coates,[9] questioned Sue Johnson-Phillippe, the QHR-employed Chief Executive Officer ("CEO") of the Hospital, about whether and when she learned of Dr. Masel's experimental surgery assertion:

Q: Dr. Masel—it wasn't Dr. Schlicht's letter. It was Dr. Masel's letter that got in on Tuesday—or sorry, it was dated Tuesday, July 10, 2007 and we can look at the response letter from Schlicht to know that Dr. Masel was accusing Dr. Schlicht of quote "performing experimental medicine", right?

A I didn't see that at the time.

Q You've seen that letter since, haven't you?

A Well I don't even think I read it, I saw of it, yes.

Q Okay. And that is—July 10 is three days before you were—you either immediately resigned or were fired, depending on who you believe right?

A Well I hope you believe me.

Q Well just there's different answers, and I'm not the finder of fact.

A Okay

Q Okay

A I get it.

Q So your testimony is that you had no idea before you left—

A No.

Q -- that the proctor for Dr. Schlicht had accused him of—

A No.

Q -- experimental behavior. Is that right?

A No, I did not.

Corporate Liability Trial Transcript, September 9, 2014, 124:15 – 125:14.

[9] At the Corporate Liability Trial, counsel for members of the UTC worked as a team by entering their appearances for all members of the UTC and dividing responsibility for representing the interests of all members of the UTC at trial. For example, only one counsel for the UTC examined or cross-examined each witness.

Similarly, excerpts from Sue Johnson-Phillippe's deposition dated March 29, 2013 ("SJP Deposition") admitted into evidence at the Corporate Liability Trial reflect the following testimony concerning QHR's knowledge of any concerns related to Dr. Schlicht given in response to questions posed by Mr. Coates:

> Q. Did you at any point before you left tell the Regional Office of any concerns you had regarding Dr. Schlicht?
>
> A. No. And to re-answer the prior question, did I have any concerns? No.
>
> Deposition of Sue Johnson Phillippe, p. 62, lines 4 – 9.
>
> Q. Are you aware that Dr. Masel wrote a letter to somebody within Gerald Champion and used the wor[]d "experimental" to talk about what Schlicht was doing?
>
> A. No.
>
> SJP Deposition, 346: 9 - 13.
>
> Q. Okay. Let's talk about Exhibit 79. This is Dr. Schlicht's letter to Administration, and it's dated shortly after you left; right?
>
> A. That's right
>
> Q. But it says it's from Dr. Schlicht to Administration at Gerald Champion. That's you; right?
>
> A. It wasn't – no. It was after I left.
>
> . . . .
>
> Q. Ok. This says, "Dear sirs, This is the second part of my response to Dr. Masel's allegations and deals with my business relationship with him as well as his claims that I am not a spine specialist and perform, quote, "experimental surgery," end quote. Do you see that?
>
> A. That's what it says. Yes, I see that.
>
> Q. The first part of this response had already come to you before you left, hadn't it?
>
> A. I don't recall, I honestly don't.
>
> Q. No idea at all; is that right?

A. I am telling you I don't recall.

. . . .

Q. I have not been provided the first part of this letter, which is why I'm asking you these questions. And you don't remember seeing it either?

A. No.

SJP Deposition, 376: 8 – 16; 376: 21 – 25; 377: 5 – 9; and 377: 20 – 24.

James Richardson, the QHR-employed CEO of the Hospital who succeeded Ms. Phillippe, began his employment as interim CEO of the Hospital on July 19, 2007. *See* Amended Memorandum Opinion, p. 38. The Court found, based on evidence admitted at the Corporate Liability Trial, that the issue concerning whether Dr. Schlicht was performing experimental surgery on patients of the Hospital first came to Mr. Richardson's attention "within a few days after he became interim CEO." Amended Memorandum Opinion, p. 39.

In determining that QHR breached its duty to members of the UTC by how it reacted to Dr. Masel's experimental surgery allegation, the Court fixed the date of the breach at no earlier than the July 21, 2007 date of Dr. Schlicht's *second* response to Dr. Masel's experimental surgery allegation. Amended Memorandum Opinion. pp 41-45, and pp. 78 -82. There was no evidence presented at the Corporate Liability Trial that QHR learned of Dr. Masel's allegation until Mr. Richardson learned of Dr. Schlicht's *second* response.

