MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Edward Zaragoza,
Appellant-Plaintiff,

v.

Wexford of Indiana, LLC, *et al.*,
Appellee-Defendants.

August 10, 2022

Court of Appeals Case No. 22A-CT-206

Appeal from the Marion Superior Court

The Honorable Gary L. Miller, Judge

Trial Court Cause No. 49D03-1906-CT-22347

Tavitas, Judge.

Case Summary

[1] Edward Zaragoza, an inmate in the Department of Correction ("DOC"), appeals the trial court's grant of summary judgment to Wexford of Indiana, LLC ("Wexford") and several doctors who were employed by Wexford during

the relevant times. Wexford provided medical care at the DOC facility where Zaragoza was incarcerated. Zaragoza alleged medical malpractice and violations of the Eighth Amendment and further asserted that Wexford was liable for the alleged actions of the doctors. We conclude that the trial court did not err in granting summary judgment to the defendants and, accordingly, affirm.

Issue

[2] Zaragoza raises a lone issue: whether the trial court erred in granting summary judgment to the defendants.[1]

Facts

[3] On June 4, 2019, Zaragoza filed a complaint against Wexford and its employees, alleging medical malpractice and that doctors withheld treatment from Zaragoza in violation of Zaragoza's constitutional rights.[2] Dr. Jackie West-Denning, Dr. Samuel Byrd, and Dr. Naveen Rajoli were named as defendants. Zaragoza alleged that he has been diagnosed with hypothyroidism and that, as a result of various allergies, the medication Synthroid does not agree with him. Zaragoza sought alternative medication but was repeatedly

[1] We note that, below, Zaragoza raised claims pertaining to the First Amendment, *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S. Ct. 2018 (1978), and emotional distress. Zaragoza appears to have abandoned those claims on appeal. *See, e.g.*, *Countrywide Home Loans, Inc. v. Holland*, 993 N.E.2d 184, 194 (Ind. Ct. App. 2013) ("Although Holland raised a claim of unjust enrichment in his complaint, he makes no such claim on appeal, and therefore appears to have abandoned that argument."). We do not address those claims further.

[2] Zaragoza amended his complaint on April 23, 2020.

denied by Wexford's doctors. Zaragoza claimed that the prescribed medication resulted in deleterious side effects, including headaches, muscle pains, neck tightness, cognitive problems, and blurred vision. One of the defendants noted that the alternative medication was requested, but that after a second opinion from the regional clinical pharmacist, the request was denied, in part because the alternative medication can make Zaragoza's condition more difficult to manage.

[4] On April 29, 2021, the defendants filed a motion for summary judgment. Defendants argued, inter alia:

> Based upon all of the evidence obtained thus far, it is clear that the Defendants are entitled to summary judgment as to all of Plaintiff's claims against them. Based upon the undisputed evidence, Plaintiff was provided appropriate care and treatment while incarcerated at Wabash Valley that met or exceeded the applicable standard of care as he never suffered any allergic reaction to Synthroid, refused to take his medication as prescribed, his TSH levels have been normal, and there was no clinical evidence warranting he be referred to a specialist. As such, there can be no Eighth Amendment claim.

Appellant's App. Vol. II pp. 70-71. The defendants designated affidavits from the treating physicians: Dr. Byrd, Dr. West-Denning, and Dr. Rajoli, all named defendants.

[5] In response, Zaragoza designated evidence from Dr. Richard Schultheis. Dr. Schultheis does not appear to have conducted any examinations of Zaragoza. Zaragoza and Dr. Schultheis had several conversations, though it is not clear if

those conversations were face to face. In addition to the conversations, Dr. Schultheis reviewed "relevant medical records." *Id*. at 199. Dr. Schultheis opined in his affidavit, among other things, that Wexford's doctors had departed from the standard of care in their treatment of Zaragoza. Dr. Schultheis further opined as follows:

