

**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,	)	No. 15-cv-00776
	)	
Plaintiff,	)	Judge Philip G. Reinhard
	)	Magistrate Judge Lisa A. Jensen
vs.	)	
	)	Jury Demanded
Wexford Health Sources, Inc. and	)	
Arthur Davida,	)	
	)	
Defendants.	)	

**DEFENDANT WEXFORD HEALTH SOURCES, INC. ANSWER AND AFFIRMATIVE  
DEFENSES TO PLAINTIFF'S SIXTH AMENDED COMPLAINT AT LAW**

NOW COME the DEFENDANT, WEXFORD HEALTH SOURCES, INC., by and through its attorneys CONNOLLY KRAUSE LLC and for its Answer and Affirmative Defenses to Plaintiff's Sixth Amended Complaint [Dkt.#244], states as follows:

**Jurisdiction**

1. This is a civil action arising under 42 U.S.C. § 1983, the Illinois Wrongful Death Act, 740 ILCS 180/1 et seq., and the Illinois Survival Statute, 755 ILCS 5/1-1 et seq. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343 and 28 U.S.C. § 1337(a).

**ANSWER:** Defendant admits that this is a civil action. Defendant denies liability. Defendant admits jurisdiction. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of this paragraph.

## **Parties**

2. Plaintiff Victor M. Gonzalez is the duly appointed Independent Administrator of the Estate of Roger Gonzalez, deceased.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

3. Defendant Wexford Health Sources, Inc. (hereinafter "Wexford") is a foreign corporation that, pursuant to a written contract with the State of Illinois, provides health care to inmates held by the Illinois Department of Corrections. Plaintiff asserts federal and state law claims against Wexford.

**ANSWER:** Defendant admits that Wexford is a foreign corporation that, pursuant to written contract with the State of Illinois, provides healthcare to inmates at some facilities held by the Illinois Department of Correction. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of this paragraph.

4. Defendant Arthur Davida was, in October of 2014, a physician employed by defendant Wexford at the NRC Stateville Correctional Facility of the Illinois Department of Corrections (hereinafter "NRC") in Crest Hill, Illinois. Plaintiff asserts federal and state law claims against Davida, who is sued in his individual capacity.

**ANSWER:** Defendant denies that Plaintiff asserts State Law claims against Dr. Davida. Defendant admits that in October 2014 Dr. Davida was a physician employed by Wexford at NRC Stateville Correctional Center of the Illinois Department of Corrections. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of this paragraph.

5. Plaintiff's claims, explained in more detail below, are as follows:

Defendant	Claims
Arthur Davida	Section 1983 deliberate indifference in failure to impose a "medical hold"
Wexford Health Sources, Inc.,	Section 1983 deliberate indifference from failure to have implemented a "medical hold" policy and respondeat superior liability under Illinois law for the negligence of Wexford employees

**ANSWER:** Defendant admits that the claims asserted against it are alleged under Section 1983 for deliberate indifference from failure to have implemented a "medical hold" policy and respondeat superior liability under Illinois for alleged negligence. Defendant denies decedent's rights were violated and denies liability. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of this paragraph.

### **The Serious Medical Needs of Plaintiff's Decedent**

6. Plaintiff's decedent entered the McHenry County Correctional Facility (hereinafter "Jail") on October 18, 2013 as a pre-trial detainee.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

7. On entry to the Jail, plaintiff's decedent weighed 400 pounds and had a variety of serious medical needs, including but not limited to:

- a) Chronic hepatitis C with liver failure,
- b) renal failure,
- c) leg edema,
- d) cirrhosis,
- e) congestive heart failure, and
- f) morbid obesity.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation of this paragraph that on entry to the Jail that Plaintiff weighed 400 pounds.

Defendant denies that Plaintiff had a variety of serious medical needs and denies that (a) – (f) are serious medical needs.

8. On September 2, 2014, following his plea of guilty, plaintiff's decedent was transferred from Centegra Hospital to the Northern Receiving Center ("NRC") of the Illinois Department of Corrections, where defendant Davida was responsible for the medical treatment provided to plaintiff's decedent.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

9. Plaintiff's decedent weighed about 460 pounds when he was transferred to the NRC.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

#### **Events at NRC**

10. Defendant Davida was informed on September 2, 2014 that on August 15, 2014, while in the custody of the Sheriff of McHenry County, plaintiff's decedent had been found unresponsive and was transported to Centegra Hospital where he remained until he was transferred to the Illinois Department of Corrections.

