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

Johnny Jones,	)	
	)	
Plaintiff,	)	
	)	No. 17-cv-8218
-vs-	)	
	)	*(Judge Rowland)*
Wexford Health Sources, Inc., a foreign corporation, and Dr. Marshall James,	)	
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Johnny Jones suffered a "career ending" injury to his left knee while a prisoner at the Sheridan Correctional Center. (Plaintiff's Additional Facts ¶ 3.) Defendant Dr. Marshall James examined plaintiff and recognized the possibility that he might have a patellar tendon rupture, but Dr. James ignored plaintiff's need for prompt surgery. As a result, plaintiff is permanently disabled.

Plaintiff contends in this lawsuit that defendant Dr. James subjected plaintiff to cruel and unusual punishment in violation of the Eighth Amendment. (Complaint ¶¶ 22-23, ECF No. 1) Plaintiff contends that the policies of defendant Wexford were another cause of this constitutional injury. (*Id.* ¶ 18.)

As a supplemental state law claim, plaintiff contends that defendant Dr. James committed medical malpractice under Illinois law, for which defendant Wexford is jointly liable as his employer.

Defendant James seeks summary judgment on plaintiff's federal and state law claims. Defendant Wexford does not seek judgment on plaintiff's *Monell* claim but joins with James in seeking summary judgment on plaintiff's state law medical malpractice claim. Plaintiff shows below that the Court should deny defendants' motion.

I. The Court Should Deny Summary Judgment because of Defendants' Flouting of Local Rule 56.

This Court recently reminded litigants that "a Local Rule 56.1 statement of facts is not a substitute for a statement of facts contained in a supporting memorandum of law." *Stark v. Johnson & Johnson*, No. 18 CV 06609, 2020 WL 1914767, at *1 (N.D. Ill. Apr. 20, 2020) (citations omitted). Defendants fail to include a statement of facts in their memorandum. (ECF No. 90 at 2.) The Court is entitled to strictly enforce Local Rule 56.1, *Thornton v. M7 Aerospace LP*, 796 F.3d 757, 769 (7th Cir. 2015), and should strike defendants' motion for summary judgment.

II. Statement of Facts

A. Historical Facts

Plaintiff, while a prisoner at the Sheridan Correctional Center, ruptured the patella tendon on his left knee while playing basketball on November 14, 2015: when plaintiff went for a rebound, he felt and heard something "snap." (Plaintiff's Additional Facts ¶ 1; ECF No. 91 ¶ 1.) A prison guard helped plaintiff off the floor and several guards took plaintiff to the health care unit, where plaintiff was examined by a nurse. (Plaintiff's Additional Facts ¶ 5.) The nurse conferred by telephone about plaintiff with defendant Dr. James, then provided plaintiff with

ibuprofen and crutches, and instructed him to rest and keep his left leg elevated. (*Id.* ¶ 6.)

Dr. James examined plaintiff for the first time on November 16, 2015. (Plaintiff's Additional Facts ¶ 7.) Plaintiff reported to Dr. James that his knee pain was 8 out of 10. (*Id.* ¶ 8.) Dr. James observed increased knee swelling and pain and suspected a patellar tendon rupture. (*Id.*) Plaintiff's injury exhibited "the classic mechanism of injury for a patellar tendon rupture." (*Id.* ¶ 2.)

A ruptured patellar tendon is a "bad injury" that can be "career ending" for an athlete because it prevents the patient from walking and causes severe pain. (Plaintiff's Additional Facts ¶ 3.) A ruptured patellar tendon should be surgically repaired within ten days of the injury. (*Id.* ¶ 4.) A delay longer than three weeks means that the surgeon cannot repair the tendon but must reconstruct it by using cadaver tendon, causing a poorer result: the longer a patient waits for surgery, the greater the likelihood of complications, such as the chronic pain and stiffness that plaintiff is currently experiencing. (*Id.*)

Dr. James ordered an X-ray to "rule out" a ruptured patellar tendon. (Plaintiff's Additional Facts ¶ 9.) Dr. James's intent to "rule out" means that Dr. James "clearly had a suspicion of an acute patellar tendon rupture." (*Id.*)

When he examined plaintiff on November 16, 2015, Dr. James considered presenting plaintiff's case at a "collegial," that is, a "conference … with a senior doctor that pretty much determines where we [are] going to go forth with the management of the particular patient." (Plaintiff's Additional Facts ¶ 10.) Dr.

