IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Victor M. Gonzalez, Administrator of the Estate of Roger Gonzalez, deceased,	)	
Plaintiff,	)	No. 15-cv-00776
-*vs*-	)	*(Judge Reinhard)*
Wexford Health Sources, Inc. and Arthur Davida, M.D.	)	*(Magistrate Judge Johnston)*
Defendants.	)	

PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

Plaintiff has filed a sixth amended complaint that includes a federal claim against defendant Dr. Davida and state and federal claims against defendant Wexford Health Sources, Inc.

Defendant Dr. Davida has answered the sixth amended complaint (ECF No. 247); defendant Wexford has filed a Rule 12(b)(6) motion to dismiss. (ECF No. 248.) The Court should deny the motion.

I. Facts

This case arises from the death of Roger Gonzalez while incarcerated in the Illinois Department of Corrections ("IDOC"). Plaintiff's decedent was seriously ill when he was arrested in October of 2013: "On entry to the Jail, decedent weighed approximately 400 pounds and had a variety of serious medical needs, including chronic hepatitis-C with liver failure, renal failure,

leg edema, cirrhosis, congestive heart failure, and morbid obesity." (Order, September 26, 2017, ECF No. 126 at 2.) Plaintiff decedent's condition worsened by September 2, 2014, when he pleaded guilty and was transferred to the Northern Receiving Center ("NRC") of the IDOC. (Order, September 26, 2017, ECF No. 126 at 4.) Plaintiff's decedent was critically ill. (Sixth Amended Complaint ¶ 12, ECF No. 244 at 4.)

Defendant Davida, who was then a physician working for defendant Wexford at the NRC, sent plaintiff's decedent to the University of Illinois Hospital, where he remained from October 22, 2014 until he was returned to the NRC on October 31, 2014. (Sixth Amended Complaint ¶ 15, ECF No. 244 at 4.)

Plaintiff's decedent continued to be critically ill when he returned from the hospital: He weighed about 500 pounds, required a catheter, had a scrotum that was swollen to the size of a basketball and leaking, and he could not transfer, stand, or move himself in any way. (Sixth Amended Complaint ¶ 32, ECF No. 244 at 8.) His serious medical problems included acute chronic heart failure, ascites (accumulation of fluid in the peritoneal cavity), stage 3 renal disease, morbid obesity, anemia, hepatitis-C, chronic obstructive pulmonary disease, liver disease, and hypertension. (Sixth Amended Complaint ¶ 31, ECF No. 244 at 8.)

Plaintiff's decedent was transferred from the NRC to the Robinson Correctional Center on November 6, 2014. (Sixth Amended Complaint ¶ 16, ECF No. 244 at 4.) Defendant Davida had the power to stop the transfer by imposing a "medical hold." (Sixth Amended Complaint ¶ 25, ECF No. 244 at 6.)

Changing prisons involved a six to seven-hour ride by van. (Sixth Amended Complaint ¶ 17, ECF No. 244 at 4.) There was no medical reason to transfer plaintiff's decedent: the Robinson prison did not have the proper equipment to handle plaintiff's decedent, such as a bed that could accommodate his size. (Sixth Amended Complaint ¶ 30, ECF No. 244 at 8.) Nor did the Robinson prison have a full-time physician: Dr. Shah, an employee of defendant Wexford, was the only physician at Robinson; he worked there four days a week.[1]

Plaintiff's decedent arrived at the Robinson Correctional Center after the lengthy van ride without shoes, wearing socks and gauze wrapping on his ankles. (Sixth Amended Complaint ¶ 29, ECF No. 244 at 7.) One of his feet was a dark purple color. (*Id.*) Plaintiff's decedent was wearing dirty

[1] Plaintiff relies on *Smith v. Dart*, 803 F.3d 304, 311 (7th Cir. 2015) to assert this fact, which is not specifically alleged in the sixth amended complaint.

pajamas with urine stains and a medical gown to cover his scrotum. His scrotum was the size of a basketball and was leaking. (*Id.*)

Plaintiff seeks to impose liability on defendant Wexford for its failure to have implemented the "medical hold" procedure required by Wexford's contract with the State of Illinois.[2] (Sixth Amended Complaint, ¶ 19, ECF No. 244 at 5.) The Seventh Circuit recognized this theory of *Monell* liability in its *en banc* decision in *Glisson v. Indiana Department of Corrections*, 849 F.3d 372, 380 (7th Cir. 2017).[3]

Plaintiff's decedent was taken from Robinson on November 6, 2014 to Crawford Memorial Hospital and was returned to the prison later that day. (Sixth Amended Complaint ¶ 34, ECF No. 244 at 9.)

