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

LARRY DUBOSE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 19 CV 8255
	)	
COOK COUNTY, JOHN HALLINAN DR. DAVID KELNER,	)	Judge Marvin E. Aspen
	)	
	)	JURY TRIAL DEMANDED
	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

NOW COME Defendants, Cook County, John Hallinan and Dr. David Kelner ("Defendants"), by their attorney KIMBERLY M. FOXX, State's Attorney of Cook County, through her Assistant State's Attorneys, Rachael D. Wilson and Cory J. Cassis, and reply in support of Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint[1]. In reply in support of Defendants' Motion, Defendants state as follows:

INTRODUCTION

Defendants filed their Motion to Dismiss Plaintiff's Second Amended Complaint arguing multiple failings of Plaintiff's claims. In Plaintiff's Response, Plaintiff argues new facts and general principles rather than respond to Defendants' arguments. Specifically, Plaintiff fails to address Dr. Kelner's Objective Reasonableness argument in Plaintiff's Response and Cook County's Healing Arts Malpractice argument. As such, Plaintiff forfeits any arguments he could

[1] Pursuant to Stipulation regarding the Second Amended Complaint, Defendants will refer to the operative complaint filed on August 6, 2020 replacing Plaintiff's First Amended Complaint to fix a typographical error. (Dkt. 34 and 35.)

have made in opposition to those arguments in Defendant's Motion to Dismiss. *Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir. 2011).

Despite Plaintiff's arguments, the Second Amended Complaint fails to remedy Plaintiff's original Complaint's insufficiencies. Specifically, (1) Plaintiff fails to properly allege personal involvement of Defendants; (2) Plaintiff makes no allegation that Dr. Kelner was objectively unreasonable; (3) Plaintiff fails to assert a *Monell* claim; (4) the Illinois Local Government and Government Employee Tort Immunity Act bars a *respondeat superior* claim; and (5) Plaintiff failed to allege sufficient facts showing Cook County is liable pursuant to the Illinois Healing Arts Malpractice Statute or to provide the affidavits required under Section 2-622. Thus, the Court should dismiss Plaintiff's Second Amended Complaint with prejudice.

ARGUMENT

I. Plaintiff's Claims Fail as a Matter of Law Because Plaintiff Failed to Allege Personal Involvement of Dr. Kelner and Defendant Hallinan in the Alleged Constitutional Violation.

Plaintiff's Second Amended Complaint is premised upon the allegation that Defendants failed to provide him previously prescribed medication for seven days during his time at the Cook County Jail. (*See generally* Dkt. 34.) As an initial matter, Plaintiff states that he seeks to hold Defendant Kelner liable as a policymaker and Cook County liable under *Monell v. Department of Social Services*, 436 US 658 (1978). By naming Defendant Kelner in his official capacity as a policymaker and Cook County, Plaintiff has sued Cook County twice under two different names. *See Wireman v. White County Sheriff's Department*, 2017 U.S. Dist. LEXIS 62947, *9-10, 2017 WL 1491910 (N.D. Ind. April 25, 2017) (*citing McMillian v. Monroe County, Alabama*, 520 US 781, 785 n.2 (1997) and *Monell*, 436 US at 690 n.55). Because Plaintiff cannot sue the same entity under different names, Defendant Kelner should be dismissed in his official capacity.

To the extent Plaintiff's Second Amended Complaint sues Defendant Kelner and

Defendant Hallinan in their individual capacities, Plaintiff fails to overcome Defendants' lack of personal involvement in the alleged constitutional deprivation. As discussed herein, the Court should dismiss Dr. Kelner and Defendant Hallinan from Plaintiff's Second Amended Complaint.

A. Plaintiff's claims against Defendant Hallinan fail as a matter of law.

Plaintiff argues Defendant Hallinan failed in his duty to Plaintiff. However, Plaintiff fails to meaningfully distinguish *Johansen v. Curran* and *Manney v. Monroe*. Plaintiff's failure is fatal to his claim.