**ANSWER:** Defendant admits that by the medical records Dr. Davida was informed on or about September 2, 2014 of the details contained in the records of the referenced Centegra Hospitalization. Defendant denies the remaining allegations of this paragraph.

11. Defendant Davida was also informed on September 2, 2014 that a physician at Centegra Hospital had written the following in the medical records of the plaintiff's decedent:

Basically, he comes to the hospital with vastly elevated serum ammonia level, gets put on lactulose and rifaxirnin to which the morning level decreases and the patient returns to his baseline. Then he is released from the hospital, and comes back with the same type pictures a few days later.

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This patient is critically ill and will definitely need more than two midnights in hospital secondary to his risk of comorbidities, permanent disability and death.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

12. As a result of the foregoing, defendant Davida knew on September 2, 2014 that plaintiff's decedent was critically ill and required medical attention lest he suffer permanent disability or death.

**ANSWER:** Defendant denies the allegations of this paragraph.

13. Defendant Davida was informed on or about September 5, 2014 of the results of blood tests taken of plaintiff's decedent on September 2, 2014. These blood tests showed a variety of abnormal readings.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

14. On September 22, 2014, medical personnel employed by defendant Wexford ordered a repeat of the blood tests that had been taken of plaintiff's decedent on September 2, 2014. The results of these blood tests were available to Wexford employees on September 24, 2014 and showed that plaintiff's decedent had become more ill.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation that on September 22, 2014, medical personnel employed by defendant Wexford ordered a repeat of the blood tests that had been taken of plaintiff's decedent on September 2, 2014. Defendant lacks knowledge or information sufficient to form a belief about the truth of the

allegation that on September 24, 2014 the results of these blood tests were available to Wexford employees. Defendant denies that the blood tests showed that plaintiff's decedent had become more ill.

15. Plaintiff's decedent continued to become increasingly ill, and on October 22, 2014, he was sent from the NRC to the University of Illinois Hospital, where he remained until October 31, 2014 when he was returned to the NRC.

**ANSWER:** Defendant admits that on October 22, 2014, plaintiff's decedent was sent from the NRC to the University of Illinois Hospital, where he remained until October 31, 2014 when he was returned to the NRC. Defendant denies the remaining allegations of this paragraph.

#### **Transfer to the Robinson Correctional Center**

16. Plaintiff's decedent was transferred from the NRC to the Robinson Correctional Center in the morning of November 6, 2014.

**ANSWER:** Defendant admits that Plaintiff's decedent was transferred from the NRC to the Robinson Correctional Center on November 6, 2014. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of this paragraph.

17. The transfer involved a six to seven hour ride by van.

**ANSWER:** Defendant denies the allegations of this paragraph.

18. It was obvious when plaintiff's decedent left the NRC that the transfer would be harmful to his health.

**ANSWER:** Defendant denies that when plaintiff's decedent left the NRC that the transfer would be harmful to his health. Defendant denies that it was obvious that when plaintiff's decedent left the NRC that the transfer would be harmful to his health.

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.

**ANSWER:** Defendant denies the allegations of this paragraph.

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.

**ANSWER:** Defendant denies knowledge of a serious risk of harm. Defendant denies the remaining allegations of this paragraph and denies the allegations in subparagraphs (a) and (b).

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.

**ANSWER:** Defendant denies the allegations of this paragraph.

22. Defendant Wexford did not inform its physicians, including defendant Davida, about the above described "medical hold" power.

**ANSWER:** Defendant denies the allegations of this paragraph that it did not inform its physicians, including defendant Davida of a "medical hold." Defendant denies the remaining allegations of this paragraph.

23. Defendant Davida did not know on November 6, 2014 that he had the power to place a "medical hold" on the transfer of plaintiff's decedent to the Robinson Correctional Center.

**ANSWER:** Defendant denies the allegations of this paragraph.

24. Defendant Davida would have instituted a “medical hold” and thereby prevented the transfer of plaintiff’s decedent to the Robinson Correctional Center if he knew that he had that power.

