UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIDNEY L. PETERSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	19 C 415
	)	
SARAH MAYS, et al.,	)	Judge Charles P. Kocoras
	)	
Defendants.	)	

ORDER

Plaintiff Sidney Peterson was injured after he personally applied a caustic medication to treat his genital warts while at the Illinois Department of Corrections' Stateville Correctional Center ("Stateville"). He brought this action against the prescribing doctor, the attending nurses, and Wexford Health Sources, Inc. ("Wexford"), alleging constitutional violations and negligence. This Court dismissed the deliberate indifference and negligence claims. *See Peterson v. Wexford Health Sources, Inc.*, 2019 WL 11505773 (N.D. Ill. 2019) (Kocoras, J.). The Seventh Circuit affirmed the dismissal of Plaintiff's federal claims, reversed the dismissal of the state-law negligence claim, and remanded the case for further proceedings in connection with the negligence claim. *See Peterson v. Wexford Health Sources, Inc.*, 986 F.3d 746 (7th Cir. 2019). Defendants Mays and Coleman, the two nurses involved in the case, are the only remaining defendants. They now move for summary judgment on Plaintiff's state-law claim. For the reasons set forth below, Defendants' motion for summary judgment

is denied and Plaintiff is granted leave to file an amended complaint, consistent with the Court's directives below, by October 2, 2023. Telephonic status hearing is set for October 19, 2023 at 10:00 a.m.

I. Background

The facts of this case are straightforward and primarily undisputed. At all relevant times, Coleman was a registered nurse and Mays was a Correctional Medical Technician and licensed practical nurse. Both were employed by Stateville.

On or around January 19, 2015, former defendant Dr. Arthur Davida prescribed Plaintiff a medication known as Podocon-25. The prescription order included directions that Podocon-25 be administered by a nurse; however, Podocon-25 is not approved by the FDA for application by non-physicians. The packaging includes warnings that the medication is to be applied "only by a physician."

On March 9 and March 11, 2019, Mays provided Podocon-25 to Plaintiff. Dr. Davida's prescription order from March 9th stated that a patient may apply Podocon-25 with a nurse observing. Davida acknowledged that this was not the proper procedure and that he should have applied the Podocon-25 himself. Neither Coleman nor Mays administered Podocon-25 to Plaintiff or any other individual as IDOC employees.

In his complaint, Plaintiff alleges Defendants owed him a duty to comply with the warnings of the United States Food and Drug Administration ("FDA")—that the Podocon-25 medication was to be applied only by a physician—and breached that duty, causing Plaintiff's injuries. Plaintiff specifically alleges that "his negligence claim does

not amount to 'healing art malpractice' under Illinois law; plaintiff therefore does not attach the certificate required by Section 2-622 of the Illinois Code of Civil Procedure. Plaintiff respectfully requests leave to amend to add this certificate if the Court disagrees." Dkt. # 1, ¶ 24.

On September 9, 2021, following the remand of the state-law claim, Plaintiff emailed all counsel of record what he describes as a "2-622 statement." It is a document entitled "Affidavit of Merit of Denise Panosky DNP, RN, CNE, CCHP, FCNS." At the beginning of the document, Panosky notes that her opinions are "preliminary because I have not reviewed any deposition testimony and may not have received/reviewed complete medical records." Dkt. # 97, at 5. Panosky then describes the applicable standard of care for Defendants Coleman and Mays and recounts the medical records she reviewed. Panosky concludes:

> Nurses Mays, LPN, and three other nurses who administered Podophyllin 25%, fell below the nursing standard of care that is expected of a reasonable prudent registered nurse/licensed practical nurse acting in the same or similar circumstances. These actions contributed to Mr. Peterson's personal injuries as stated in the Complaint and fell below the nursing standard of care. It is my opinion that there is reasonable and meritorious cause for the filing of the action.

Dkt. # 97, at 7–8. The document does not reference Coleman by name other than when describing the standard of care applicable to a registered nurse. Defendants admit to receiving this email but deny that the document complies with the requirements of the Illinois statute.

II. Discussion

Defendants argue they are entitled to summary judgment in their favor because they are protected by state sovereign immunity[1] or, alternatively, because Plaintiff failed to file the "affidavit of merit" required by Illinois law for medical malpractice cases.