In *Johansen v. Curran*, the plaintiff sued medical professionals who allegedly failed to provide him medication. *Johansen v. Curran*, 2019 U.S. Dist. LEXIS 28281, 2019 WL 861373 (N.D. Ill. February 22, 2019). In *Johansen*, defendant Johnson saw the plaintiff three days after he entered the Lake County Jail pursuant to a health service request form and documented the plaintiff's condition when she saw him. *Id.* at *7-8. Johnson did not directly contact the mental health specialists for the plaintiff to be evaluated. *Id.* Johnson then saw the plaintiff on a couple other occasions. *Id.* at *32. Each time Johnson saw the plaintiff, the plaintiff told her of his concerns about not receiving his medication. *Id.* The *Johansen* court found that Johnson's conduct was unreasonable because, as a social worker, she had a duty to take care of the plaintiff's mental health needs and was aware that he was not receiving his medication. *Id.* at *33.

In the case at bar, Defendant Hallinan interacted with Plaintiff at intake at 5:50pm, where Plaintiff allegedly informed Defendant Hallinan that he had just been at the hospital and of medication Plaintiff was taking. (Dkt. 34 at ¶12-13.) Defendant Hallinan never interacted with Plaintiff after intake. Plaintiff attempts to argue that Defendant Hallinan's actions are equivalent to *Johansen* defendant Johnson, but that is not case. In fact, Plaintiff's allegations against Defendant Hallinan are nearly identical to those against another defendant in the *Johansen* case,

Townsend. The *Johansen* plaintiff alleged and argued that defendant Townsend reviewed the plaintiff's intake materials and, therefore, knew of his mental health needs, but did not take action to ensure his needs were met. *Johansen*, 2019 U.S. Dist. LEXIS 28281 at *25-26. The *Johansen* court found that defendant Townsend was not aware that the plaintiff was not receiving his medication, saw the plaintiff had received his medication the morning of his arrival, and never interacted with the plaintiff. *Id.* at 26. Although Defendant Hallinan interacted with Plaintiff in the case at hand, Defendant Hallinan only interacted with Plaintiff during the intake process with knowledge that Plaintiff had been to the hospital the day before. (Dkt. 31 at ¶12-13.) Plaintiff concedes that Defendant Hallinan did not interact with Plaintiff after the intake process. (Dkt. 34 at pg. 9.) As such, Plaintiff pled that Defendant Hallinan's conduct is the equivalent and identical to that of Townsend's conduct: reviewing intake information. Therefore, because Plaintiff fails to suggest on the well-pled facts that Defendant Hallinan could have known that Plaintiff was not seen by a psychiatrist or receiving his medication after intake just like Townsend in the *Johansen* matter, Plaintiff failed to plead Defendant Hallinan's personal involvement in Plaintiff's alleged constitutional violation.

In *Manney v. Monroe*, the plaintiff sued medical professionals for alleged inadequate dental care. *Manney v. Monroe*, 151 F. Supp. 2d 976 (N.D. Ill. 2001). Plaintiff next attempts to compare Defendant Hallinan with *Manney* defendant Monroe, a dental hygienist. The *Manney* plaintiff alleged that he complained directly to defendant Monroe, and the parties did not dispute that she saw the plaintiff in his cell to provide dental care in January or February. *Id.* at 983. The *Manney* court found that the plaintiff claimed that defendant Monroe examined the plaintiff's mouth, stated the area looked bad, and would schedule an appointment for the plaintiff, and defendant Monroe likely screened the plaintiff multiple times. *Id.* The *Manney* court determined that because

defendant Monroe was involved with the plaintiff's dental care, she was personally involved within the meaning of Section 1983. *Id.* at 989.

Much like *Johansen* defendant Johnson, *Manney* defendant Monroe saw the plaintiff at least twice and is alleged to have ignored the plaintiff's complaints to her as she passed his cell. *Manney*, 151 F. Supp. 2d at 984, 988-89. The fact that *Manney* defendant Monroe had multiple occasions to address the plaintiff's complaints, as well as direct contact with the plaintiff's care, distinguishes her role from that of Defendant Hallinan. Again, Plaintiff only spoke with Defendant Hallinan at the intake interview. (Dkt. 34 at ¶12-13.) As such, unlike *Manney* defendant Monroe, Defendant Hallinan had no knowledge that Plaintiff was not receiving his medication.