Dr. Vipin Shah, a physician employed by defendant Wexford and acting within the scope of that employment, attended to plaintiff's decedent at Robinson following his return from Crawford Memorial Hospital. Plaintiff

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[2] Plaintiff pleads this theory in the alternative to Davida's personal responsibility. (Sixth Amended Complaint, ¶¶18-24, ECF No. 244 at 5-6.)

[3] In *Glisson*, the Indiana Department of Corrections had adopted "Chronic Disease Intervention Guidelines, which explain what policies its health-care providers are required to implement." 849 F.3d. at 380. The health care provider in *Glisson* "consciously chose not to adopt the recommended policies" *Id.* The *en banc* Seventh Circuit held this failure to implement the state guidelines "would be a deliberate policy choice," for which the health care provider could be liable under 42 U.S.C. § 1983 if the failure to adopt the policy caused constitutional harm. *Id.*

contends that Dr. Shah did not meet the standard of care, as explained in the expert report previously served on defendants.[4] (Sixth Amended Complaint ¶ 40, ECF No. 244 at 9.) Plaintiff also alleges that because of Dr. Shah's negligence, "the condition of plaintiff's decedent worsened, causing him to experience great pain and suffering and resulting in his death." (Sixth Amended Complaint ¶ 41, ECF No. 244 at 10.)

Plaintiff's decedent was evacuated from the Robinson Correctional Center in the morning of November 9, 2014, returned to the Emergency Room at Crawford Memorial Hospital, and died later that day. (Sixth Amended Complaint, ¶ 43, ECF No. 244 at 9.)

II. The Federal Rules Do Not Require Pleading Counts

Defendant's first argument is that Federal Rule of Civil Procedure 10 requires that a complaint be pleaded in separate counts. (ECF No. 249 at 2-

[4] Plaintiff's expert identifies several departures from the standard of care, including the following:

> Dr. Shah deviated from the standard of care when he did not avail himself of the results of the medical evaluation Mr. Gonzalez underwent at Crawford Memorial Hospital, failed to obtain laboratory testing to monitor Mr. Gonzalez's renal status, and failed to recognize Mr. Gonzalez's deteriorating urine Output.
>
> Dr. Shah admitted that he did not know how to receive communications from other institutions when those communications contained medical information that could impact the medical care Dr. Shar was providing to Mr. Gonzalez.
>
> Dr. Shah's deviation from the ordinary standard of care caused Dr Shah to not appreciate the severity of Mr. Gonzalez's renal function, and accounts for the lack of monitoring in the form of input and output, as well as the failure to assess daily laboratory assessments of renal function.

3.) Nothing in the text of the rule supports this argument, and the Seventh Circuit has specifically rejected it:

> Although it is common to draft complaints with multiple counts, each of which specifies a single statute or legal rule, nothing in the Rules of Civil Procedure requires this. To the contrary, the rules discourage it.

Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073, 1078 (7th Cir. 1992). This is because "[a] complaint must narrate a plausible grievance; it need not set out a legal theory or cite authority." *Frank v. Walker*, 819 F.3d 384, 387 (7th Cir. 2016).

The Court previously rejected defendant's argument that plaintiff's complaint was too vague. (ECF No. 126 at 11-12.) Defendant does not provide any reason to revisit that ruling. As before, "it is sufficiently clear from the face of the [sixth] amended complaint which allegations are raised against the respective defendants." (*Id.* at 12.)

III. The Federal Rules Do Not Require Pleading Elements

Defendant next argues that plaintiff's state law medical malpractice claim should be dismissed because plaintiff did not plead each elements of that claim. (ECF No. 249 at 3-4.) This argument is also not supported by the text of any of the Federal Rules of Civil Procedure. On the contrary, the Federal Rules of Civil Procedure do not require "cause of action pleading"

because a plaintiff need not plead facts to support each element of a claim. *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014).

