043133/19344/MHW/REN/SLB

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JOHNNY JONES,

Plaintiff,

v.

WEXFORD HEALTH SOURCES, INC. and DR. MARSHALL JAMES,

Defendants.

Case Number 17 cv 8218

Honorable Mary M. Rowland

DEFENDANTS', WEXFORD HEALTH SOURCES, INC. AND DR. MARSHALL JAMES, REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants, WEXFORD HEALTH SOURCES, INC. ("Wexford") and DR. MARSHALL JAMES ("Dr. James"), by and through their attorneys, Matthew H. Weller, Ronald E. Neroda and Sandra L. Byrd of CASSIDAY SCHADE LLP, and for their Reply in support of their Motion for Summary Judgment, state as follows:

INTRODUCTION

Plaintiff's Response Brief [Dkt. #103] missed its mark. Plaintiff has failed to provide this Court with any legal or factual basis for denying Defendants' well-founded summary judgment motion, instead Plaintiff attempts to paint a picture of an injury that sidelined his non-existent basketball career [Dkt. 103, pg. 1] and left him permanently disabled. Yet he has provided no proof to support either contention. Likewise, Plaintiff attempts to distract this court by arguing that Defendants' have not complied with Local Rule 56.1, *Id*. at pg. 2, arguing irrelevant case law and presenting additional "facts" that are largely unsupported by the record. (*See* Defendants' Response to Plaintiff's Local Rule 56.1(b) Statement of Additional Facts ("DRSOAF") filed concurrently with this Reply.

Fact and expert discovery are concluded and the record before this Court is clear that Defendants are entitled to summary judgment as a matter of law.

LEGAL STANDARD

After a properly supported motion for summary judgment is made, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "A party will only be successful in opposing summary judgment 'when it presents definite, competent evidence to rebut the motion.'" *Essex v. United Parcel Serv., Inc.*, 111 F.3d 1304, 1308 (7th Cir. 1997).

ARGUMENT

I. Plaintiff's Defective Local Rule 56.1 Response

Plaintiff's Local Rule 56.1 Response is procedurally and substantively defective. Local Rule 56.1 requires that the party opposing a motion for summary judgment file "a *concise* response to the movant's statement…." L.R.56.1 (emphasis added). "When a responding party's statement fails to dispute the facts set forth in the moving party's statement in the manner directed by the rule, those facts are deemed admitted for the purposes of the motion." *Cracco v. Vitran Express, Inc.*, 559 F.3d 625, 632 (7th Cir. 2000). Thus, district courts disregard Local Rule 56.1 responses that do not comply with the mandates of the rule, including responses that contain extraneous evidence, do not cite to specific portions of the record and make legal arguments. *Id.*

Instead of complying with Local Rule 56.1, Plaintiff attempts to shoehorn in additional facts in response to Defendants' Local Rule 56.1 statement, sometimes taking as many as two pages to respond. (*See, e.g.* Dkt. #101, ¶16). This is completely improper. If a responding party wishes to rely on additional facts in his brief, then he must file a separate statement "consisting

of short numbered paragraphs, of any additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon." L.R. 56.1(b)(3)(C). This then allows the movant, a chance to respond with necessary record evidence, and cite that information in his reply brief.

Here, Plaintiff smuggles additional facts into his Local Rule 56.1 response either by disagreeing with or objecting to the statement of fact and then citing to record evidence going far beyond what the disputed statement discussed in the first place. *See* [Dkt. # 101, ¶¶ 14, 16, 17, 20-27, 29, 30, 31-33]. This is improper. *See Bolden v. Dart*, 2013 U.S. Dist. LEXIS 102397 *6 (N.D. Ill. 2013) (holding that Local Rule 56.1(b)(3)(B) responses that make "factual assertions that go well beyond the facts asserted in the corresponding paragraphs of Defendants' Local Rule 56.1(a)(3) statement" should be stricken because they are not set forth in a Local Rule 56.1(b)(3)(C) statement of additional facts.)