Although Plaintiff argues that Defendant Hallinan is the "gatekeeper," Plaintiff only provided the following bare facts: Defendant Hallinan spoke with Plaintiff, Defendant Hallinan obtained information regarding Plaintiff's prescription medications, Plaintiff was booked into the Cook County Jail, Plaintiff submitted complaints about not receiving medication, and Plaintiff received medication seven days after intake. (Dkt. 34 at ¶¶12-13, 25-26.) As pled, Plaintiff failed to allege that Defendant Hallinan did not fulfill his duty to Plaintiff. Rather, even read liberally, Plaintiff pleads nothing more than an unfounded "free-floating obligation to put things to rights," a duty which Defendant Hallinan simply does not have. *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009). Indeed, in light of Plaintiff's allegations that he was able to submit requests and complaints after intake and having received his medication seven days after intake, Plaintiff essentially confirms that Defendant Hallinan was not a gatekeeper at all. Seemingly, Plaintiff's allegations assert that Defendant Hallinan did not in fact close the gate to treatment and Plaintiff had other avenues available to him to request treatment. Therefore, Plaintiff failed to allege personal involvement of Defendant Hallinan as required for liability under Section 1983.

Plaintiff must plead more than that a defendant's conduct may be consistent with liability to state a plausible claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.") Plaintiff failed to make such a claim against Defendant Hallinan. As such, Plaintiff's claims in the Second Amended Complaint against Defendant Hallinan must be dismissed with prejudice.

B. Plaintiff' claims against Dr. Kelner fail as a matter of law.

Plaintiff argues that Dr. Kelner can be held liable as a policymaker. (Dkt. 36 at pg. 9.) As stated above, Plaintiff is stating that Dr. Kelner is being sued in his official capacity. Therefore, Plaintiff has sued both Dr. Kelner and Cook County unnecessarily because a suit against an official in his or her official capacity is essentially a suit against the entity. *See Wireman v. White County Sheriff's Department*, 2017 U.S. Dist. LEXIS 62947 at *9-10, 2017 WL 1491910 (N.D. Ind. April 25, 2017) (*citing McMillian*, 520 US at 785 n.2 (1997) and *Monell*, 436 US at 690 n.55). Accordingly, Dr. Kelner should be dismissed with prejudice because Plaintiff cannot sue an entity under two different names for the same allegations.

To the extent Plaintiff argues that Dr. Kelner is sued in his individual capacity, Plaintiff's allegations still fail as a matter of law. Plaintiff believes incorrectly that Dr. Kelner concedes that Plaintiff fairly alleges that Dr. Kelner turned a blind eye to the practice of ignoring the 24-Hour Policy. (Dkt. 36 at pg. 9.) Plaintiff further erroneously asserts that the knowledge and conduct of others can be attributed to Dr. Kelner, through the legal conclusions that Dr. Kelner turned a blind eye to the practice of ignoring the 24-Hour Policy. (Dkt. 31 at pg. 6.) Plaintiff cannot attribute knowledge and conduct to Defendant Kelner for Section 1983 liability merely by using magic words of liability. Plaintiff must plead that Dr. Kelner was personally involved in the alleged

constitutional violations.

As argued in Defendant's Motion to Dismiss, Plaintiff did not plead that Dr. Kelner ever had personal interaction with Plaintiff or knowledge that Plaintiff was not receiving his medication. (Dkt. 31 at pg. 7.) Rather, Plaintiff argues that Dr. Kelner knew of a practice that his subordinates would ignore established policies of the jail and did not act in accordance by scheduling a psychiatrist to see Plaintiff during his intake processing. (Dkt. 36 at pg. 9-12.) However, even if Plaintiff's allegation was true, and Defendants do not concede his allegations are true, "failure to follow department policy isn't a constitutional violation." *Williams v. Warden*, 2020 U.S. Dist. Lexis 118393, *9, 2020 WL 3791594 (N.D. Ind. July 7, 2020) (*citing Estelle v. McGuire*, 502 U.S. 62, 68 (1991) and *Keller v. Donahue*, 271 F. App'x 531, 532 (7th Cir. 2008)); *Lewis v. Richards*, 107 F.3d 549, 553 n.5 (7th Cir. 1997). As a matter of law, Plaintiff has failed to allege that Dr. Kelner was personally involved in a constitutional violation, and therefore, the Court should dismiss Dr. Kelner from Plaintiff's Second Amended Complaint with prejudice.