James, however, did not get around to presenting plaintiff's case at a "collegial" until December 15, 2015. (*Id.* ¶¶ 12, 28) This was long after a ruptured patellar tendon can be repaired without leaving the patient permanently disabled. (*Id.* ¶ 4.) Instead, Dr. James prescribed what he described as "conservative treatment" but which amounted to no treatment at all: pain medication, complete rest, and no weightbearing. (*Id.* ¶ 12.)

Dr. James conducted a cursory examination of plaintiff on November 16, 2015 that was far below the standard of care: Dr. James failed to document plaintiff's inability to extend his knee, the limited range of motion of the injured knee, tenderness to palpation in the knee, inability to perform a straight leg raise, defect in the patellar tendon, or the presence of an effusion or hemarthrosis. (Plaintiff's Additional Facts ¶ 13.) A doctor who met the standard of care and performed an adequate examination of plaintiff on November 16, 2015 would have determined that there was an urgent need for surgical consultation. (*Id.* ¶ 14.)

Dr. James learned on November 16, 2015 that the X-ray he ordered had been taken that day. (Plaintiff's Additional Facts ¶ 15.) The X-ray was read by a radiologist working offsite on November 18, 2015, who that day wrote a report interpreting the X-ray. (*Id.* ¶ 16.) The radiologist noted that plaintiff's "patella is slightly high riding;" a finding that supported, rather than ruled out, a patellar tendon rupture (*Id.* ¶ 17.)

The report of the radiologist was transmitted by fax or by email to Dr. James on November 18, 2015. (Plaintiff's Additional Facts ¶ 18.) After he reviewed

the X-ray report, Dr. James should have immediately sent plaintiff for an MRI or secured a consultation with an orthopedist. (*Id.* ¶ 20.) Instead, Dr. James persisted in his "treatment of no treatment"—pain medication, rest, and no weightbearing on the left knee. (*Id.* ¶ 19.)

On November 30, 2015, Dr. James reviewed plaintiff's file and decided that there was no need to examine plaintiff and assess his condition. (Plaintiff's Additional Facts ¶ 25.) Dr. James finally re-examined plaintiff on December 8, 2015 when he found that plaintiff continued to show signs and symptoms of a probable patella tendon rupture. (*Id.* ¶¶ 26-27.) Dr. James finally presented plaintiff's condition at a "collegial" on December 15, 2015 and obtained authorization for an MRI. (*Id.* ¶ 28.) Dr. James could have requested that collegial review be performed sooner as an "urgent consultation." (*Id.* ¶ 29.)

Plaintiff received an MRI on January 18, 2016 that confirmed a complete tear of the patellar tendon in the left knee. (Plaintiff's Additional Facts ¶ 31.) Plaintiff was examined by an orthopedic surgeon on February 8, 2016, who diagnosed a torn patella tendon and recommended surgery as soon as possible. (*Id.* ¶¶ 32, 34.)

The delay between plaintiff's injury and his consultation with an orthopedic surgeon did not meet the standard of care and caused harm to plaintiff. (Plaintiff's Additional Facts ¶ 33.) The surgeon told plaintiff that the delay would impact the outcome of the surgery. (*Id.* ¶ 34.) The prediction was accurate: the delay caused scar tissue to develop, which complicated the surgery; the surgeon was forced to use a graft to do a reconstruction rather than a repair. (*Id.* ¶ 35.) The surgery,

which was performed on February 16, 2016, was not completely successful—plaintiff did not recover knee function and continued to have pain; after a three-month delay between injury and surgery it was not possible to have a successful surgery. (*Id.* ¶ 36.)

