

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM)	
ABDULLAH AL SHIMARI <i>et al.</i> ,)	
)	
Plaintiffs,)	Case No. 1:08-cv-827 (LMB/JFA)
v.)	
)	
CACI PREMIER TECHNOLOGY, INC.,)	
)	
Defendant.)	
)	
)	

**PLAINTIFFS’ REPLY IN SUPPORT OF THEIR MOTION IN LIMINE
TO EXCLUDE THE 2004 MEMORANDUM BY DONALD RUMSFELD
CONCERNING THE PROCESSING OF CLAIMS BY IRAQI DETAINEES**

Having removed the only basis for the Court’s admission of the Rumsfeld memorandum, namely Plaintiffs’ request for judicial notice of certain facts, CACI was left to defend the memorandum’s relevance as a standalone proposition in its opposition brief. However, CACI’s scattershot attempts to do so all miss the mark. CACI may try to argue to the jury that it is somehow not liable for the harm that Plaintiffs suffered. But CACI may not tell the jury to let CACI off the hook for liability because Plaintiffs can obtain compensation from the government instead, as CACI did at the April trial. CACI does not even try to defend this use of the Rumsfeld memorandum because it is so obviously improper.

The other possible bases for admitting the Rumsfeld memorandum that CACI proposes in its opposition brief are equally irrelevant and impermissible. It is black-letter law that Plaintiffs’ decision-making in suing CACI is irrelevant and an improper area for questioning, and (even if it was relevant) the Rumsfeld memorandum reveals nothing about Plaintiffs’ credibility because

Plaintiffs were unaware of the memorandum. The jury may not be asked to speculate whether Plaintiffs avoided suing the government because the government has access to some information protected by the state-secrets privilege. Any possible use of the Rumsfeld memorandum by CACI is an attempt to induce the jury to decide this case on improper grounds. The Court should preclude CACI from trying to confuse another jury at the retrial.

ARGUMENT

I. THE “EMPTY CHAIR” DEFENSE DOES NOT PERMIT A DEFENDANT TO TELL THE JURY THAT THE PLAINTIFFS CAN PURSUE CLAIMS AGAINST A THIRD PARTY

CACI first insists that it is “entitled to ask the jury to consider why Plaintiffs have not pursued claims” against the United States because “it is a tried, true, and appropriate defense to identify some other person or entity ... as the real culprit that should bear responsibility....” ECF No. 1699 at 5. This does not logically follow. Of course, a defendant may try to argue that it did not cause the plaintiff’s injury because a third party did. That is the “empty chair” defense discussed in the cases that CACI cites.¹ But the “empty chair” defense does not allow CACI to tell the jury to find that CACI is not liable, even if it were part of the conspiracy to abuse detainees and otherwise aided and abetted that abuse, because Plaintiffs could seek compensation from the government instead. There is no authority in CACI’s brief that permits a defendant to highlight an alternative legal—or as the case here, limited administrative—mechanism by which the plaintiffs can obtain relief from third parties, because no such authority exists.

¹ For example, in the lead case that CACI cites, the defendant was allowed to argue that the plaintiffs’ injuries were caused by his smoking habit rather than any defect in the defendant’s medical device. *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 202 (4th Cir. 2001). Similarly, CACI can argue that it is not liable because it was not a part of the conspiracy to abuse detainees and did not aid and abet that abuse. But the *Cooper* defendant could not tell the jury that the plaintiff could sue tobacco companies because that is irrelevant in assessing who was liable for the plaintiff’s injuries. The same principle applies here.

Yet that is exactly how CACI used the Rumsfeld memorandum in the April trial, asking the jury to “tell [Plaintiffs] to make their claim against the United States” because “the government has agreed that it will pay bona fide claims of detainee abuse.” ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 65:22-23. CACI’s brief does not bother defending this use of the Rumsfeld memorandum because it is so clearly improper. And CACI does not point to any other trial evidence for which the Rumsfeld memorandum provides relevant context, because there is none. The existence of a limited Army administrative claims review process simply does not matter in a trial against CACI on viable tort claims where the jury is being asked to decide questions of fact, and therefore the Court should exclude evidence of that process.

In passing, CACI accuses Plaintiffs of seeking to “obscure” the military’s role in the unlawful abuse that Plaintiffs suffered. Not so. Plaintiffs’ claims turn on a conspiracy between CACI *and* military personnel. While CACI may be able to assert to the jury that the military police directly abused Plaintiffs, CACI may not tell the jury to let CACI off the hook because Plaintiffs could obtain compensation from the government instead. That is CACI’s only purpose in offering the Rumsfeld memorandum, and it is impermissible. The Court should not let CACI mislead another jury in this manner.

CACI also once again mischaracterizes a comment by Plaintiffs’ counsel at a 2017 conference that Plaintiffs “are not contending that the CACI interrogators laid a hand on the plaintiffs.” Faridi Decl., Ex. A at 15:21-22. Plaintiffs’ counsel said that in the context of discussing theories of liability and explaining that Plaintiffs have brought conspiracy and aiding-and-abetting claims. Plaintiffs have never stated that CACI interrogators did not interact with Plaintiffs, or that CACI had no “input into abusive treatment that [Plaintiffs] received,” as CACI now suggests, ECF No. 1699 at 4. To the contrary, it is undisputed that each Plaintiff was

questioned (formally or informally) by a CACI interrogator.² In any event, the 2017 statement by Plaintiffs' counsel has no bearing on whether the Rumsfeld memorandum should be admitted.