Furthermore, throughout Plaintiff's Second Amended Complaint, Plaintiff states that he suffers from a serious health need. (Dkt. 34 at ¶¶8, 9, 13, 16.) Plaintiff then alleged and argued that Plaintiff received his medication from a physician seven days after intake. (*Id.* at ¶26, Dkt. 36 at pg. 11.) When Plaintiff saw a physician, Plaintiff was prescribed medication for his alleged serious medical condition. (Dkt. 34 at ¶26). According to Plaintiff's allegations, Dr. Kelner was not required or involved in Plaintiff's alleged need for medication. Therefore, on the facts alleged, Plaintiff has not pled conduct of Dr. Kelner that would suggest personal involvement for liability.

As stated above, Plaintiff must plead more than that a defendant's conduct may be consistent with liability to make a plausible claim. *Ashcroft*, 556 U.S. at 678 (2009) ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the

line between possibility and plausibility of entitlement to relief."). Plaintiff failed to make a plausible claim against Dr. Kelner. As such, Dr. Kelner must be dismissed with prejudice.

II. Plaintiff Makes No Allegations that Dr. Kelner's Actions were Objectively Unreasonable.

Should the Court find that Plaintiff has pled sufficient facts of Dr. Kelner's personal involvement, Plaintiff failed to address the lack of facts suggesting that Dr. Kelner was objectively unreasonable. As such, Plaintiff forfeited any argument he could have made in reference to Dr. Kelner's arguments. *Alioto*, 651 F. 3d at 719.

To the extent Plaintiff's Response is responsive, Plaintiff cites cases discussing "hours of needless suffering." (*See* Dkt. 36 at pg. 12.) However, Plaintiff has yet to provide any facts that Dr. Kelner's actions were objectively unreasonable. As stated in Defendants' Motion to Dismiss, when determining objective unreasonableness, courts must focus on the totality of the facts and circumstances. *McCann v. Ogle Cty.*, 909 F.3d 881, 886 (7th Cir. 2018). As pled, the facts suggest that Plaintiff was brought in after hours, Plaintiff informed Defendant Hallinan of his medical needs, Dr. Kelner had a policy or practice in place for psychiatric treatment, Plaintiff submitted two grievances complaining of pain and suffering, Plaintiff was seen three days after the second grievance and prescribed medication. (*See generally* Dkt. 34.) Even taken as true, Plaintiff has failed to allege any facts of unreasonableness against Dr. Kelner. As such, Plaintiff fails to state a claim against Dr. Kelner under Section 1983.

For the reasons stated in Defendant's Motion to Dismiss, the Court should dismiss Dr. Kelner from Plaintiff's Second Amended Complaint with prejudice. (Dkt. 31 at pg. 8-9.)

III. Plaintiff Failed to Plead a *Monell* Claim Against Cook County.

Plaintiff asserts that his *Monell* claim should not be dismissed because the pleading adequately sets forth all that is required at the pleading stage. To support his argument, Plaintiff

cites *Williams v. Dart* which states that "[s]upporting 'each evidentiary element of a legal theory' is for summary judgment or trial, not a test of the pleadings under Rule 12(b) or 12(c)." *Williams v. Dart*, 967 F.3d 625, 638 (7th Cir. 2019). In *Williams*, the Seventh Circuit reversed and remanded a District Court finding that that complaint "did not contain plausible, nonconclusory allegations of discrimination," further asserting that the questions under FRCP Rule 8 is "whether the defendant had fair notice of what he must defend himself against and whether there is some reason to believe he could be found liable at the end of the case." *Id.* at ¶ 21-22 (citing to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The *Williams* plaintiffs set forth sufficiently detailed allegations to put the Sheriff on notice that they could be found liable for intentional discrimination based on claims that the plaintiffs were targeted "because of their race," and asserting specific bail review policies that they believe "disproportionately targets African Americans by using charge, prior arrests, and neighborhood to determine eligibility for release." *Id*. As a result, plaintiffs asserted that more than 4 out of 5 inmates affected by this policy were black. *Id.*

