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

DEEFENDANTS', WEXFORD HEALTH SOURCES, INC AND DR. MARSHALL JAMES, RESPONSE TO PLAINTIFF'S MOTION TO EXCLUDE OPINIONS OF DR. CHADWICK PRODROMOS ON DEFENSE MOTION FOR SUMMARY JUDGMENT

Defendants, WEXFORD HEALTH SOURCES, INC. and DR. MARSHALL JAMES, by and through one of their attorneys, Sandra L. Byrd of CASSIDAY SCHADE LLP, and for their Response to Plaintiff's Motion to Exclude Opinions of Dr. Prodromos on Defense Motion for Summary Judgment, states as follows:

INTRODUCTION

Plaintiff's Motion to Exclude Opinions of Dr. Prodromos on Defense Motion for Summary Judgment ("Motion to Exclude") [Dkt. #104] asks this Court not to consider the opinions of Defendants' medical expert, Dr. Chadwick Prodromos, at the summary judgment stage because Dr. Prodromos did not render his opinions in the light most favorable to Plaintiff. [Dkt. #104, ¶¶ 3-4]. Summary judgment is "the proverbial 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Beardsall v. CVS Pharm., Inc.*, 953 F.3d 969, 973 (7th Cir. 2020). Instead of showing this Court why his case should proceed to trial, Plaintiff asks this Court to ignore Dr. Prodromos' opinions—opinions Plaintiff chose not challenge in a deposition,

[Dkt. #104, n. 1]—by imposing a new and novel legal standard that is not supported by the facts or the law. Plaintiff's invitation should be declined.

ARGUMENT

Section One of Plaintiff's Motion to Exclude is entitled "Legal Standard for Expert Opinion at Summary Judgment", [Dkt. 104 at 1], yet Plaintiff has failed to provide this Court with any authority that sets forth the legal standard he has invented. Instead, the authority he has cited does nothing more than set forth the standard for summary judgment motions generally and provide this Court with authority that would be applicable if Plaintiff were making a *Daubert* challenge to Dr. Prodromos' opinions. To be clear, Plaintiff has not raised a *Daubert* challenge, he simply disagrees with Dr. Prodromos' conclusions and has asked this Court to strike those conclusions because they do not fit his theory of the case. This is not what the law requires.

In his attempt to convince this Court to ignore the well-founded opinions of Dr. Prodromos, Plaintiff initially relies on an excessive force case from the Southern District of Indiana in which the court, in an aside mentioned only in a footnote, states that it could not resolve a factual dispute at the summary judgment stage despite the fact that the defendant police officer offered an expert opinion in his favor. *Bowens v. City of Indianapolis*, 2014 U.S. Dist. LEXIS 131540, n. 1 (S.D. Ind. 2014). The *Bowens* court did not exclude the expert opinion from its consideration, it simply concluded that the expert opinion did not resolve a factual issue that the court determined should be resolved by the trier of fact. Nothing in *Bowens* supports Plaintiffs assertion that this Court must exclude Dr. Prodromos' opinion at the summary judgment stage because he does not, in Plaintiff's opinion, consider the facts in the light most favorable to Plaintiff. The *Bowens* court did not impose that standard on itself, and nothing in the *Bowens* opinion supports Plaintiff's insistence that this Court do so.

Plaintiff next looks to North Carolina to try and convince this Court to impose upon Defendants' expert a legal standard that the law does not require by relying on case law that examines whether an expert's opinion meets the *Daubert* standard. *Lightfoot v. Georgia Pacific*, 2018 U.S. Dist. LEXIS 214897 (E.D. N.C. 2018). In *Lightfoot*, the defendants filed a Motion to Reconsider following the court's ruling on a *Daubert* motion in which the court considered the facts in the light most favorable to Plaintiff. *Id*. at *6. *Lightfoot*, like Plaintiff's other cited authority, does not address the legal standard for this Court to employ for weighing expert testimony at the summary judgment stage. Instead the *Lightfoot* court determined whether an expert opinion should be excluded for failing to meet the *Daubert* standard, a question that is not before this Court.