> There are several medications available to treat Hypothyroidism: Synthroid, Armour Thyroid, Cytomel, and Tirosint, among others. Synthroid is generally recommended and generally well tolerated, but the same is not true for all patients, especially those with numerous allergies. Armour Thyroid and Tirosint are often used successfully in patients who present with allergic reactions to Synthroid due to the fact that they are devoid of almost, if not all of the inactive ingredients contained in Synthroid. The use of Armour Thyroid and Cytomel requires additional blood work to be done on a [ ] regular basis to monitor the therapeutic dose verses toxicity. The use of Synthroid or its generic version Levothyroxine is the cheaper and easier course of treatment.
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> [ ] Edward Zaragoza has 36 documented food allergies, 25 environmental allergies and at least 5 documented medication allergies. Exhibit-A; B; C at pg. 3. In my medical Opinion, Edward Zaragoza should be under the regular care of an immunologist due to his allergy history and ongoing allergy issues.
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> * * * * *
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> That in my medical opinion based on a reasonable amount of medical certainty that had all three doctors - Dr. Byrd; Dr. West-Denning; and Dr. Rajoli - consulted with a specialist, specifically an allergist and/or an endocrinologist that the cause of [Zaragoza's] severe adverse reactions to the Synthroid could have

> easily been diagnosed and dealt with leading to proper treatment of [Zaragoza's] hypothyroidism.

Id. at 200, 208.

[6] On October 20, 2021, the trial court granted the defendants' motion for summary judgment. Zaragoza now appeals.

Analysis

[7] Zaragoza alleges that the trial court erred in granting summary judgment to the the defendants. "'When this Court reviews a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court.'" *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1098 (Ind. Ct. App. 2021) (quoting *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020)). "Summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id*. (quoting *Murray v. Indianapolis Public Schools*, 128 N.E.3d 450, 452 (Ind. 2019)); *see also* Ind. Trial Rule 56(C).

[8] The summary judgment movant invokes the burden of making a *prima facie* showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden shifts to the non-moving party to show the existence of a genuine issue of material fact. *Id*. On appellate review, we resolve "[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party." *Id*.

[9] We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "We limit our review to the materials designated at the trial level." *Gunderson v. State, Ind. Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*.

[10] Zaragoza limits his arguments to his medical malpractice and Eighth Amendment claims. Given that those claims have significant overlap, they can be similarly resolved.

Medical Malpractice Claims

[11] To establish a prima facie case of medical malpractice: "a plaintiff must demonstrate: (1) a duty on the part of the defendant in relation to the plaintiff; (2) failure by the defendant to conform his conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff resulting from that failure." *Stewart v. Alunday*, 53 N.E.3d 562, 566 n.4 (Ind. Ct. App. 2016). In the particular context of medical malpractice claims, it is well settled that a party's failure to present expert testimony will result in summary judgment being awarded against that party. *See, e.g, Scripture v. Roberts*, 51 N.E.3d 248, 251 (Ind. Ct. App. 2016). We have further held that: "'[E]xpert opinions which conflict on ultimate issues necessarily defeat summary judgment.'" *Riley v. St. Mary's Med. Ctr. of Evansville, Inc.*, 135 N.E.3d 946, 951 (Ind. Ct. App. 2019) (quoting *Siner v. Kindred Hosp. L.P.*, 51 N.E.3d 1184, 1190 (Ind. 2016)); *see also Chi Yun Ho v. Frye,* 880 N.E.2d 1192, 1200-01 (Ind. 2008).

[12] Nevertheless, summary judgment affidavits are subject to certain requirements, and failure to comply with those requirements may render a summary judgment affidavit insufficient as a matter of law. *See* Ind. Tr. R. 56(E) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). "The affidavit requirements of Trial Rule 56(E) are mandatory and a court considering a summary judgment motion should disregard inadmissible information contained in supporting or opposing affidavits. The party offering the affidavit into evidence bears the burden of establishing its admissibility." *D.H. by A.M.J. v. Whipple*, 103 N.E.3d 1119, 1126 (Ind. Ct. App. 2018) (internal citations omitted).

[13] Zaragoza was required to submit evidence showing the existence of a genuine issue of material fact for trial. Zaragoza provided the affidavit of Dr. Richard Schultheis in opposition to the motion for summary judgment. Schultheis's testimony is subject to the requirements of Indiana Rule of Evidence 702. "Ind. Evidence Rule 702 relates to the admissibility of expert testimony. It assigns to the trial court a gatekeeping function of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *McCutchan v. Blanck*, 846 N.E.2d 256, 260-61 (Ind. Ct. App. 2006) (citing *Lytle v. Ford Motor Co.*, 814 N.E.2d 301, 309 (Ind. Ct. App. 2004), *trans. denied*). Here, Rule 702 required that Dr. Schultheis be "qualified as an expert by knowledge, skill, experience, training, or education[,]" and that his testimony rested "upon reliable scientific principles." Ind. Evidence R. 702.