In comparison, the Seventh Circuit considered the case of *Ashcroft v. Iqbal*, which held that the mere allegations that that defendant "approved" a policy of arresting "Arab Muslim men" after September 11, 2001, was not enough. *Id*. at ¶25. In *Iqbal*, the United States' Supreme Court stated that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft*, 556 U.S. at 679 (2009). The *Iqbal* complaint alleged that the petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him] to harsh conditions of confinement as a matter of policy, solely on account of [his] religions, race, and/or national origin and for no legitimate penological interest." *Id*. at 680. Further, the respondent argued that Ashcroft

was the "principal architect" and that Mueller was "instrumental" in adopting and executing the policy. *Id*. at 680-681. The Supreme Court found that these bare assertions were nothing more than "formulaic recitations of the elements," and too conclusory in nature. *Id*. at 681. Simply put, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusion. Threadbare recitals of the elements of a cause of action, supported by mere conclusory allegations do not suffice." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Turning to the allegations of the Second Amended Complaint, Plaintiff alleges that "an official jail policy required that within 24 hours of a detainee's booking at the Jail, a Qualified Medical Professional or Qualified Mental Health Professional with appropriate prescribing authority, shall decide whether to continue the same or comparable medication that the detainee reports having been prescribed" followed by the conclusion that "the Jail adopted the official policy to discharge its constitutional duty to provide medical care…" (Dkt. 34 at ¶ 9-10.) At no point does Plaintiff identify what policy he is talking about, when, or to what end the policy was adopted, what duty the Jail had, under what authority this duty was prescribed, or how the policy relates to the alleged constitutional violation. Without more, this allegation fails the necessary pleading requirement that "an official policy not only caused a constitutional violation but was the moving force behind it." *Shultz v. Dart*, 2013 U.S. Dist. LEXIS 156546, *11, 2013 WL 5873325 (N.D. Ill. 2013).

Plaintiff further asserts that on or after August 31, 2013, the policy was no longer implemented, yet, once again concludes that Plaintiff and "others similarly situated" have had their constitutional rights violated by a policy that, per Plaintiff's allegations, is no longer implemented. (Dkt. 34 at ¶11.) Plaintiff makes no allegation speaking to the policy or practice as it exists at the time of the alleged occurrence, instead opting for a generalized conclusion that his rights have

been violated without any factual guidance. Much like *Iqbal's* complaints about Ashcroft and Mueller, Plaintiff simply concludes that "Hallinan acted pursuant to a widespread practice of disregarding the official policy," (Dkt. 34 ¶16); Dr. Kelner "knew that the jail could not implement the official policy," (*Id.* at ¶18); and Dr. Kelner "knew that the Jail was not implementing the official policy." (*Id.* at ¶21). These are all conclusory statements failing to provide basic facts which sufficiently identify what the official policy was and that said policy was the driving force behind the alleged constitutional deprivation at the time of the alleged occurrence. Comparable to the respondent in *Iqbal* who pleads that petitioners "knew of, condoned and willfully and maliciously agreed to subject [him] to harsh conditions…," Plaintiff's assertions that Dr. Kelner and Defendant Hallinan took these conscious and willful steps to "disregard" and "turn a blind eye" to Plaintiff's situation, without more, are simply insufficient to put Defendants on notice of liability under *Monell*.

Furthermore, as discussed above, failing to follow a policy is not in and of itself a constitutional violation. *Williams*, 2020 U.S. Dist. Lexis 118393 at *9 (*citing Estelle v. McGuire*, 502 U.S. 62, 68 (1991) and *Keller v. Donahue*, 271 F. App'x 531, 532 (7th Cir. 2008)); *Lewis v. Richards*, 107 F.3d 549, 553 n.5 (7th Cir. 1997). Even taken as true and in the most liberal light, Plaintiff has only pled that someone at the Cook County Jail may have failed to follow policy which caused Plaintiff to go without medication for seven days. Yet, according to the Seventh Circuit, *Monell* liability requires more than one cited instance. *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293, 303 (7th Cir. 2009) (holding that a widespread practice or custom must be more frequent than three occasions; *i.e.* must be more than a random event.). Plaintiff has not pled or identified a policy, custom or practice which caused his alleged constitutional deprivation.