The Illinois sovereign immunity statute provides that the state may not be "made a defendant or party in any court," with certain exceptions, including allowing some claims to be heard in the Court of Claims. 745 ILCS 5/1. This protection extends to state employees acting within the scope of their authority. *Murphy v. Smith*, 844 F.3d 653, 658 (7th Cir. 2016). A state law claim against a state employee is considered to be against the state and therefore barred when "there are (1) no allegations that an agent or employee of the State acted beyond the scope of his authority through wrongful acts; (2) the duty alleged to have been breached was not owed to the public generally independent of the fact of State employment; and (3) where the complained-of actions involve matters ordinarily within that employee's normal and official functions of the State." *Id.* (quoting *Healy v. Vaupel*, 133 Ill. 2d 295, 309 (1990)). The parties hotly dispute the source of the alleged duty with respect to Mays and Coleman.

Illinois requires the plaintiff in a medical malpractice suit to file an affidavit stating that "there is a reasonable and meritorious cause" for litigation. 735 ILCS 5/2-

[1] Notably, Defendants raised their sovereign immunity argument at the motion to dismiss stage yet withdrew the defense after reviewing Plaintiff's response brief. *See* Dkt. # 22, at 2 ("Plaintiff contends that Defendants are not entitled to sovereign immunity because, as medical professionals, they owe an independent duty to their patients regardless of their status as employees. After reviewing Plaintiff's Response, Defendants withdraw this argument.").

622. The plaintiff needs a physician's report to support the affidavit's assertions. The report must show that the physician has reviewed the plaintiff's medical records and must justify the conclusion that "a reasonable and meritorious cause" exists. *See id.*; *Young v. United States*, 942 F.3d 349, 350 (7th Cir. 2019). This requirement applies to malpractice litigation in federal court because Section 2-622 "is a substantive condition of liability." *Young*, 942 F.3d at 350 (citing *Hahn v. Walsh*, 762 F.3d 617 (7th Cir. 2014)).

Defendants argue Mays is protected by sovereign immunity because the duty owed by Mays as alleged in the complaint "would not have arisen outside of the context of her employment, as Defendant Mays was not a member of a licensed profession subject to independent professional standards." Dkt. # 94, at 4 (citing *Jackson v. Alverez*, 358 Ill. App. 3d 555, 652 (4th Dist. 2005)). In *Jackson*, sovereign immunity applied to claims against a mental health worker who allegedly failed to properly supervise the plaintiff because the plaintiff did not allege in the complaint that the defendant was "a member of a particular profession to which a set of professional standards applied." *Id.* However, in this case, Plaintiff did allege in his complaint that Defendant Mays was a licensed practical nurse (and thus subject to a set of professional standards), and Defendants admit this fact.

As for Coleman, Defendants concede that Coleman, as a registered nurse, was subject to professional standards that apply outside the scope of her employment with the state. However, Defendants argue Plaintiff's complaint does not allege that

Coleman was liable for breaching a duty owed as a medical professional and, even if it did, Plaintiff did not attach the required Section 2-622 affidavit to his complaint.

Plaintiff claims that Defendants misunderstand his theory of his case because his claim is one for medical malpractice, not ordinary negligence, and therefore sovereign immunity does not apply. Plaintiff contends he was "'not required to plead a legal theory and specifying an incorrect theory is not a fatal error.'" Dkt. # 95, at 3 (citing *Connectors Realty Grp. Corp. v. State Farm Fire & Cas. Co.*, 2021 WL 1143513, at *6 (N.D. Ill. 2021) (Kocoras, J.)). This is true, but the problem with Plaintiff's argument is the fact that the operative complaint in this case expressly disavows a claim for medical malpractice. Nevertheless, Plaintiff asserts that "[f]ollowing remand, plaintiff made plain he was pursuing a medical malpractice claim, serving a statement of merit for his claims against defendants Mays and Coleman." *Id*. Despite this claim, however, Plaintiff never attempted to file an amended complaint or file an appropriate Section 2-622 affidavit and medical report, nor has he given any reason for his delay.[2] Defendants strongly object to Plaintiff's new theory of liability and urge the Court to reject

[2] Plaintiff cites *Young* for the proposition that he did not have to file his Section 2-622 affidavit with his complaint and that addressing the issue at summary judgment is sufficient to maintain his claim. In *Young*, the court held that a *pro se* inmate who failed to attach a Section 2-622 affidavit had until the summary judgment stage to do so and therefore could survive a motion to dismiss, but that his failure to do so after a summary judgment motion was filed required that summary judgment be entered in favor of the defendants. 942 F.3d at 351–52. Plaintiff has been on notice for years that a Section 2-622 affidavit and medical report is required to pursue a medical malpractice claim. He admits to as much in his complaint and even provided defense counsel with his purported "certificate of merit" in September 2021. He now attaches his version of a Section 2-622 affidavit in response to Defendants' motion for summary judgment, but, for reasons explained *infra*, this document is insufficient as a matter of law.