[14] We conclude that Dr. Schultheis's affidavit is deficient in several regards and, therefore, insufficient to establish any genuine issues of material fact. First, Dr. Schultheis's affidavit fails to describe his methodology in sufficient detail. He merely asserts that he reviewed Zaragoza's "relevant medical records" and had "multiple conversations" with Zaragoza. Appellant's App. Vol. II p. 199; *see also Doe v. Shults-Lewis & Child & Fam. Servs., Inc.*, 718 N.E.2d 738, 750 (Ind. 1999) (holding that in order to establish a genuine issue of material fact "the plaintiff need only present information supporting the scientific validity of the methodologies and processes used to form his opinion"). Accordingly, the affidavit does not contain enough information for a trier of fact to determine that Dr. Schultheis implemented a methodology based on the requisite "reliable scientific principles." Ind. Evidence R. 702(b).

[15] "The proponent of expert scientific testimony bears the burden of establishing the foundation and reliability of the scientific principles underpinning such testimony pursuant to Evidence Rule 702(b)." *Taylor v. State*, 101 N.E.3d 865, 870 (Ind. Ct. App. 2018) (citing *Sciaraffa v. State*, 28 N.E.3d 351, 357 (Ind. Ct. App. 2015), *trans. denied*).

> In determining reliability, courts may consider the following nonexclusive factors: (1) whether the technique has been or can be empirically tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error as well as the existence and maintenance of standards controlling the technique's operation; and (4) general acceptance within the relevant scientific community.

Id. (citing *Barnhart v. State*, 15 N.E.3d 138, 144 (Ind. Ct. App. 2014)). Dr. Schultheis's affidavit contains no information regarding any of these factors. Zaragoza has failed to meet his burden to demonstrate the reliability of the principles underlying Dr. Schultheis's opinions.

[16] Second, the sum total of testimony regarding whether Dr. Schultheis is qualified to offer the opinions contained in his affidavit consists of the facts that (1) Dr. Schultheis attended medical school; (2) Dr. Schultheis has a current medical license; and (3) Dr. Schultheis is "familiar with the Standard of [C]are for general practitioners in the State of Indiana . . . ." Appellant's App. Vol. II p. 199. Of course, it does not follow from the mere fact that a person carries a medical license that the person is qualified to opine on any and every fact-sensitive medical circumstance. The Seventh Circuit Court of Appeals has recognized this reality in the context of the identical federal rule of evidence. In *Cunningham v. Masterwear Corp.*, the Seventh Circuit concluded that, though the plaintiff's witness was a medical expert, he had never treated a respiratory illness caused by exposure to perchloroethylene ("PCE") vapors—the subject matter of that case. 569 F.3d 673 (7th Cir. 2009). The court rejected the expert's conclusion with respect to the causation of the plaintiff's injuries, recognizing that the expert was not a toxicologist and had advanced no theory "that would link the level and duration of the exposure of the plaintiffs to PCE to their symptoms." *Id*. at 675.

[17] Here, Dr. Schultheis's affidavit contains no information about whether he has any specialties, board certifications, or specific experience pertaining to

immunology, or the branches of medicine particularly associated with Zaragoza's alleged ailments or allergies. We emphasize that this assessment of the degree of Dr. Schultheis's expertise is a matter not of *credibility*, but of *admissibility*. Medical causation is a question that comes in varying degrees of complexity. *See, e.g., Totton v. Bukofchan*, 80 N.E.3d 891, 894 (Ind. Ct. App. 2017). For this reason, we require specificity about a purported expert's qualifications to opine on such a question, and here, Zaragoza has failed to meet his burden to demonstrate that specificity with respect to Dr. Schultheis.