Accordingly, the Court should dismiss Plaintiff's *Monell* claim against Defendant Kelner

and Cook County with prejudice because Plaintiff failed to allege sufficient facts to support his claim. Because no federal claim remains, the Court should also dismiss Plaintiff's state law claims.

IV. Despite Plaintiff's Arguments, Cook County Cannot be Held Liable Under the Doctrine of *Respondeat Superior* Under the Illinois Local Government and Government Employee Tort Immunity Act.

As the Court should dismiss Plaintiff's federal law claims, the Court should decline to exercise supplemental jurisdiction over Plaintiff's state law claims. Alternatively, Plaintiff next responds to Defendants' argument that *respondeat superior* is not actionable under the Illinois Local Government and Government Employee Tort Immunity Act ("Tort Immunity Act") because Plaintiff made no allegations that the Defendants conduct was willful and wanton. Plaintiff asserts that any cause of action subject to Tort Immunity Act protection requires a factual finding. Yet, the Seventh Circuit has approved the granting of dismissal on the basis of the Tort Immunity Act where the allegations of the complaint show that certain immunities of the act apply. *See Payne v. Churchich*, 161 F.3d 1030, 1044 (7th Cir. 1998) (dismissal affirmed under Tort Immunity § 4-103, finding that immunity of public entities and employees is absolute); *Johnson v. Mers*, 279 Ill. App. 3d 372, (2nd Dist. 1996)(absolute immunity of a public employee in the position of determination of policy or exercise of discretion under §2-201).

Plaintiff argues that the "willful and wanton" requirements of the immunity are only applicable to the "execution or enforcement of any law," under §2-202, citing to cases where the Tort Immunity Act did not apply to police vehicles involved in collisions while not actively enforcing the law at the time of the collision, *i.e.*, when not acting pursuant to their official duties. However, as pled, Plaintiff seeks to hold Defendants, medical staff working in the Cook County Jail, liable precisely because of their duties as medical staff working in the Cook County Jail. Defendants are in fact enforcing the law, as employees treating inmates within a penal institution.

Alternatively, even if §2-202 does not apply to the Defendants in this case, §4-105 surely does, providing immunity and requiring the same willful and wanton standard as §2-202.

Illinois law 745 ILCS 10/4-105 states:

> Neither a local public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or maintain medical care for a prisoner in his custody; but this section shall not apply where the employee, acting within the scope of his employment, knows from his observation of conditions that the prisoner is in need of immediate medical care, and ***through willful and wanton conduct***, fails to take reasonable action to summon medical care. Nothing in this Section requires the periodic inspection of prisoners. ***(Emphasis added)***

Plaintiff failed to alleged willful and wanton conduct of Defendants, and, therefore, the claims as pled fall short pursuant to immunities provided by the Tort Immunity Act. Accordingly, as discussed in Defendants' Motion to Dismiss, because an entity cannot be held "liable for an injury resulting from an act or omission of its employee where the employee is not liable," Cook County cannot be held liable for any of Plaintiff's state law claims. 745 ILCS 10/2-109. As such, Plaintiff's state law claims must be dismissed pursuant to the Tort Immunity Act.

V. Alternatively, the Court Should Dismiss Plaintiff's Claims Against Defendant Cook County Pursuant to 12(b)(6) and 735 ILCS 5/2-622.

As an initial matter, Plaintiff failed to respond to Defendant Cook County's argument stating that Plaintiff failed to allege facts against Cook County to put it on notice of his claims against it. As such, Plaintiff has forfeited any argument he could have made in regard to that argument. *Alioto*, 651 F. 3d at 719. Therefore, for the reasons stated in Defendant's Motion to Dismiss, the Court should dismiss Plaintiff's state law Healing Arts Malpractice claim from Plaintiff's Second Amended Complaint with prejudice. (Dkt. 31 at pg. 8-9.)