II. PLAINTIFFS' MOTIVE FOR SUING CACI IS IRRELEVANT, AND THE RUMSFELD MEMORANDUM DOES NOT REVEAL ANYTHING ABOUT PLAINTIFFS' MOTIVE

CACI argues that the Rumsfeld memorandum is relevant because the jury should “question why a Plaintiff would seek to hold a company vicariously liable for the alleged secondary liability of its employees,” rather than suing the government. ECF No. 1699 at 5. This is doubly wrong. First, the jury may not consider why Plaintiffs sued CACI (and not the government) because a “plaintiff’s motive for bringing suit is irrelevant,” with very limited exceptions that do not apply here. *Samsung Elecs. Co., Ltd. v. NVIDIA Corp.*, No. 3:14-CV-757, 2016 WL 754547, at *2 (E.D. Va. Feb. 24, 2016) (collecting cases); *see also Medeiros v. Choy*, 418 P.3d 574, 582 (Haw. 2018) (“[T]he precept that a plaintiff’s motives for bringing an action are not relevant to the merits of the suit ... has remained well established in courts throughout the nation in the [last century].” (citing *Dickerman v. N. Tr. Co.*, 176 U.S. 181, 190 (1900))). And second, even if Plaintiffs’ motive for suing CACI was relevant (which it is not), the Rumsfeld memorandum does not reveal anything about Plaintiffs’ motive because there is no evidence that Plaintiffs ever knew the Rumsfeld memorandum existed. Indeed, when asked on cross-examination why he did not sue the government, Asa’ad Al-Zuba’e responded: “How would I sue them?” ECF No. 1623 (Apr. 16, 2024 Morning Trial Tr.) 67:22-24.

² Moreover, Plaintiffs only learned in 2018—well after the 2017 conference where Plaintiffs’ counsel made the statement that CACI continually harps on—that “CACI Interrogator A” and “CACI Interrogator G” interrogated Plaintiffs Al-Zubae and Al Shimari, when the United States confirmed that in responses to CACI’s interrogatories. *See* ECF No. 1707-3 at 4-5.

III. THE RUMSFELD MEMORANDUM HAS NO BEARING ON PLAINTIFFS' CREDIBILITY BECAUSE PLAINTIFFS NEVER KNEW ABOUT IT

For the same reasons, the Rumsfeld memorandum does not make Plaintiffs' decision to sue CACI "curiouser and curiouser," reflecting "credibility concerns," as CACI contends. ECF No. 1699 at 6. The Rumsfeld memorandum has no bearing on Plaintiffs' credibility because there is no evidence that Plaintiffs even knew the Rumsfeld memorandum existed. And CACI does not point to any part of Plaintiffs' testimony that is undermined by the Rumsfeld memorandum—because there is none. Moreover, the Rumsfeld memorandum does not absolve CACI of liability, and does not preclude Plaintiffs from pursuing claims against CACI. Simply put, the Rumsfeld memorandum has nothing to do with Plaintiffs' lawsuit against CACI.

IV. THE GOVERNMENT'S STATE-SECRETS ASSERTIONS ARE NOT A BASIS TO ADMIT THE RUMSFELD MEMORANDUM

Perhaps CACI's most far-fetched argument is that the Rumsfeld memorandum is relevant because the jury should consider whether Plaintiffs did not sue the United States "because their narratives cannot withstand scrutiny from a defendant with unfettered access to witnesses and documents cataloging what actually occurred." ECF No. 1699 at 6. Such fanciful, self-serving, and rank speculation about a hypothetical case is irrelevant.³ A jury may not consider what might have happened if Plaintiffs had sued the government, or how evidence that was excluded might have undermined Plaintiffs' testimony. Instead, a jury may "base [its] verdict only on the

³ In addition to not being a basis for relevance, CACI's argument also makes no sense. There is no reason to think that, if the United States were a defendant, it would not have made the same state-secrets assertions it made in this case (which pertain only to limited and non-dispositive information, as Plaintiffs have explained elsewhere, *see* ECF No. 1082 at 9-11). Any jury hearing a case that Plaintiffs brought against the government would not learn any information that was withheld from CACI. And, as the Court has acknowledged, the government's state-secrets assertions affected Plaintiffs as well as CACI. ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 6:13-22, 85:4-11. Therefore, CACI may not ask the jury to infer that the privileged evidence, if admitted, would have harmed Plaintiffs' case.

evidence received in the case.” ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 80:13-14. By invoking the prospect of a case without state-secrets assertions, CACI is admitting that its purpose in offering the Rumsfeld memorandum is to call the jury’s attention to evidence not in the case. The Court should reject this gambit.

V. CACI DOES NOT BOTHER DEFENDING ITS MISCHARACTERIZATIONS OF THE RUMSFELD MEMORANDUM

Finally, it bears noting that CACI does not even bother trying to defend its mischaracterization of the Rumsfeld memorandum in its closing argument at the April trial. As noted in Plaintiffs’ moving brief (ECF No. 1683-1 at 8), the Rumsfeld memorandum does not permit Plaintiffs to “sue” the United States, ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 45:2-8, nor does it indicate that “the government has agreed that it will pay bona fide claims of detainee abuse,” *id.* at 65:14-15. Rather, the Rumsfeld memorandum proposes a limited administrative review process. The Court should preclude CACI from repeating these mischaracterizations at the retrial.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion *in limine* to exclude the Rumsfeld memorandum from the retrial and preclude CACI from telling the jury that Plaintiffs should obtain relief from the government instead.

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Respectfully submitted,

/s/ Charles B. Molster, III

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2024, I electronically filed the foregoing, which sends notification to counsel for Defendants.

/s/ Charles B. Molster, III

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