Following his release from the penitentiary, plaintiff was treated by another orthopedic surgeon, who performed a second surgery. (Plaintiff's Additional Facts ¶¶ 37, 39.) Plaintiff continues to have persistent and chronic pain, limited range of motion, dysfunction, and inability to use his left leg as he did before the surgery. (Plaintiff's Additional Facts ¶ 40.)

B. Expert Opinion

Plaintiff supports his claims with the expert opinions of Dr. Vincent Cannestra, a board certified orthopedic surgeon. Dr. Cannestra explains in his report that defendant Dr. James deviated from the standard of care by performing an inadequate initial examination (Plaintiff's Additional Facts ¶¶ 13, 14) and by failing to order a prompt MRI scan or orthopedic consultation after the initial examination and after reviewing the X-ray he ordered at the initial examination. (*Id.* ¶¶ 20, 21.) Dr. Cannestra opines that these deviations from the standard of care are so egregious as to constitute no treatment at all. (*Id.* ¶ 24.)

Defendants counter Dr. Cannestra with opinions from their retained expert, Dr. Prodromos. Plaintiff demonstrates in his motion to exclude the defense opinion testimony that Dr. Prodromos's opinions are not based on the record viewed in the light most favorable to plaintiff and are not admissible under Federal

Rule of Evidence 702. In addition, each of Dr. Prodromos's opinions is hotly disputed by Dr. Cannestra. The Court cannot resolve these disputes at summary judgment. *E.g.*, *Godinez v. City of Chicago*, No. 16-CV-07344, 2019 WL 5597190, at *2 (N.D. Ill. Oct. 30, 2019). Defendants do not argue to the contrary. Instead, they simply ignore the vast majority of Dr. Cannestra's opinions.

III. Plaintiff's Claims

Plaintiff sues defendant Dr. James for deliberate indifference to his serious medical needs in violation of the Eighth Amendment. To analyze this claim, the Court performs a two-step analysis, "first examining whether a plaintiff suffered from an objectively serious medical condition, and then determining whether the individual was deliberately indifferent to that condition." *Petties v. Carter*, 836 F.3d 722, 727 (7th Cir. 2016). Defendants correctly concede that plaintiff's knee injury was an objectively serious medical condition. (ECF No. 92 at 5.) Plaintiff will therefore address only the second prong of his Eighth Amendment deliberate indifference claim.

Plaintiff also brings a medical malpractice claim, under the Court's supplemental jurisdiction, against Dr. James and his employer, defendant Wexford. Wexford is liable for the medical negligence of its employees, such as Dr. James. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163–64, 862 N.E.2d 985, 991 (2007).

To succeed on his medical malpractice claim, plaintiff must show "'(1) the proper standard of care for the defendant physicians; (2) an unskilled or negligent failure to comply with the appropriate standard; and (3) a resulting injury

proximately caused by the physicians' failure of skill or care.'" *Wipf v. Kowalski*, 519 F.3d 380, 384 (7th Cir. 2008) (quoting *Jinkins v. Evangelical Hosps. Corp.*, 336 Ill. App. 3d 377, 783 N.E. 2d 123, 126-27 (2002).)

Finally, plaintiff brings a constitutional claim against defendant Wexford under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), asserting that he was injured because of express policies or a widespread practice of defendant Wexford. (Complaint ¶ 18, ECF No. 1.) Delays in accessing surgery are "features of the Wexford system of health." *Norwood v. Ghosh*, 723 F. App'x 357, 363-64 (7th Cir. 2018). Defendant Wexford does not address plaintiff's *Monell* claim in its motion for summary judgment (ECF No. 90) or in its supporting memorandum. (ECF No. 92.) Defendants may not, of course, reserve this argument for a reply memorandum. *Narducci v. Moore*, 572 F.3d 313, 323–24 (7th Cir. 2009). Plaintiff therefore will not address this waived argument

IV. Summary Judgment Standard

The Court recently summarized the legal standards for summary judgment in *TreeHouse Foods, Inc. v. SunOpta Grains & Foods Inc.*, No. 18-CV-1412, 2020 WL 2836797, at *1 (N.D. Ill. May 31, 2020):