If Plaintiff wanted to get additional facts before the court that had nothing to do with the statement of fact he was disputing, then he should have included them in his statement of additional facts. [Dkt. #102]. Instead, Plaintiff's failure to follow the rules deprives Defendants a meaningful opportunity to respond with record evidence to the additional facts Plaintiff put into his 56.1 response.

Additionally, Plaintiff's Local Rule 56.1 response makes numerous improper legal objections, often as the exclusive basis for disputing a fact. [Dkt. #101, ¶¶ 2, 11, 14, 16, 17, 20, 21-32]. Legal arguments are not properly made in responses to statements of fact. *Brownlee v. Catholic Charities of the Archdiocese of Chi.*, 16-CV-665, 2020 U.S. Dist. LEXIS 34216, *9, 2020 WL 977968 (N.D. Ill. Feb. 28, 2020). "By objecting or including an argument in a response to a Local Rule 56.1(a)(3) response, the party resisting summary judgment deprives the moving

party of the chance to reply. Including arguments in a Local Rule 56.1(b)(2) memorandum of law or in a separate motion to strike avoids these problems by permitting full adversary presentation." *Id.*

If Plaintiff wanted to make a legal objection or move to strike a statement of fact, then the proper mechanism is raising the objection in his response brief. Doing so affords Defendants an opportunity to respond and set forth the record for the Court. Instead, Plaintiff objects in his 56.1 Response effectively depriving Defendants of the ability to respond. These objections are improper and the court should deem those facts admitted.

Likewise, Plaintiff's argument that Defendant's Local Rule 56.1 Statement of Facts should be stricken is not well founded. Plaintiff relies upon a recent ruling by this Court to support his argument, and significantly, omits citation to the cases upon which this Court relied when making its ruling. [Dkt. #103, pg. 2, *citing Stark v. Johnson & Johnson*, No. 18cv6609, 2020 WL 1914767, at *1 (N.D. Ill. Apr. 20, 2020)]. In *Stark*, the moving party failed entirely to mention its Local Rule 56.1 Statement of Facts in its summary judgment memorandum of law, *Stark v. Johnson & Johnson*, 18cv6609, Dkt. #60, and liberally cited to the record instead of its Statement of Facts throughout its brief. *Stark v. Johnson & Johnson*, at *2. In *Stark*, this Court relied upon *FirstMerit Bank, N.A. v. 2200 N. Ashland, LLC*, No. 12 C 572, 2014 U.S.Dist. LEXIS 159741, at *11 (N.D. Ill. 2014) in its admonishment to litigants to comply with the requirements of Local Rule 56.1. In *FirstMerit Bank*, as in *Stark*, the parties improperly cited to the record instead of to their Local Rule 56.1 Statement of Facts. That is not the scenario before the court in this matter. Regardless, in neither *Stark* nor *FirstMerit Bank* did the court strike the Statement of Facts that was filed as Plaintiff suggests this Court should do. This is a suggestion this Court should decline to follow.

II. Plaintiff Failed to Rebut Defendants' Motion for Summary Judgment on the Issue of Deliberate Indifference with Definite, Competent Evidence

In order to prove deliberate indifference, Plaintiff must put forth evidence that (1) he suffered from an objectively serious medical condition and (2) Dr. James was subjectively aware of the condition and (3) Dr. James responded recklessly, in the criminal sense. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Defendants have conceded that Plaintiff's injury was an objectively serious medical condition, however Plaintiff's Response Brief fails to rebut the remaining two elements.

In support of his argument, Plaintiff attempts to compare the factual scenario in this matter to *Conley v. Birch*, 796 F.3d 742 (7th Cir. 2015), *Petties v. Carter*, 836 F.3d 722 (7th Cir. 2016) and *Almond v. Wexford Health Sources, Inc.*, No. 3:15 C 50291, 2020 U.S. Dist. LEXIS 3392, 2020 WL 108419 (N.D. Ill. Jan. 9, 2020), however, Plaintiff's attempts are misplaced.