**ANSWER:** Defendant denies that defendant Davida did not know that he had the power to institute a “medical hold.” Defendant denies the remaining allegations of this paragraph.

25. In the alternative to the facts alleged in paragraphs 23-24 above:

- a) Defendant Davida knew that he had the power to place a hold on the transfer of plaintiff’s decedent from the NRC.
- b) Defendant Davida knew that plaintiff’s decedent would suffer harm if he was transferred from the NRC.
- c) Defendant Davida had a duty, under state and federal law, to prevent plaintiff’s decedent from suffering unnecessary harm while in the custody of the Illinois Department of Corrections.
- d) Defendant Davida breached the aforesaid duty when he turned a blind eye to the fact that plaintiff’s decedent would suffer harm if transferred from the NRC to Robinson and refused to place a hold on the transfer.
- e) Defendant Davida thereby caused harm to plaintiff’s decedent.

**ANSWER:** Defendant reincorporates its answers to paragraphs 23-24 into this paragraph.

As to subparagraph (a), defendant admits that defendant Davida knew that he had the power to place a hold on the transfer of plaintiff’s decedent from the NRC and denies that Plaintiff’s decedent required a medical hold.

As to subparagraph (b), defendant denies that defendant Davida knew that Plaintiff’s decedent would suffer harm if he was transferred from the NRC. Defendant further denies that Plaintiff’s decedent suffered harm from the transfer.

As to subparagraph (c), defendant admits all duties imposed under state and federal law but denies that plaintiff has alleged a duty and denies the allegations of this subparagraph (c). Defendant denies that plaintiffs decedent suffered unnecessary harm from defendant Davida’s actions or inactions. Defendant denies the remaining allegations of this sub paragraph.

As to subparagraph (d), defendant denies that defendant Davida breached any aforesaid or any duty owed to Plaintiff/decedent. Defendant denies that Dr. Davida turned a blind eye. Defendant denies the remaining allegations of this subparagraph.

As to subparagraph (e), defendant denies that defendant Davida caused harm to plaintiff's decedent. Defendant denies the remaining allegations of this subparagraph.

Defendant denies the remaining allegations of this paragraph.

26. Defendant Wexford's failure to have implemented the above described "medical hold" requirement in an explicit policy and any failure to have informed its physicians, including defendant Davida, about that power amounted to deliberate indifference to a known risk of serious harm and was a cause of the death of plaintiff's decedent.

**ANSWER:** Defendant denies that the above described alleged "medical hold" requirement is the "medical hold" requirement. Defendant denies that Wexford failed to have implemented "medical hold" requirement in an explicit policy. Defendant denies that Wexford failed to have informed its physicians of medical hold policy. Defendant denies that Wexford failed to inform defendant Davida of Wexford medical hold policy. Defendant denies deliberate indifference. Defendant denies that the medical hold policy amounted to deliberate indifference. Defendant denies that the medical hold policy amounted to deliberate indifference to a known risk of serious harm. Defendant denies that plaintiffs decedent had a known risk of serious harm. Defendant denies that the medical hold policy was a cause of death of plaintiff's decedent. Defendant denies the remaining allegations of this paragraph.

27. The contractual requirement referred to in paragraph 19 above means that defendant Wexford consciously chose the approach that it took when it failed to implement that contractual requirement.

**ANSWER:** Defendant denies the allegations of this paragraph.

28. Defendant Wexford's failure to have implemented the above described "medical hold" requirement reflects reckless or callous indifference to the federally protected rights of inmates confined in the Illinois Department of Corrections and warrants an award of punitive damages.

**ANSWER:** Defendant denies the allegations of this paragraph.

### **Arrival at the Robinson Correctional Center**

29. Plaintiff's decedent arrived at the Robinson Correctional Center without shoes, wearing socks and gauze wrapping on his ankles. One foot was a dark purple color. Plaintiff's decedent was wearing dirty pajamas with urine stains on them and a medical gown to cover his scrotum. His scrotum was swollen to the size of a basketball and leaking.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

30. Medical staff recognized upon the arrival of plaintiff's decedent at the Robinson Correctional Center that the prison did not have the proper equipment to handle plaintiff's decedent, such as a bed that could accommodate his size.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

31. Nursing staff at Robinson informed a physician employed by defendant Wexford about the arrival of plaintiff's decedent and the fact that plaintiff's decedent had a variety of serious medical problems, including 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.