> The Court "consider[s] all of the evidence in the record in the light most favorable to the non-moving party, and [ ] draw[s] all reasonable inferences from that evidence in favor of the party opposing summary judgment." *Skiba v. Ill. Cent. R.R. Co.*, 884 F.3d 708, 717 (7th Cir. 2018) (internal citation and quotations omitted). In doing so, the Court gives the non-moving party "the benefit of reasonable inferences from the evidence, but not speculative inferences in [its] favor." *White v. City of Chi.*, 829 F.3d 837, 841 (7th Cir. 2016) (internal citations omitted). "The controlling question is whether a reasonable trier of fact could find in favor of the non-moving party on the

> evidence submitted in support of and opposition to the motion for summary judgment." *Id.* (citation omitted).

Id. at *1. Application of these standards to the record in this case requires that the Court deny defendants' motion for summary judgment.

V. Trial Is Required on Plaintiff's Medical Malpractice Claim

Plaintiff's medical malpractice claim rests on the expert opinions of Dr. Vincent Cannestra, a board certified orthopedic surgeon, that defendant Dr. James deviated from the standard of care by performing an inadequate initial examination and by failing to order a prompt MRI scan or orthopedic consultation after the initial examination and after reviewing the x-ray he ordered at the initial examination. (Plaintiff's Additional Facts ¶¶ 13, 14, 20, 21, 22.) Dr. Cannestra also opines that the time between plaintiff's injury and his consultation with an orthopedic surgeon did not meet the standard of care and caused harm to plaintiff. (*Id.* ¶ 33.)

These opinions satisfy the first two requirements of a medical malpractice claim. *Wipf v. Kowalski*, 519 F.3d 380, 384 (7th Cir. 2008). Dr. Cannestra also provides sufficient evidence on causation, the third and final requirement of a medical malpractice claim. *Id.* Plaintiff's expert explains how plaintiff was harmed by the delay between his injury and his first surgery. (Additional Facts ¶¶ 33, 40.) The delay caused plaintiff to have persistent and chronic pain, limited range of motion, dysfunction, and inability to use his left leg as he did prior to the injury:

> It is also highly unlikely that plaintiff will ever return to the basketball court or participate in recreational activities as he did prior to his prison injury.

(*Id.* ¶ 40.)

Defendants discuss only one of Dr. Cannestra's opinions about how Dr. James breached the standard of care, mistakenly arguing that Dr. Cannestra lacks support for his opinion that defendant Dr. James's initial examination of plaintiff was inadequate. (ECF No. 92 at 9-11.) While the opinions that defendants ignore are enough for plaintiff's claims to survive summary judgment, defendants are mistaken in their challenge to Dr. Cannestra's opinion that Dr. James's initial examination of plaintiff failed to meet the standard of care.

Defendants argue that Dr. Cannestra should have considered Dr. James's testimony about the examination (ECF No. 92 at 10), but Dr. Cannestra did consider Dr. James's testimony. (Plaintiff's Response to Defendants' Local Rule 56.1 Statement ¶ 33.)

Dr. Cannestra explained that the standard of care for an examination of a patient presenting as plaintiff did on November 16, 2015 would include documentation of plaintiff's ability to extend his knee, his active range of motion of the injured knee, whether or not there was tenderness on palpation in the knee, ability to perform a straight leg raise, any observed defect in the patellar tendon, or the presence of an effusion or hemarthrosis. (Plaintiff's Additional Facts ¶ 13.) Dr. Cannestra concluded, from the medical records and from the deposition testimony of Dr. James, that Dr. James failed to meet this standard of care in his initial examination. (Plaintiff's Additional Facts ¶ 14.) Defendants may not like Dr. Cannestra's opinion, but they may not simply dismiss it with their unadorned claim that it is "unsupported." (ECF No. 92 at 10.)