In *Conley*, the plaintiff was involved in an altercation with another inmate in which the other inmate struck Conley's hand with a combination lock. *Conley v. Birch*, 796 F.3d at 744. Conley did not seek medical treatment for two days and when he did the nurse who performed his examination noted significant injuries, bruising and swelling in his reports and noted that Conley probably had a fracture. *Id*. The nurse spoke with Dr. Birch by phone but Dr. Birch did not order an x-ray. *Id*. at 745. When Dr. Birch examined Conley in person five days later, Dr. Birch ordered an x-ray that confirmed the nurse's suspicion that Conley had a fracture. *Id*.

Conley contended that based on the initial telephone conversation between Dr. Birch and the nurse, Dr. Birch "strongly suspected that Conley's hand was fractured" and Dr. Birch's failure to either immediately order an x-ray or any type of precautionary treatment, Dr. Birch was deliberately indifferent to Plaintiff's serious medical needs. *Id*. at 746. In reversing a grant of summary judgment in Dr. Birch's favor, the Seventh Circuit found that on the night that the

prison nurse called Dr. Birch at home regarding Conley, the nurse relayed to Dr. Birch that Conley had a "'possible/probable fracture'". *Id*. at 747. Based on this finding, the Seventh Circuit concluded that on the night Dr. Birch spoke with the prison nurse over the phone, Dr. Birch "strongly suspected" that Conley's hand was fractured. *Id.*

The facts before this Court are quite different. There is no evidence before this Court that when the nurse at Sheridan called Dr. James at home following Plaintiff's fall that the nurse conveyed anything to Dr. James that would cause Dr. James to conclude that Plaintiff had ruptured his patellar tendon. Likewise, two days later when Dr. James examined Plaintiff and ordered an x-ray, Dr. James noted he wanted to "rule out" an injury to Plaintiff's patellar tendon. Seeking to "rule out" an injury is vastly different than "strongly suspecting" an injury.

Likewise, in *Petties v. Carter*, the evidence before the court included the fact that Petties' treating physician had significant prior experience with torn Achilles tendons—the injury Petties had—and that during his initial contact with Petties the doctor "thought" Petties had ruptured his Achilles tendon. *Petties v. Carter*, 836 F.3d at 726. The doctor failed to follow the treatment protocol for patients with ruptured Achilles tendons and failed to immobilize Petties foot. *Id*. The gravamen of Petties' complaint against the doctor was the doctor's failure to immobilize Petties' ruptured tendon for six weeks while Petties awaited an MRI. *Id*. at 731. The evidence established that the doctor diagnosed Petties with an Achilles rupture and that the doctor knew the importance of immobilizing a ruptured Achilles tendon, yet he failed to do so until he came under scrutiny. *Id*. at 732. Again, this factual scenario is not comparable to the facts before this Court. Unlike the doctor in *Petties* Dr. James never "thought" Plaintiff had a ruptured patellar tendon nor did Dr. James ever diagnose Plaintiff with a ruptured patellar tendon prior to Plaintiff's MRI.

In *Almond*, the inmate-patient injured his knee while running in the prison yard. *Almond v. Wexford Health Sources, Inc.*, 2020 U.S. Dist. LEXIS 3392, at *2. Almond was eventually diagnosed with a ruptured quadriceps tendon, however the primary doctor responsible for Almond's care did not observe any of the typical signs of such an injury during her multiple examinations of Almond and Almond's x-rays did not support a diagnosis of a ruptured quadriceps tendon. *Id.* at **4-5. During the doctor's fourth examination of Plaintiff, she first suspected that Almond may have ruptured his quadriceps tendon. *Id.* at *5. The doctor requested a collegial review to obtain approval for Almond to be taken off-site for an MRI, *Id.*, and nearly a month later (the request was made on August 28 and the collegial review was on September 25) another doctor presented the case for collegial review but did not relay that the referring doctor suspected a quadriceps tear. *Id.* at *6. The MRI was not approved and on-site treatment was continued. *Id.* Approximately three weeks later, on October 15, a second collegial review was conducted and an ultrasound was approved. *Id.* at *7. Almond did not see an orthopedic specialist until nearly 10 months after his injury occurred.