To the extent that Plaintiff's Response is responsive, at the end of his Second Amended Complaint, Plaintiff inserts the general allegation that "as a result of the foregoing, plaintiff was

subjected to healing arts malpractice under Illinois law." (Dkt. 34, ¶ 28.) Defendants contend that Plaintiff has once again failed to plead minimal facts to support a Healing Arts Malpractice claim for the same reason he has failed to plead a *Monell* claim—labels and conclusions are not sufficient. Plaintiff briefly responds that his allegations that Plaintiff did not receive medication for seven days due to conduct of County employees is sufficient to identify a claim for a breach of the standard of care. (Dkt. 36, pg. 13.)

A claim for healing arts malpractice, however, lies where "a professional applies his expert knowledge or skill in an unreasonably deficient way, resulting in injury." *Awailt v. Marketti*, 2012 U.S. Dist. LEXIS 49182, *11 (N.D. Ill. 2012). A claim for negligence is not a medical malpractice claim merely because it involves medical treatment or care. *Id.* If a plaintiff has not alleged a deviation from the appropriate medical standards, then the plaintiff has not alleged a claim based on medical or other healing arts malpractice. *Rodriguez v. Wexford*, 2019 U.S Dist. LEXIS 156782 *5, 2019 WL 432994 (S.D. Ill. 2019). Plaintiff makes no statement identifying what the standard of care is, how the standard of care was breached or deviated from, or how the alleged breach or deviation caused Plaintiff's claimed injuries. Even under a notice pleading standard, merely identifying a medical malpractice cause of action against any of the individual Defendants is insufficient to state a claim, and, likewise, is insufficient to state a claim against Cook County. Therefore, the Court should dismiss Plaintiff's state law claims with prejudice.

As to the affidavit requirements of §2-622, Plaintiff misinterprets the Seventh Circuit's reasoning in *Young v. United States*, 942 F.3d 349 (7th Cir. 2019). According to the Seventh Circuit, "a prisoner may have insuperable difficulty obtaining a favorable physician's report before filing a complaint, so if a complaint not accompanied by a §5/2-622 affidavit is defective, many a *prisoner* will be unable to litigate a malpractice claim. If a *prisoner or other pro se plaintiff* has

until the summary judgment stage to comply with the state law," they have a better chance to receive such information. *Id.* at 351 (*emphasis added*). The Seventh Circuit did not make a new procedure, rather, per the Circuit's own words, the Seventh Circuit created a carve out for litigants who do not have access in the way that an attorney representing a client would to litigate their claims. As such, Defendants are asking the Court to follow *Young* in that *Young* carved out an opportunity for unrepresented litigants to litigate their claims without the same resources and connections of represented parties.

Accordingly, because Plaintiff is neither incarcerated nor a *pro se* litigant, thus having no impediment to complying with Illinois law, Plaintiff must provide a §2-622 report and affidavit confirming that his claim is in fact meritorious to proceed with litigation. At a minimum, there is no reason why Plaintiff's counsel cannot include the attorney affidavit required under §2-622 confirming the merit of the claim after consulting with a medical provider.

CONCLUSION

WHEREFORE Defendants respectfully request that Plaintiff's Amended Complaint be dismissed with prejudice for failure to state a claim upon which relief may be granted because (1) Plaintiff's Amended Complaint fails to allege personal involvement of Defendants; (2) Plaintiff's Amended Complaint makes no allegation that Dr. Kelner's actions were unreasonable; (3) Plaintiff fails to assert a *Monell* claim; (4) Plaintiff's *respondeat superior* claim is barred by the Illinois Local Government and Government Employee Tort Immunity Act; and (5) Plaintiff failed to allege sufficient facts showing Cook County is liable pursuant to the Illinois Healing Arts Malpractice Statute, or provide the affidavits required under §2-622. In the alternative, the Court should dismiss Dr. Kelner and Defendant because Plaintiff failed to allege any personal involvement or objective unreasonableness as well as require Plaintiff to submit the

attorney affidavit under §2-622. Moreover, Defendants request that the Court stay any responsive pleadings in this matter until the Court rules of this motion and grant any other relief this Court deems fair and just.

Respectfully submitted,

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State's Attorney of Cook County

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