Defendants also ask the Court to ignore Dr. Cannestra's opinion because, in their view of the facts, plaintiff's knee was only "slightly swollen" and his plain level "was low." (ECF No. 92 at 10.) Defendants advance this contention in Paragraph 14 of their Local Rule 56.1 Statement. Plaintiff responds to that paragraph by showing that Dr. James recorded different observations in the medical records, as he explained at his deposition. (Medical Record, November 16, 2015, Plaintiff's Exhibit 3; Dr. James Dep. 26:12-28:19, ECF No. 91-2 at 8; Dr. Cannestra Verified Expert Report at 7, Plaintiff's Exhibit 1.) The Court must, of course, view the record in the light most favorable to the party opposing summary judgment, *Skiba v. Ill. Cent. R.R. Co.*, 884 F.3d 708, 717 (7th Cir. 2018). Whether Dr. James met the standard of care in his examination of plaintiff is a question for trial.

Defendants similarly fail to view the facts in the light most favorable to plaintiff in their argument that plaintiff "presented with symptoms that are atypical of a person with an acute patellar tendon rupture." (ECF No. 92 at 11.) The opposite inference is appropriate on defendants' motion for summary judgment, especially when Dr. James suspected a ruptured patella tendon, considered presenting plaintiff's case to "collegial review," and ordered an X-ray to rule out the possibility of a ruptured patella tendon. (Plaintiff's Additional Facts ¶ 9.)

Defendants continue to ask the Court to disregard its duty to read the record in the light most favorable to plaintiff in their assertion that plaintiff has not been harmed by the medical malpractice. (ECF No. 92 at 11-13.) Plaintiff's retained expert, Dr. Cannestra, is unequivocal in his opinion that plaintiff was

harmed by the delay. (Additional Facts ¶¶ 33, 40.) The same is true for the treating orthopedic surgeons, Dr. Behl and Dr. Verma, who agree that plaintiff was harmed by the delay in treatment. (Additional Facts ¶¶ 34, 38.) As Dr. Behl explained, the delay caused scar tissue to develop, which complicated the surgery; Dr. Behl was forced to use a graft to do a reconstruction rather than a repair. (Plaintiff's Additional Facts ¶ 35.)

Defendant also raise other arguments about the results of plaintiff's second surgery. (ECF No. 92 at 12-13.) These arguments ignore disputed facts, but they are also irrelevant to whether Dr. James is liable for medical malpractice. Any disputes about the extent of plaintiff's damages must be resolved at trial.

VI. Trial Is Required on Plaintiff's Deliberate Indifference Claim

Recent decisions in this circuit make plain that when, as here, a prisoner presents to a prison doctor with a tendon rupture and the doctor fails to provide prompt treatment, a trial is required to determine whether the prison doctor was deliberately indifferent to the serious medical need.

In *Conley v. Birch*, 796 F.3d 742 (7th Cir. 2015), the Seventh Circuit reversed the grant of summary judgment in a case where, as here, the prison physician "strongly suspected" a fracture. *Id.* at 747. Here, defendant James ordered an X-ray to "rule out" a patellar fracture. A trial was required in *Conley* because a jury could find that the providing "only painkillers and ice to an inmate suffering from a suspected fracture" could amount to deliberate indifference. *Id.* Dr. James prescribed similar treatment for plaintiff in this case. As in *Conley*, a jury could

find that what Dr. James did after the X-ray results reached the prison—continuing painkillers and rest—was likewise deliberate indifference.

The en banc Seventh Circuit reached the same result in *Petties v. Carter*, 836 F.3d 722 (7th Cir. 2016). There, the prisoner had a ruptured Achilles tendon. The prison doctor provided the prisoner with the same treatment as Dr. James prescribed in this case—painkillers, crutches, and bedrest. The prisoner in *Petties* argued that more was required and the en banc Court of Appeals agreed, holding that a trial was required to determine if the jail doctors acted with deliberate indifference in not providing the appropriate treatment for the ruptured tendon. *Id.* at 731-733.