Relying on the factual scenario in *Petties*, the court found that these facts presented a "close question" and denied summary judgment on the narrow issue that a jury could find that the doctor should not have pursued the collegial review process but should have sent Almond for an emergency MRI. Again, this factual scenario is very different than the facts before the court and, as noted above, the facts in *Petties*, on which the Almond court relied, differ significantly from the facts related to Dr. James.

In the instant matter, when Plaintiff arrived at the healthcare unit after injuring his knee on November 14, 2015 he did not have any swelling, tenderness, bruising, cuts or open wounds and his pain level was a four on a scale of one to ten. (Defendant's Statement of Facts, "DSOF",

¶13). Plaintiff was in the healthcare unit with the nurse for approximately one hour during which time the nurse called Dr. James to relay Plaintiff's symptoms. *Id.* Plaintiff was returned to his cell with crutches and pain medication, *Id,* and was seen by Dr. James two days later. (DSOF ¶14). Dr. James conducted a 20 minute examination of Plaintiff, noted that Plaintiff's left knee was slightly swollen, did not have any deformities, had a little laxity in the patella, was similar in presentation to Plaintiff's right knee and ordered an x-ray. *Id.* Additionally, Dr. James prescribed pain medication for six weeks, crutches for six weeks, lay-in for four weeks, and no group classes for four weeks. *Id.*

The results of Plaintiff's x-ray showed some osteoarthritis of his knee joint, mild swelling and a slightly high riding patella. (DSOF ¶15). When Plaintiff's symptoms persisted, on December 8, 2015, Dr. James submitted a referral for Plaintiff to receive an off-site MRI that was approved on December 15, 2015. (DSOF ¶17). Once the MRI was approved the scheduling process was handled by persons other than Dr. James. *Id.*

There is no evidence before this Court that when Dr. James was contacted at home by the nurse on November 14, 2015 that the nurse relayed facts to Dr. James that would cause Dr. James to suspect Plaintiff had ruptured his patellar tendon as the court in *Conley* found in reversing a grant of summary judgment; there is no evidence that Dr. James had extensive experience with ruptured patellar tendons as was the case in *Petties* nor is there evidence that on his initial examination of Plaintiff Dr. James suspected Plaintiff had ruptured his patellar tendon similar to the doctor in *Petties*; and, there is no evidence before this Court that once Dr. James suspected a ruptured patellar tendon that an emergency referral for an MRI was necessary, similar to the "close question" in *Almond,* nor is there evidence that Dr. James following the normal protocol for getting an MRI approved resulted in a delay of nearly seven months as was

the case in *Almond*. Plaintiff's assertion that "the facts here are as strong as in *Almond*," (Dkt. #103, pg. 14), is simply unsupported.

Further, Plaintiff argues that because his retained expert reached the legal, not medical, conclusion that Dr. James treatment amounted to "no treatment at all" that summary judgment must be denied. *Id*. Dr. Cannestra's opinion which was not rendered to a reasonable degree of medical certainty, (DSOF, Ex. G), however, amounts to nothing more than a difference in medical opinions, a standard that is insufficient to prove deliberate indifference. *Murphy v. Wexford Health Sources, Inc.*, No. 19-3310, 2020 U.S. App. LEXIS 19055, *8 (7th Cir. June 18, 2020) (quoting *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016)).