**ANSWER:** Defendant admits that nursing staff at Robinson informed a physician employed by defendant Wexford about the arrival of plaintiff's decedent. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of this paragraph.

32. Nursing staff also informed the above referred physician that plaintiff's decedent weighed about 500 pounds, had a catheter, a scrotum that was swollen to the size of a basketball and leaking, and that plaintiff's decedent could not transfer, stand, or move himself in any way. The nurse also informed the physician that plaintiff's decedent had an elevated ammonia level that caused him to not be able to speak coherently or to stay awake.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

33. Later in the day on November 6, 2014, a physician employed by the Illinois Department of Corrections ordered that plaintiff's decedent receive medical attention at a hospital emergency room.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

34. On November 6, 2014, an ambulance transported plaintiff's decedent from the Robinson Correctional Center to Crawford Memorial Hospital in Robinson, Illinois; plaintiff's decedent arrived at the hospital at 8:48 p.m.

**ANSWER:** Defendant admits that on November 6, 2014, an ambulance transported plaintiff's decedent from the Robinson Correctional Center to Crawford Memorial Hospital in Robinson, Illinois. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of this paragraph.

35. Plaintiff required hospitalization on November 6, 2014 as the direct and proximate result of his transfer that day from NRC to the Robinson Correctional Center.

**ANSWER:** Defendant denies the allegations of this paragraph.

**Crawford Memorial Hospital**

36. Medical staff at Crawford Memorial Hospital measured the weight of plaintiff's decedent at 489 pounds upon his arrival on November 6, 2014.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

37. Plaintiff's decedent was returned to the Robinson Correctional Center at about 9:14 p.m. on November 6, 2014

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

**Return to the Robinson Correctional Center**

38. Plaintiff's decedent remained at the Robinson Correctional Center until the morning of November 9, 2014 when he was returned to the Emergency Room at Crawford Memorial Hospital.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

39. 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.

**ANSWER:** Defendant admits that Dr. Vipin Shah is a physician employed by defendant Wexford. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of this paragraph.

40. Dr. Shah did not meet the standard of care, as explained in the expert report previously disclosed to defendants.

**ANSWER:** Defendant denies that Dr. Shah did not meet the standard of care. Defendant denies the content of the expert report. Defendant denies the remaining allegations of this paragraph.

41. As a result of this breach of duty, the condition of plaintiff's decedent worsened, causing him to experience great pain and suffering and resulting in his death.

**ANSWER:** Defendant denies that Dr. Shah or Wexford breached any duty. Defendant denies that the condition of plaintiff's decedent worsened. Defendant denies causation. Defendant denies that plaintiff's decedent experienced great pain and suffering. Defendant denies the remaining allegations and denies any alleged breach caused or resulted in death.

42. At about 7:10 a.m. on November 9, 2014 a nurse at the Robinson Correctional Center was unable to measure plaintiff's blood pressure and plaintiff was evacuated by ambulance to the Crawford Memorial Hospital Emergency Room.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

43. Plaintiff's decedent experienced cardiac arrest at the Crawford Memorial Hospital Emergency Room and died on November 9, 2014.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph.

44. Plaintiff's decedent was deprived of his life and experienced great pain and suffering as a result of the foregoing wrongful acts.

**ANSWER:** Defendant denies the allegations of this paragraph.

45. Plaintiff hereby demands trial by jury.

**ANSWER:** Defendant WEXFORD HEALTH SOURCES, INC. demands a trial by jury.

WHEREFORE plaintiff requests that appropriate damages be awarded against each defendant.

**ANSWER:** Defendant denies liability and denies plaintiff is entitled to any damages against any defendant.

WHEREFORE, Defendant, WEXFORD HEALTH SOURCES, INC., denies that plaintiff is entitled to any of the relief he seeks, including compensatory damages and punitive damages, and respectfully requests this Honorable Court to enter an Order granting judgment in favor of Defendant and against Plaintiff, dismissing his Sixth Amended Complaint (Dkt. 244) with prejudice and with costs including attorney fees pursuant to 42 U.S.C. § 1988(b) and for such other relief as this Court deems appropriate and just.