Another judge in this district recently applied these cases to deny summary judgment against doctors in a case involving delayed treatment for a ruptured Achilles tendon. As Chief Judge Pallmeyer explained:

> In *Petties v. Carter*, an inmate suffered a ruptured Achilles tendon in January, underwent an MRI in March, and saw an off-site specialist in July. 836 F.3d at 726-27. The prisoner later brought a § 1983 claim against the prison medical staff for deliberate indifference, and the trial court entered summary judgment for the defendants. *Id.* at 727. The Seventh Circuit reversed, finding material questions of fact precluding summary judgment. *Id.* at 731-33. Specifically, the court noted that the doctor's decision not to view the ruptured tendon as an emergency and refusal to send the inmate to the emergency room to obtain an MRI, which prolonged the inmate's pain, generated a question for the jury about whether the doctor demonstrated deliberate indifference. *Id.* at 733.

Almond v. Wexford Health Source, Inc., No. 3:15 C 50291, 2020 WL 108419, at *6 (N.D. Ill. Jan. 9, 2020). Chief Judge Pallmeyer denied the motion for summary judgment in *Almond* because a jury could conclude that the doctor's conduct

"caused unnecessary and unreasonable delay in arranging for proper treatment." *Id.*

The facts here are as strong as in *Almond.* Dr. James suspected a ruptured patellar tendon, considered presenting the case for "collegial review," and ordered an X-ray to rule out a rupture. (Plaintiff's Additional Facts ¶¶ 8, 9, 10.) Nevertheless, Dr. James took no action on his suspicion even after he reviewed the radiologist's report that was consistent with a rupture. (*Id.* ¶¶ 12, 19.) Dr. James proceeded in a similarly leisurely fashion when he finally decided to take action: he did not present plaintiff's case to "collegial" until December 15, 2015, and then stood by while another month passed before plaintiff received an MRI. (*Id.* ¶¶ 28, 31.) As in *Almond*, this evidence generates "a question for the jury about whether the doctor demonstrated deliberate indifference." *Almond v. Wexford Health Source, Inc.*, No. 3:15 C 50291, 2020 WL 108419, at *6 (N.D. Ill. Jan. 9, 2020).

In addition, plaintiff's deliberate indifference claim is supported by the expert opinions of Dr. Cannestra who opines that Dr. James's deviations from the standard of care are so egregious as to constitute no treatment at all. (Plaintiff's Additional Facts ¶ 24.) Dr. Cannestra provides "verifying medical evidence," *Williams v. Liefer*, 491 F.3d 710, 715 (7th Cir. 2007), that the delay in treatment harmed plaintiff. (Plaintiff's Additional Facts ¶¶ 33, 40.)

There is no merit in defendants claim that plaintiff received regular and consistent care. (ECF No. 92 at 6.) The facts underlying this argument are all disputed. (Plaintiff's Response to Defendants' Local Rule 56.1 Statement ¶¶ 11, 13,

14, 15, 16.) A prison grievance filed by plaintiff on December 29, 2015, complaining about the delay in treating his patella tendon rupture, shows the folly of defendants' argument that plaintiff was never denied medical care. (Plaintiff's Additional Facts ¶ 30.) The legal basis for this argument is also lacking: "an inmate is not required to show that he was literally ignored by prison staff to demonstrate deliberate indifference." *Petties v. Carter*, 836 F.3d 722, 729 (7th Cir. 2016).

Defendants also point out that Dr. James did not personally schedule plaintiff's MRI, (ECF No. 92 at 7-8), but this argument ignores that the scheduling could only occur after Dr. James presented at a collegial. (Plaintiff's Additional Facts ¶ 11.) Finally, defendants present a cursory and undeveloped argument against plaintiff's claim for punitive damages. (ECF No. 92 at 13.) The Court should reject this frivolous argument; the standard for deliberate indifference liability and the standard for punitive damages are the same. *Woodward v. Corr. Med. Servs. of Illinois, Inc.*, 368 F.3d 917, 930 (7th Cir. 2004).

VII. Conclusion

For all these reasons, the Court should deny defendants' motion for summary judgment.

Respectfully submitted,

/s/ Joel A. Flaxman
Joel A. Flaxman
ARDC No. 6292818
Kenneth N. Flaxman
200 South Michigan Ave. Ste 201
Chicago, Illinois 60604
(312) 427-3200
Attorneys for Plaintiffs