Medical professionals are "entitled to deference in treatment decisions unless no minimally competent medical professional would have so responded under these circumstances." *Sain v. Wood*, 512 F.3d 886, 894-95 (7th Cir. 2008). Worded another way, if even one minimally competent medical professional signs off on Dr. James's medical treatment decisions, then Plaintiff cannot sustain his claim of deliberate indifference any further. Here, Dr. Chadwick Prodromos signed off on Dr. James's medical treatment decisions and noted that Dr. James, a primary care physician, would not be expected to diagnose a complete patellar tendon rupture based on Plaintiff's presentation and the radiology findings. (DSOF ¶29). In fact, Dr. Prodromos stated that Dr. James was "astute" for even considering an injury to Plaintiff's patellar tendon. (DSOF ¶30). That is a far cry from a finding that no minimally competent medical professional would respond the same under the same circumstances. Under this strict standard, Plaintiff's claim of deliberate indifference fails.

Likewise, while Defendants will address this issue more fully in their response to Plaintiff's motion to exclude the opinions of Dr. Prodromos, there is simply no basis for Plaintiff

to argue that Dr. Prodromos's opinions at the summary judgment stage must be ignored. For this to be true it would mean that anytime a plaintiff discloses a doctor expert in a deliberate indifference claim, there is a question of fact. Such a contention is false, and courts routinely grant summary judgment to medical defendants in deliberate indifference claims even when there are "dueling experts." *See e.g., Walker v. Wexford Health Sources, Inc.*, No. 13-CV-7237, 2017 U.S. Dist. LEXIS 127718, 2017 WL 3453388 (N.D. Ill. Aug. 11, 2017) (granting Wexford Defendants summary judgment when Plaintiff disclosed a board-certified medical doctor criticizing their care) *aff'd Walker v. Wexford Health Sources, Inc.*, 940 F.3d 954 (7th Cir. 2019); *Hemphill v. Obaisi*, No. 15-CV-4968, 2019 U.S. Dist. LEXIS 155713, 2019 WL 4345360 (N.D. Ill. Sept. 12, 2019) (granting Wexford Defendants summary judgment when Plaintiff disclosed a correctional medicine physician criticizing their care).

Finally, Plaintiff's argument that he has alleged a constitutional claim against Wexford is unsupported. Plaintiff cites to Paragraph 18 of his Complaint for support that he has alleged a constitutional claim against Wexford. Paragraph 18 of Plaintiff's Complaint does not adequately allege a constitutional violation against Wexford. To adequately plead a *Monell* claim, Plaintiff must plead that Wexford had an unconstitutional policy or widespread practice and that deliberate indifference occurred because of that unconstitutional policy or widespread practice. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986). Here Plaintiff pled that "[b]ecause of express policies or a widespread practice of defendant Wexford, *or, in the alternative*, deliberate indifference or negligence of Wexford's employees, plaintiff did not receive an MRI until January 18, 2016." [Dkt. #1, ¶18].

Plaintiff did not plead either prong of a *Monell* claim—Plaintiff did not plead that Wexford has unconstitutional policies or widespread unconstitutional practices nor did Plaintiff

plead that because of these alleged unconstitutional policies or practices deliberate indifference occurred. Instead, Plaintiff simply pleaded that Wexford has express policies or "a widespread practice" or that deliberate indifference or negligence (which is insufficient to prove deliberate indifference, *Murphy,* 2020 U.S. App. LEXIS 19055, at *10.) occurred. This is insufficient for a *Monell* claim, however, if this Court disagrees, Wexford requests the opportunity to file an amended Motion for Summary Judgment to address this claim as permitted by the Federal Rules of Civil Procedure. Fed. R. Civ. P 60(b)(1) & (6).

III. Plaintiff Failed to Rebut Defendants' Motion for Summary Judgment on the Issue of Medical Negligence

Plaintiff's claim of medical malpractice by Dr. James is unsupported by the record before the court. The parties are in agreement as to the three elements Plaintiff must prove to succeed on a claim of medical malpractice: the standard of care, defendant's negligent failure to comply with that standard, and injuries proximately caused by the breach of that standard. [Dkt. #92, pg. 9 and Dkt. #103, pgs. 7-8].