Finally, Plaintiff relies on a Seventh Circuit *Daubert* case in his attempt to convince this Court to adopt his novel legal theory. In *Owens v. Auxillium*, 895 F.3d 971 (7th Cir. 2018), the Seventh Circuit held that the District Court did not abuse its discretion when the District Court struck the plaintiff's expert's opinions after concluding that the opinions did not meet the *Daubert* standard. *Id*. at 973. Prior to summary judgment, the defense moved to strike Plaintiff's expert's opinions because they were not tied to the facts of the case. *Id*. at 972. When the expert was confronted at his deposition with hypotheticals based on the actual facts of the case, the expert declined to give an opinion. *Id*. The *Owens* court held that because the experts opinions were not based on the facts of the case it was proper to exclude the opinions because they would not assist the trier of fact. *Id* at 973.

The facts before this Court are quite different. Although Plaintiff dedicated nearly his entire Motion to Exclude—42 paragraphs and 11 pages—to reciting his version of the facts, he did not bother to depose Dr. Prodromos, [Dkt. #104, n. 1], to determine if Dr. Prodromos, like

the expert in *Owens*, based his opinions on incorrect facts. Instead, Plaintiff simply concludes that Dr. Prodromos relied on "'alternative facts'", [Dkt. #104, ¶6], in reaching his conclusions. *Owens* does not support Plaintiff's suggestion that this Court can now ignore Dr. Prodromos' opinions at the summary judgment stage. *Owens* stands for the proposition that *Daubert* does not permit an expert opinion to be put before a trier of fact if that opinion is based on facts that are wholly unsupported by the record. Plaintiff chose to forego the opportunity to challenge Dr. Prodromos' opinions and cannot now ask this Court to ignore those unchallenged opinions simply because he does not like them.

For Plaintiff's suggested summary judgment standard to be true, the necessary result would be that anytime both parties disclose an expert, there is automatically a question of fact that precludes summary judgment. Such a suggestion is false, and courts routinely grant summary judgment to medical defendants 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 the defendants summary judgment when the 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 the defendants summary judgment when the plaintiff disclosed a correctional medicine physician criticizing their care).

In *Walker*, the Seventh Circuit affirmed the District Court's grant of summary judgment despite the fact that the plaintiff disclosed an expert who rendered at least six different opinions related to the medical defendants' care of the plaintiff and the medical defendants' disclosed an expert who held contrary opinions. *Walker* at 962. In fact the Seventh Circuit specifically found

that there was no evidence, despite Plaintiff's expert's opinion to the contrary, that the District Court erred in granting summary judgment. *Id.* at 965-966.

Likewise, in *Hemphill*, the court was also faced with the situation where both the plaintiff and the defendants put forth dueling expert opinions and yet the court granted summary judgment in favor of the defendants. *Hemphill v. Obaisi*, No. 15-CV-4968, 2019 U.S. Dist. LEXIS 155713, 2019 WL 4345360 (N.D. Ill. Sept. 12, 2019). If Plaintiff's theory that this Court must exclude Dr. Prodromos' opinions because those opinions do not view the facts in the light most favorable to Plaintiff was the law, the *Hemphill* court could not have reached a conclusion in favor of the defendants.

Plaintiff's Motion to Exclude is nothing more than an attempt by Plaintiff to convince this Court to adopt an improper legal standard in ruling on Defendants' well-founded Motion for Summary Judgment. As such, Plaintiff's Motion to Exclude should be denied.

WHEREFORE, defendants WEXFORD HEALTH SOURCES, INC. and DR. MARSHALL JAMES request that this honorable Court deny Plaintiff's Motion to Exclude Opinions of Dr. Prodromos on Defense Motion for Summary Judgment and for such other relief as this Court deems proper.

Respectfully submitted,

WEXFORD HEALTH SOURCES, INC. and DR. MARSHALL JAMES

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 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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