UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W., a minor child, by his next friend, Wyatt Squires, Plaintiff, v. EVANSVILLE VANDERBURGH SCHOOL CORPORATION, Defendant.	)	No. 3:18-cv-00037-WTL-MPB

Plaintiff's Response in Opposition to Defendant's Motion to Strike

Defendant Evansville Vanderburgh School Corporation ("EVSC") has filed a motion to strike (Dkt. 25) seeking to strike two paragraphs from the declaration of plaintiff J.A.W. (Dkt. 17-1) and one paragraph from the declaration of Wyatt Squires (Dkt. 17-2) as inadmissible hearsay. Two initial points must be made before reviewing EVSC's arguments.

First, even if the statements noted by EVSC are struck as hearsay statement of J.A.W.'s mother, it would still be established that for whatever reason, J.A.W.'s mother cannot or will not serve as his next friend in this litigation (Dkt. 17-1 ¶ 36)[1]; J.A.W. has no other adult relatives who can so serve (Dkt. 17-1 ¶ 37); and Mr. Squires, a friend and

[1] Of course, EVSC has moved to strike this entire paragraph. But, there is not even a colorable argument that "I have spoken to my mother about my efforts to use the male restrooms within the schools I attend" and the fact that she is aware of this case is hearsay. There is not even a hint of a statement by J.A.W.'s mother in this statement. *See, infra.*

mentor to J.A.W., is willing and able to serve (Dkt. 37-1 ¶ 40; Dkt. 37-2 ¶¶ 9-10). This, alone, is sufficient to allow Mr. Squires to serve as next friend if the Court deems a next friend to be necessary.

Secondly, this case is in an odd procedural posture. J.A.W. filed this case with Mr. Squires as his next friend because he has no adult family members willing to serve in that capacity, a point not contested by EVSC. Yet, EVSC is aggressively attempting to block this litigation by arguing that Mr. Squires cannot serve as next friend while at the same time attempting to prevent J.A.W. from explaining why his mother cannot or will not serve as next friend. EVSC appears to contend that only a declaration from J.A.W.'s mother as to why she does not want to play a role in this litigation would suffice, although in order to do that she would have to be willing at this juncture to play a role in the litigation. This is curious, to say the least. In any event, EVSC's claim that all the paragraphs should be struck as inadmissible hearsay is not meritorious and should be denied for the reasons noted below

J.A.W.'s declaration

1. Paragraph 36 of J.A.W.'s declaration provides:

> I have spoken with my mother about my efforts to use the male restrooms within the schools I attend and she supports me in my efforts and in this case. However, she is involved in a dissolution of marriage case with her current husband and does not want to be involved in any other court proceedings at this point. She did indicate that when her current divorce is over she will be willing to serve as next friend in this matter.

In the first sentence of this paragraph J.A.W. notes that he has spoken to his mother and she is aware of both his desire to use male restrooms in EVSC and this litigation. This

is clearly not hearsay as it does not involve any out of court statement of J.A.W.'s mother used to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801(c). The first sentence also notes that J.A.W. believes that his mother supports him in this litigation. He is not asserting that his mother made statements of support, merely his opinion that she supports him. This also is not hearsay. Even if a specific statement was made by his mother, such a statement would be "nonhearsay, offered to show its effect on the listener." *Foo v. Trustees of Ind. Univ.*, 88 F. Supp. 2d 937, 942 n.3 (S.D. Ind. 1999).

In the second sentence, J.A.W. explains why he believes his mother does not want to get involved in this litigation at this point. If this is viewed only as J.A.W.'s opinion, it is simply not hearsay as it is based on J.A.W.'s perception. *Hughes v. Indianapolis Radio License Co.*, No. 1:07-cv-81-WTL-TAB, 2009 WL 226209, at *3 (S.D. Ind. Jan. 30, 2009) ("The next statement at issue is a statement by one of the Plaintiff's potential customers following a meeting with Plaintiff and Medland to the effect of 'that man has a problem.' The Court determines that this statement is not hearsay, in that it is not being offered for the truth of the matter being asserted—that Medland 'had a problem'—but rather is being offered to show that the customer's perception was that Medland had a problem.").