In sum, the issue of when QHR first became aware of Dr. Masel's experimental surgery assertion was included in the Pre-Trial Order for the Corporate Liability Trial and was actually litigated at the trial. It was also necessarily decided. As to any individual member of the UTC, when the negligent conduct occurred is relevant to whether that conduct breached QHR's duty to that particular plaintiff. As discussed above, if QHR did not learn of Dr. Masel's experimental surgery assertion until after Dr. Schlicht or Dr. Bryant performed a medical procedure on a

particular plaintiff, then QHR necessarily could not have breached a duty to that plaintiff by enabling Dr. Schlicht or Dr. Bryant to continue to perform medical procedures on other patients of the Hospital after QHR gained such knowledge. And without a breach of duty to a particular plaintiff, there can be no causal link between a breach of duty to the plaintiff and the injuries the plaintiff suffered. Movants' argument that when QHR first became aware of Dr. Masel's experimental surgery assertion was reserved for the Causation Trial is not convincing.

B. QHR's breach of duty in granting Dr. Schlicht temporary privileges as a cause of the UTC's injuries

In their Motions to Reconsider, Movants assert that they have been deprived of the opportunity to prove a causal link between QHR's grant of temporary privileges to Dr. Schlicht and injuries to Movants.[10] More specifically, Movants assert that they should be permitted to present expert testimony at the trial on the causation element of their negligence claims to establish that the QHR's negligent grant of temporary privileges to Dr. Schlicht is causally related to Movants' injuries.[11]

The Court concluded, as QHR argued in its motion for summary judgment, that QHR's breach of duty in granting temporary privileges to Dr. Schlicht could not be the cause of injury to Movants inflicted by surgeries Dr. Schlicht performed because Dr. Schlicht did not perform any surgeries under the temporary grant. *See* QHR Motions for Summary Judgment, at 1, n. 1 setting forth QHR's argument. Docket No. 317. In their Response, Movants did not address this issue. They simply asserted they needed to take additional discovery and present further evidence on

[10] Although it is not clear from the Motions to Reconsider, Movants apparently argue that a causal link between (i) the CEO's grant of temporary privileges to Dr. Schlicht; and (ii) the medical staff's subsequent grant of permanent privileges under which the injury causing procedures in question were performed, establishes the required causal link between the grant of temporary privileges and the injuries.

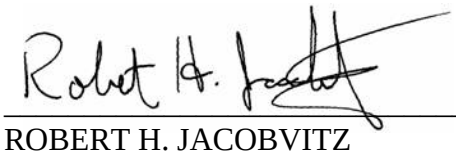
[11] *See, e.g.*, Docket No. 396, ¶ B ("In addition . . . Plaintiffs and other members of the United Tort Claimants were prevented from presenting their experts, including, but not limited to, Mr. Peterson, on the issue of why the granting of temporary privileges to Dr. Schlicht by the Hospital CEO was causally related to the injuries at issue in this litigation.").

causation, without stating what the evidence might be or show, what Movants hoped to discover, or how additional discovery or evidence might enable Movants to rebut QHR's argument.

A party may not use a motion to alter or amend a judgment under Rule 59 to raise new arguments that could have been raised in response to the original motion. *See Servants of the Paraclete,* 204 F.3d at 1012 (stating that "[i]t is not appropriate to . . . advance arguments [through a Rule 59 motion] that could have been raised in prior briefing") (citing *Van Skiver v. United States,* 952 F.2d 1241, 1243 (10th Cir. 1991)). The Court need not consider arguments raised for the first time in a Rule 59 motion. *See United States v. Trestyn,* 646 F.3d 732, 742 (10th Cir. 2011) (acknowledging that "'arguments raised for the first time in a motion for reconsideration are not properly before the [district] court and generally need not be addressed.'") (quoting *United States v. Castillo-Garcia,* 117 F.3d 1179, 1197 (10th Cir. 1997), *overruled on other grounds by United States v. Ramirez-Encarnacion,* 291 F.3d 1219, 1222 n.1 (10th Cir. 2002)). *See also, Mungo v. Taylor,* 355 F3d 969, 978 (7th Cir. 2004) ("Arguments raised for the first time in connection with a motion for reconsideration . . . are generally deemed to be waived.") (citation omitted).[12] The Court will not consider Movants' new argument that there is a causal link between the QHR-employed CEO's grant of temporary privileges to Dr. Schlicht and the injuries the Movants sustained. Movants waived such argument by failing to raise it in their Response to QHR's motions for summary judgment. [13]

[12] An exception, not applicable here, is where the new argument questions the Court's subject matter jurisdiction. *See Franklin Sav. Corp. v. United States,* 180 F.3d 1124, 1129 (10th Cir. 1999) ("defects in subject-matter jurisdiction can never be waived and may be raised at any time . . .") (citation omitted).
[13] However, other members of the UTC, against whom final summary judgments have not been granted, may present evidence at the Causation Trial to establish such a causal link.

WHEREFORE, IT IS HEREBY ORDERED that the Motions for Reconsideration are DENIED.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: September 3, 2015

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