### **AFFIRMATIVE DEFENSES**

Without prejudice to the denials of the allegations contained in Plaintiff's Sixth Amended Complaint (Dkt. 244), Defendant, WEXFORD HEALTH SOURCES, INC., without waiving the obligations of Plaintiff to prove every factual element of his claims, states as and for its Affirmative Defenses as follows:

#### **1. Qualified Immunity**

At all times relevant to Plaintiff's claims, the Defendant charged herein acted in the good faith performance of its official duties without violating Plaintiff's clearly established constitutional rights. Defendant is protected from liability by the doctrine of qualified immunity.

## **2. Official Capacity Claim Barred**

To the extent that Plaintiff's claims are against Defendant in its official capacity the claims are barred by the Eleventh Amendment.

## **3. Injunctive Relief Barred**

To the extent Plaintiff is suing Defendant for declaratory relief or injunctive relief not intended to address ongoing violations, his requests for such relief are barred by the Eleventh Amendment and the Prison Litigation Reform Act. Further, the Defendant no longer has the authority to order the relief sought if ordered and Plaintiff is not subject to the conditions of which he complains.

## **4. Failure to Exhaust Administrative Remedies**

Plaintiff has failed to exhaust his administrative remedies prior to the initiation of this cause of action and as a result Plaintiff's claims are barred by the Prison Litigation Reform Act.

## **5. Statute of Limitations**

(a) Plaintiff's Sixth Amended Complaint brings claims against Wexford grounded in 42 U.S.C. § 1983 under federal law and medical negligence under Illinois state law.

(b) For deliberate indifference claims brought under 42 U.S.C. § 1983, the applicable state statute of limitations and tolling rules for personal injury actions apply, which is two (2) years in Illinois. *Devbrow v. Kalu*, 705 F.3d 765, 768 (7th Cir. 2013); *see also* 735 ILCS 5/13-212. Pursuant to 735 ILCS 5/13-212, an action arising out of medical negligence must be filed within two-years from the date on which the claimant knew, or should have known, the existence of injury or death for which damages are sought. 735 ILCS 5/13-212. The cause of action also accrues when a person knows his injury and its cause. *Devbrow*, 705 F.3d at 768; *see also* *White v. United States*, 2017 U.S. Dist. LEXIS 127140 (S.D. Ill., August 10, 2017) (ruling that the two-year statute of

limitations began to run once Plaintiff was aware of his symptoms of PTSD despite having not been officially diagnosed with the injury); *Davis v. Stephanie*, 2016 U.S. Dist. LEXIS 58068 (S.D. Ill. May 2, 2016) (ruling that the statute of limitations begins to accrue “once a plaintiff is in possession of the critical facts that he has been hurt and who has inflicted the injury”). “Civil rights claims, therefore, accrue when the plaintiff knows or should know that his or her constitutional rights have been violated.” *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1992). To determine when the Plaintiff knew or should have known, the courts have proceeded under a two-prong analysis. Courts must first identify the injury, then determine the date on which the plaintiff could have sued for that injury. “That date should coincide with the date the plaintiff ‘knows or should have known’ that his rights were violated.” *Kelly v. City of Chicago*, 4 F.3d 509, 511 (7<sup>th</sup> Cir. 1993).

(c) Accordingly, the statute for limitations for Plaintiff’s federal law and Illinois state law claims against Wexford is two years. Plaintiff’s Sixth Amended Complaint federal law claim against Wexford arises out of an alleged failure to instruct its physicians regarding a “medical hold” policy, and Defendant Davida’s alleged failure to institute a “medical hold” policy on November 6, 2014, starting the two-year statute of limitations clock to run on Plaintiff’s federal law claim. (Dkt. 244, ¶¶ 21-23). Further, Plaintiff’s Illinois state law claim against Wexford arises out of alleged insufficient medical care provided by Dr. Shah on November 6 and 7 of 2014, starting the two-year statute of limitations clock to run on Plaintiff’s Illinois state law claim which is two years. (Dkt. 244, ¶39).

(d) Plaintiff filed his initial complaint on January 27, 2015 without even a reference to Wexford. (Dkt. 1). Plaintiff did not bring his complaint against Wexford for the first time until November 8, 2016, outside the two-year statute of limitations for both his federal law and Illinois

state law claims against Wexford.