The Seventh Circuit recently reiterated, in the course of reversing the dismissal of complaint at the pleading stage, that "[s]upporting 'each evidentiary element of a legal theory' is for summary judgment or trial, not a test of the pleadings under Rule 12(b)(6) or 12(c)." *Williams v. Dart*, 967 F.3d 625 (7th Cir. 2020) (quoting *Freeman v. Metro. Water Reclamation Dist. of Greater Chicago*, 927 F.3d 961, 965 (7th Cir. 2019).) This is because "under Rule 8 of the Federal Rules of Civil Procedure, plaintiffs have no obligation to plead legal theories." *Harrell v. Cook*, 169 F.3d 428, 432 (7th Cir. 1999).

Federal pleading rules apply to state law claims like plaintiff's medical malpractice claim: "when federal courts entertain claims under state law—whether under the diversity jurisdiction of 28 U.S.C. § 1332 or, as here, the supplemental jurisdiction of 28 U.S.C. § 1367—it is not necessary to plead facts matching elements of legal theories." *Christensen v. County of Boone*, 483 F.3d 454, 466 (7th Cir. 2007). The Court rejected a similar argument in its earlier ruling, Order, September 26, 2017, ECF No. 126 at 12, and should again reject defendant's insistence on "fact pleading." *R3 Composites Corp. v. G&S Sales Corp.*, 960 F.3d 935, 942 (7th Cir. 2020).

The Court previously ruled that plaintiff's allegations of medical malpractice claim against defendant Wexford are sufficient. (ECF No. 126 at 12). Defendant provides no reason to revisit that ruling.

IV. The Court Must Follow *Glisson v. Indiana Department of Corrections*

Wexford's third ground for dismissal is foreclosed by the *en banc* decision of the Seventh Circuit in *Glisson v. Indiana Department of Corrections*, 849 F.3d 372, 380 (7th Cir. 2017), as plaintiff explained above at 4 & n.2.

Without mentioning *Glisson*, defendant argues that the nearly identical allegations advanced by plaintiff in this case are not sufficient to support liability. (ECF No. 249 at 5-7.) In Wexford's view, plaintiff must plead and prove repeated actions (*id.* at 5-6), but the Court of Appeals specifically rejected this argument in *Glisson*:

> The key is whether there is a conscious decision not to take action. That can be proven in a number of ways, including but not limited to repeated actions. A single memo or decision showing that the choice not to act is deliberate could also be enough. The critical question under *Monell* remains this: is the action about which the plaintiff is complaining one of the institution itself, or is it merely one undertaken by a subordinate actor?

Glisson., 849 F.3d 372 at 381.

Plaintiff's policy claim against Wexford is indistinguishable from the claim recognized in *Glisson*. Plaintiff alleges as follows:

> 19. At all times relevant, Wexford's contract with the State of Illinois required that Wexford employees place an inmate on a "medical hold" to prevent a transfer that would be injurious to the inmate's health.
>
> 20. At all times relevant, defendant Wexford knew that there was a serious risk of harm if the transfer of an inmate from one IDOC facility to another:
>
> (a) interfered with medical treatment that the inmate was receiving for serious medical needs, or
>
> (b) involved a lengthy drive by van that would be injurious to the inmate's health.
>
> 21. At all times relevant, defendant Wexford knew that failing to inform its physicians that they were required to place an inmate on a "medical hold" under the circumstances set out above would result in harm to inmates.
>
> 22. Defendant Wexford did not inform its physicians, including defendant Davida, about the above described "medical hold" power.

(Sixth Amended Complaint, ECF No. 244 at 5.) Plaintiff goes on to allege that Wexford's "conscious decision" to not implement the medical hold policy required by its contract with the State of Illinois, was a cause of the death of plaintiff's decedent. (*Id.* ¶ 28, ECF No. 244 at 7.) Under *Glisson*, these allegations are sufficient, and the Court should reject defendant's argument to the contrary.

There is no merit in any argument by defendant Wexford that it is "surprised" by plaintiff's reliance on *Glisson*. Plaintiff outlined his *Glisson*

arguments in his memorandum in opposition to the motion to dismiss the Fourth Amended Complaint. (ECF No. 198 at 7-10.)

V. Conclusion

For all these reasons, the Court should deny the motions to dismiss.

Respectfully submitted,

/s/ Kenneth N. Flaxman
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