Plaintiff's attempt to effectively amend his complaint in response to their motion for summary judgment.

Generally, a plaintiff "may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." *Anderson v. Donahoe*, 699 F.3d 989, 997 (7th Cir. 2012). "When a new argument is made in summary judgment briefing, the correct first step is to consider whether it changes the complaint's factual theory, or just the legal theories the plaintiff has pursued so far." *Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 860 (7th Cir. 2017). Factual allegations must be pleaded in a complaint and must remain consistent throughout litigation, whereas legal theories can be altered. *See id.* at 859–60; *Koger v. Dart*, 950 F.3d 971, 974 (7th Cir. 2020). "An attempt to alter the factual basis of a claim at summary judgment may amount to an attempt to amend the complaint," and "the district court has discretion to deny the *de facto* amendment and to refuse to consider the new factual claims." *Id.*

Where a plaintiff is changing legal theories, however, the court "should consider the consequences of allowing the plaintiff's new theory. If it would, for example, cause unreasonable delay, or make it more costly or difficult to defend the suit, the district court can and should hold the plaintiff to his original theory." *Id.* at 860. In other words, district courts should allow plaintiffs to "proceed on new legal theories [during summary judgment] as long as the factual basis has already been plead, and as long as the new theory does not unfairly harm the defendant by causing unfair cost, delay, or

surprise." *N.C. ex rel. Spraggins v. Brown*, 2019 WL 4749978, at *4 (N.D. Ill. 2019) (citing *Chessie*, 867 F.3d at 859).

While Plaintiff's legal theory has changed, the factual underpinnings of his claim remain the same. Defendants cannot reasonably claim they are surprised by the change in theory because Plaintiff provided Defendants with a copy of his purported "affidavit of merit" in September 2021. The Court notes, however, that Plaintiff's "affidavit of merit" is woefully insufficient and fails to comply with Section 2-622 on numerous levels. First, Plaintiff only provides the medical professional's report; there is no actual affidavit from counsel. Second, Section 2-622 requires a separate affidavit and medical report for each named defendant. The report does not discuss any actions taken by Coleman. Third, a registered nurse is not a "physician licensed to practice medicine in all its branches." 735 ILCS 5/2-622(a)(1); *see also Shanks v. Mem'l Hosp.*, 170 Ill. App. 3d 736 (5th Dist. 1988).

The Court is reluctant to reward Plaintiff's dilatory behavior and would arguably be well within its rights to grant summary judgment for Plaintiff's failure to timely provide an appropriate Section 2-622 affidavit and medical report. *See Young*, 942 F.3d at 351–52. But, in the Court's view, the interests of justice would be best served by granting Plaintiff one final opportunity to comply with the statute. Plaintiff may file an amended complaint consistent with the legal theory he now advances at summary judgment and must attach the requisite Section 2-622 affidavit and medical report to the amended complaint. *See Hamilton v. Oswego Cmty. Unit Sch. Dist. 308*, 2021 WL

767619, at *6 (N.D. Ill. 2021) ("Sharpening the complaint and bringing the claims into tighter focus will help everyone."). The affidavit and attached report must fully comport with the requirements of Section 2-622. Plaintiff is admonished that, should he fail to comply with the Court's directives, Defendants may file a renewed motion for summary judgment on this issue.

CONCLUSION

Defendants' motion for summary judgment [92] is denied. Plaintiff is granted leave to file an amended complaint that comports with his theory of medical malpractice and includes the necessary Section 2-622 affidavit by October 2, 2023. Telephonic status hearing is set for October 19, 2023 at 10:00 a.m. It is so ordered.

Dated: August 16, 2023

Charles P. Kocoras
United States District Judge