Moreover, an out-of-court statement by J.A.W.'s mother that she did not want to be involved in any other court proceedings at this point is a statement of her present motive and mental state and therefore is admissible as a present sense impression, an exception to the rule against hearsay provided by Fed. R. Evid. 803(3).

> [U]nder the state of mind exception to the hearsay rule [ ] an out of court declaration of a present existing motive or reason for acting is admissible, even though the declarant is available to testify. This exception rests on the

> rationale that the declarant's memory of his state of mind, at a time when there is ample opportunity for misrepresentation, is no more likely to be correct than another's recollection of the declaration. Since evidence of the declarant's state of mind can only be indicated by the declarant's conduct or statements, the exception to the hearsay rule provides for their admission.

Oberman v. Dun & Broadstreet, Inc., 507 F.2d 349, 351-52 (7th Cir. 1974) (internal citations omitted).

Similarly, J.A.W.'s mother's statement in the last sentence of the paragraph as to her willingness and intention to serve as next friend in the future is not hearsay. *See United States v. Best*, 219 F.3d 192, 198 (7th Cir. 2000) ("A declarant's out-of-court statement as to his intent to perform a certain act in the future is not excludable on hearsay grounds." [citing Fed. R. Evid. 803 (3)]).

2. Paragraph 41 provides that "[m]y mother specifically noted that she agreed that in her absence Mr. Squires should serve as my next friend in this litigation." To the extent this statement is used to prove that J.A.W.'s mother agrees to the appointment it is hearsay, and insofar as J.A.W. has previously relied upon the statement for that purpose, the hearsay objection is meritorious. However, this does not mean that the statement should be stricken. It is certainly admissible, and relevant, to demonstrate that the statement was made, thus justifying J.A.W. reaching out to this friend and mentor, Wyatt Squires, to serve as next friend. "Evidence that is 'used only to show notice' is not hearsay." *Harden v. Marion County Sheriff's Dept.*, 799 F.3d 857, 861 (7th Cir. 2015). Instead, "'[i]f the significance of an offered statement lies solely in the fact that it was made, no

issue is raised as to the truth of anything asserted, and the statement is not hearsay.'" *Id.* (quoting Fed. R. Evid. 801(c) advisory committee's note).

3. Paragraph 8 of Mr. Squires' declaration states that "I understand that his mother is not willing at this point, due to her personal situation, to be his next friend although she may wish to be his next friend in the future." To the extent that this statement would be offered to prove the truth of any matter asserted by J.A.W.'s mother, it is hearsay. However, Mr. Squires' understanding of why he is being called upon to serve as next friend, like his willingness to do so, is certainly relevant and therefore the statement "is not hearsay because it is not offered to prove the truth of the matter asserted, but rather is offered to show [Mr. Squires'] understanding." *University of Utah v. United States*, No. 2:15-cv-904-JNP-PMW, 2017 WL 4217252, at * at 4 n.4 (D. Utah Sept. 21, 2017), *appeal pending*, No. 17-4185 (10th Cir.).

Conclusion

There are therefore no grounds to strike the statements noted by EVSC. EVSC's motion is not meritorious and should be denied.

s/ Kenneth J. Falk
Kenneth J. Falk
No. 6777-49

s/ Gavin M. Rose
Gavin M. Rose
No. 26565-53

s/ Jan P. Mensz
Jan P. Mensz
No. 33798-49
ACLU of Indiana
2457 E. Washington St., Suite Z
Indianapolis, IN 46201
317/635-4059
fax: 317/635-4105
kfalk@aclu-in.org
jmensz@aclu-in.org

Attorneys for Plaintiff

Certificate of Service

I hereby certify that on this 10th day of May, 2018, a copy of the foregoing was filed electronically with the Clerk of this Court. A copy will be served by the Court's system on:

Patrick A. Shoulders
Robert L. Burkart
Jean M. Blanton
ZIEMER STAYMAN WEITZEL & SHOULDERS, LLP
pshoulders@zsws.com
rburkart@zsws.com
jblanton@zsws.com

s/ Kenneth J. Falk
Kenneth J. Falk
Attorney at Law