**6. *Heck v. Humphrey***

To the extent Plaintiff's allegations require the invalidation of any discipline that resulted in the loss of good time credit, these allegations are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

**7. *Mootness***

To the extent that Plaintiff is suing the Defendant for declaratory relief or injunctive relief not intended to address ongoing violations, his claim is moot.

**8. *Compensatory Damages Barred***

To the extent that Plaintiff is suing the Defendant for compensatory damages for mental or emotional injury suffered without a prior showing of physical injury, his claim is barred by the Prison Litigation Reform Act.

**9. *Failure to State Claim with Specificity***

Defendant's personal involvement has not been established with sufficient specificity to state a claim upon which relief may be granted.

**10. *Failure to Properly Name Defendants.***

Defendants have not been properly named in the caption of Plaintiff's Sixth Amended Complaint.

**11. *Res Judicata***

To extent Plaintiff has previously litigated the same issues in a prior action that are now involved in this lawsuit, Plaintiff's suit is barred by the doctrine of res judicata.

## 12. Set-Off

1. The Illinois Joint Tortfeasor Contribution Act, (the “Act”) creates a statutory right of contribution in actions “where 2 or more persons are subject to liability in tort arising out of the same injury to person or property.” 740 ILCS 100/2(a); *see Bulson v. Helmold*, 2018 U.S. Dist. LEXIS 187850 at 5-6 (N.D. Ill. 2018).

2. Pursuant to the Act, “when a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury...it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.” 740 ILCS 100/2(c); *see Bulson*, 2018 U.S. Dist. LEXIS 187850 at 5-6.

3. A setoff is “a procedural device for adjusting a verdict to avoid a windfall to the plaintiff” generally styled as a Rule 59(e) motion to alter or amend the judgment. *See Fox ex rel. Fox v. Barnes*, 2013 WL 2111816 at 2 (N.D. Ill. May 15, 2013) (citing *Zivitz v. Greenberg*, 279 F.3d 536, 539 (7<sup>th</sup> Cir. 2002); *Smith v. Altman*, No. 12 C 4546 (N.D. Ill. September 21, 2015)).

4. On July 10, 2020, Defendants, Wexford and Davida, filed a motion for entry of an order granting a set-off in the amount of a confidential settlement between Plaintiff and previous co-defendant(s) reviewed in-camera by this Honorable Court. (Dkt. 241).

5. On July 15, 2020, this Honorable Court entered an order denying Defendants, Wexford and Davida’s, request for a set-off as premature because no liability had been established. (Dkt. 246).

6. In the event that a judgment is entered against Defendant Wexford and/or Defendant Davida, Defendant Wexford and Defendant Davida are entitled to a set-off in the

amount of the confidential settlement reached between Plaintiff and previous co-defendant(s) as reviewed in-camera by this Honorable Court.

### **13. Failure to State a Claim**

a. Defendant states that Plaintiff's Sixth Amended Complaint fails to state a claim upon which relief could be granted pursuant to 42 U.S.C. Section 1983, Illinois Wrongful Death Act and Illinois Survival Statute.

b. To assert a claim for cruel and unusual punishment under the Eighth Amendment of the Constitution, the plaintiff must show (1) deliberate indifference to (2) a serious medical need of a prisoner. *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Under Illinois medical malpractice law, plaintiff must prove “(1) the proper standard of care against which the defendant’s conduct is measured; (2) an unskilled or negligent failure to comply with the applicable standard; and (3) a resulting injury proximately caused by the defendants want of skill or care. *Morisch v. United States*, 653 F.3d 522, 531 (7<sup>th</sup> Cir. 2011).

c. A private corporation acting under the color of law may be liable under Section 1983 if an official policy or custom of the corporation resulted in the alleged constitutional deprivation. *Monell v. Dep’t of Social Svcs. Of City of New York*, 436 U.S. 658, 690-91 (1978).

d. To state a viable Section 1983 claim against a private corporation acting under the color of state law, a plaintiff must prove that injury was caused by (1) an express policy; (2) a widespread practice constituting a “custom or usage;” or (3) the act of a person with final policymaking authority at the corporation. *Houskins v. Sheahan*, 549 F.3d 480, 493 (7th Cir. 2008). The Plaintiff’s allegations regarding the policies and customs of the Defendant do not rise to the level of a constitutional violation under Section 1983 and, therefore, cannot establish that the Defendant was deliberately indifferent.

e. Plaintiff has failed to plead an applicable and proper standard of care against which defendant Wexford’s conduct is measured; failed to allege an unskilled or negligent failure to

comply with the applicable standard and failed to allege that any act or omission caused or contributed to any injury of decedent.