As it relates to the first two elements, Plaintiff continues to hold Dr. James to a standard that the law does not require—Plaintiff ignores the fact that the symptoms with which Dr. James was presented were atypical for a ruptured patellar tendon. (DSOF ¶¶28 & 29). This fact was confirmed by Plaintiff's treating surgeon, Dr. Behl, (DSOF ¶28) and Defendants' expert, Dr. Prodromos. (DSOF ¶29). Plaintiff's argument that "the standard of care for an examination of a patient presenting as plaintiff did on November 16, 2015," [Dkt. #103, pg. 10], required a different examination than that performed by Dr. James is just not supported by the record. Instead it is manufactured by the opinion of Dr. Cannestra. Interestingly, Dr. Cannestra does not offer a single opinion to a reasonable degree of medical certainty. (DSOF, Ex. G).

Likewise, Plaintiff has not presented proof that he was harmed by Dr. James's medical care. Plaintiff asks this Court to ignore the testimony of Dr. Behl, Plaintiff's surgeon, that Plaintiff's surgery was a success, (DSOF ¶19), in favor of the unsupported opinion of Plaintiff's retained expert who has declared that the surgery was unsuccessful. This is not what the law requires. Instead, Plaintiff's allegations of medical malpractice require that proximate cause of an injury be established by expert testimony to a reasonable degree of medical certainty. *Townsend v. University of Chicago Hospitals*, 318 Ill. App. 3d 406, 413, 741 N.E.2d 1055 (1st Dist. 2001). "The causal connection must not be contingent, speculative or merely possible." *Saxton v. Toole*, 240 Ill. App. 3d 204, 210-211 (1st Cir. 1992).

Dr. Cannestra's opinions are insufficient to meet this burden. (DSOF, Ex. G). Dr. Cannestra has not offered any opinions to a reasonable degree of medical certainty and he certainly did not opine to a reasonable degree of medical certainty that Dr. James' alleged insufficient documentation of his examination of Plaintiff on November 16, 2015 (DRSOAF ¶13), his alleged delay in ordering an MRI (DRSOAF ¶¶ 14, 20 & 21), or the alleged delay in undergoing surgery. (DRSOAF ¶23), caused any harm to Plaintiff. "The mere possibility of a causal connection is not sufficient to sustain the burden of proximate cause. The causal connection must not be contingent, speculative or merely possible." *Susnis v. Radfar*, 317 Ill.App.3d 817, 827 (1st Dist. 2000). Here, Dr. Cannestra's opinions are mere speculation. That is insufficient as a matter of law.

III. Plaintiff has Failed to Present Evidence that Would Allow Recovery of Punitive Damages

Finally, Plaintiff's cursory argument that he is entitled to punitive damages fails. As stated in Defendants Memorandum of Law in Support of their motion for summary judgment and in this reply brief, Defendants have adequately demonstrated that Dr. James did not act with evil motive or intent required for an award of punitive damages. *Schaub v. VonWold*, 638 F.3d 905,

922-23 (8th Cir. 2011). Plaintiff has not offered this Court any evidence to rebut this and as such, this Court should grant summary judgment on this issue.

CONCLUSION

WHEREFORE, Defendants, WEXFORD HEALTH SOURCES, INC., and DR. MARSHALL JAMES request that this Honorable Court grant their Motion for Summary Judgment, enter judgment in their favor, with an award of costs and fees, and for any other relief that this Court deems just.

Respectfully submitted,

WEXFORD HEALTH SOURCES, INC., and DR. MARSHALL JAMES
By: /s/ Sandra L. Byrd

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2020 I electronically filed the foregoing document with the clerk of the court for Northern District of Illinois, Eastern Division, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of E-Filing" to the attorneys of record in this case.

/s/ Sandra L. Byrd

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