**14. Defendant Acted in Good Faith/Immunity**

a. At all times relevant herein, the Defendant acted in good faith in the performance of its official duties and without violating the decedent's statutory or constitutional rights of which a reasonable person would have known. Therefore, the doctrine of qualified immunity protects this Defendant from this lawsuit. "Qualified immunity shields [officials] from civil damages liability so long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. *Leaf v. Shelnutt*, 400 F.3d 1070, 1079-80 (7th Cir. 2005). The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, mistake of fact, or a mistake based on mixed questions of law and fact. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

b. The United States Supreme Court regards as beneficial, the two-step sequence for resolving government officials' immunity claims articulated in *Saucier v. Katz*, 533 U.S. 194, 200 (2001); *see also Pearson*, 555 U.S. at 236 ("Although we now hold that the Saucier protocol should not be regarded as mandatory in all cases, we continue to recognize that it is often beneficial..."). First, a court must decide whether the facts, as alleged by the plaintiff, make out a violation of a constitutional right. *Id.* at 232. Second, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id.* In order to show that the right was clearly established, the plaintiff must show that the defendant's "violation [of the constitutional right] was so clear that an official would realize he or she was violating an inmate's constitutional rights." *Borello v. Allison*, 446 F.3d 742, 750 (7th Cir. 2006).

c. The Plaintiff's Sixth Amended Complaint alleges that Defendants provided medical care and treatment to the decedent while he was incarcerated at a state-run prison. At no time did any Defendant render medical care that was so clearly a violation of the decedent's constitutional rights that the Defendant would realize he or she was providing medical care

tantamount to cruel and unusual punishment. Thus, the doctrine of qualified immunity applies and shields these Defendants from this litigation.

d. The Defendant further recognizes that the Seventh Circuit has suggested, in dicta, that qualified immunity is not available to private medical in state-run prisons. *See Petties v. Carter*, 836 F.3d 722, 733-34 (7th Cir. 2016). However, the United States Supreme Court's decision in *Filarsky v. Delia* controls and establishes that immunity is available to a government's private contractors who are performing jobs that, otherwise, would be performed by state agents, who unquestionably could assert qualified immunity.

e. In *Filarsky*, the Supreme Court, unanimously, held that a private attorney hired by a municipality to perform a task was entitled to claim qualified immunity. *Filarsky v. Delia*, 566 U.S. 377, 390 (2012) (“Affording immunity not only to public employees but also to others acting on behalf of the government similarly serves to ‘ensure that talented candidates are not deterred by the threat of damages suits from entering public service.’”) (internal marks omitted.)

f. Other circuits follow *Filarsky* and apply qualified immunity to private medical providers working in state-run prisons. In a decision handed down after *Petties*, the Tenth Circuit Court of Appeals found that *Filarsky* controlled and applied qualified immunity to a private doctor working in a state prison. *Estate of Lockett v. Fallin*, 841 F.3d 1098, 1108-09 (10th Cir. 2016) (“Dr. Doe stands in the same position as the attorney in *Filarsky* – he was a private party hired to do a job for which a permanent government employee would have received qualified immunity. Thus, we conclude that qualified immunity applies to Dr. Doe.”)

g. The Supreme Court's *Filarsky* decision combined with the case law of other Courts of Appeal establish that qualified immunity applies to private medical providers performing medical services in a state-run prison. Thus, Defendants have a non-frivolous argument for extending, modifying, or reversing existing law in this Circuit.

**15. Failure to Attach a 735 ILCS 5/2-622 certificate of merit report to Sixth Amended Complaint**

(a) When a plaintiff asserts a negligence action against health care workers, he must also comply with the requirements of 735 ILCS 5/2-622. Section 2-622 provides, in part: "[i]n any action, whether in tort, contract, or otherwise, in which plaintiff seeks damages for injuries or death by reason of medical malpractice, hospital, or other healing art malpractice ... [the plaintiff] shall file an affidavit" from a medical professional indicating that the case has merit. 735 ILCS 5/2-622. Failure to file an affidavit pursuant to § 2-622 is cause for dismissal under 735 ILCS 5/2-619 pursuant to 735 ILCS 5/2-622.

(b) The United States Court of Appeals for the Seventh Circuit has implicitly held that 735 ILCS 5/2-622 is a substantive law that should apply to medical malpractice claims brought in federal courts. *Sherrod v. Lingle*, 223 F.3d 605 (7th Cir. 2000). The purpose of the requirement is to "minimize frivolous malpractice suits." *Id.* at 613. "A certificate and report must be filed 'as to each defendant who has been named in the complaint ...; failure to abide by this requirement' shall be grounds for dismissal." *Lingle*, 223 F.3d at 613 (finding that that the district court's dismissal without leave to amend was proper, and adding that "dismissal is mandatory....").

(c) The majority of Illinois Federal Courts have ruled in favor of applying the statute. *See, e.g., Ibscher v. Snyder*, 2003 U.S. Dist. LEXIS 12507, 2003 WL 21696197 (N.D.Ill. 2003) (dismissing two medical malpractice counts for plaintiff's failure to comply with § 2-622); *Smith v. Gottlieb*, 2002 U.S. Dist. LEXIS 13313, 2002 WL 1636546 (N.D. Ill. 2002) (applying § 2-622 to dismiss medical malpractice cause of action before court on basis of diversity jurisdiction); *Wilson v. Formigoni*, 1992 U.S. Dist. LEXIS 17584, 1992 WL 345399 (N.D. Ill. 1992) (finding that § 2-622 is "substantive" and not "procedural," and dismissing three medical malpractice counts in § 1983 cause of action for plaintiffs failure to comply with § 2-622's

requirements); *Landstrom v. Illinois Dep't of Children & Family Services*, 699 F. Supp. 1270 (N.D. Ill. 1988), *affirmed* 892 F.2d 670 (7th Cir. 1990)(dismissing a pendent medical malpractice count in § 1983 case for plaintiff's failure to comply with § 2-622); *Thompson v. Kishwaukee Valley Medical Group*, 1986 U.S. Dist. LEXIS 19587, 1986 WL 11381 (N.D.Ill. 1986) (holding plaintiff's failure to comply with § 2-622 requires dismissal in federal court). Failing to provide an affidavit and report that there is "reasonable and meritorious cause" for filing a medical malpractice action and the reasons for that conclusion is case dispositive at the summary judgment phase. *Young v. United States*, 942 F.3d 349, 351-52 (7<sup>th</sup> Cir. 2019). The affidavit and report must be a statement that the medical malpractice cause of action is reasonable and meritorious. *Id.*

(d) Here, Plaintiff has failed to attach the required an affidavit and report that there is "reasonable and meritorious cause" for filing a medical malpractice action against defendant Wexford Health Sources, Inc. Accordingly, plaintiff's state law claim for medical negligence must be dismissed.

WHEREFORE, Defendant, WEXFORD HEALTH SOURCES, INC., respectfully requests this Honorable Court to enter an Order granting judgment in favor of Defendant and against Plaintiff, dismissing his Sixth Amended Complaint (Dkt. 244) with prejudice and with costs including attorney fees pursuant to 42 U.S.C. § 1988(b) and for such other relief as this Court deems appropriate and just.

Respectfully Submitted,  
WEXFORD HEALTH SOURCES, INC.,  
By: /s/ Robert S. Tengesdal  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 13, 2020, I caused the foregoing document to be filed electronically with the Clerk of the Court through ECF and to be served upon all counsel of record by filing the same with the CM/EFC system.

By: /s/ Robert S. Tengesdal

**CERTIFICATE OF SERVICE**

I hereby certify that on November 13, 2020, I caused the foregoing document to be filed electronically with the Clerk of the Court through ECF. All of the participants in the case are registered CM/EFC users and will be served by the CM/EFC system.

By: /s/ Robert S. Tengesdal