[18] Third, we have previously held that an affidavit that merely states that a doctor is familiar with the standard of medical care, and then opines as to whether the standard has been met, is insufficient to raise genuine issues of material fact with respect to the ultimate issue of whether the standard of medical care has been breached. *Scripture*, 51 N.E.3d at 248. Dr. Schultheis did not set forth specific facts regarding what the standard of care is or how the treatment departed from that standard of care. A conclusory statement that the standard of care has not been met is not sufficient to meet the specificity requirements of Trial Rule 56(E)?. *See, e.g.*, *Whitlock v. Steel Dynamics, Inc.*, 35 N.E.3d 265, 273 (Ind. Ct. App. 2015) ("[T]he affiants—rather than merely setting forth conclusory statements—were required to give specific details which they perceived to be the basis for their conclusions . . . .").

[19] Dr. Schultheis's failure to state the requisite standard of care is a deficiency we found fatal n *Lusk v. Swanson*, 753 N.E.2d 248 (Ind. Ct. App. 2001) ("Dr. Gaither's familiarity with the requisite standard of care is not apparent from the

contents of his affidavit, which in essence states that Dr. Swanson should have ordered x-rays of Lusk's wrist, but does not evidence any particular knowledge or expertise in orthopedics."). The opining expert in *Lusk* was a pulmonologist, unfamiliar with the standard of care in the field of orthopedics. We concluded that the affidavit in *Lusk* lacked evidence of the specific standard of care at issue and failed to establish the requisite expertise; thus, it was insufficient to establish any genuine issues of material fact.

[20] The facts in this case are similar. Dr. Schultheis averred that he: (1) is a licensed physician; (2) has a medical degree; and (3) is "familiar with the standard of care for general practitioners in the State of Indiana." Appellant's App. Vol. II p. 199. He does not aver to any additional qualifications that would inform his opinions with respect to Zaragoza's treatment for thyroid dysfunction. Dr. Schultheis does not describe any specific expertise or specialty, nor does he mention whether he has advanced qualifications in endocrinology or immunology. He does not describe any specific familiarity with thyroid dysfunction or how to treat it, nor does he state whether he has any prior experience relevant to Zaragoza's diagnosis or treatment. Dr. Schultheis's affidavit does not even identify his own area of practice. Accordingly, though Dr. Schultheis states that he is familiar with the specific standard of care for general practitioners, he has failed to aver that he is familiar with the standard of care that is salient to the specific facts of this case, or that he is even qualified to identify that standard of care. Moreover, if he is familiar with the relevant standard of care, he has failed to identify it. Thus, Dr. Schultheis's conclusions regarding whether Zaragoza's treatment fell below the

reasonable standard of care are not supported by the requisite specificity or expertise. Such unsupported conclusions do not suffice to establish a genuine issue of material fact.

[21] We also find instructive our Supreme Court's decision in *Oelling v. Rao,* 593 N.E.2d 189 (Ind. 1992). The Court found that the designated affidavit submitted by the non-movant patients' expert was inadequate because it failed to set forth the applicable standard of care and a statement that the treatment in question fell below the applicable standard. "Dr. Meister's affidavit states only that he would have treated Mr. Oelling differently, not that Dr. Rao's treatment fell below the applicable standard." *Id*. at 190-91. While Dr. Schultheis did specifically indicate that portions of Zaragoza's treatment departed from the standard of care, he did not specifically set forth the standard, and essentially describes an alternate treatment plan without supporting his opinion with the foundational requirements for such expert opinion. Accordingly, we conclude that Dr. Schultheis's affidavit fails to establish the existence of any genuine issues of material fact with respect to Zaragoza's medical malpractice claims.

Section 1983/Eighth Amendment Claims[3]

[22] Rights flowing from the Eighth Amendment to the United States Constitution[4] can be enforced via Section 1983 claims. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

"Section 1983 creates no substantive rights of its own but was 'designed to prevent the states from violating the [C]onstitution . . . and to compensate injured plaintiffs for deprivations of those federal rights.'" *Melton v. Indiana Athletic Trainers Bd.*, 156 N.E.3d 633, 649 (Ind. Ct. App. 2020) (quoting *Culver-Union Twp. Ambulance Serv. v. Steindler*, 629 N.E.2d 1231, 1233 (Ind. 1994)), *trans. denied*. "To prevail on a Section 1983 claim, 'the plaintiff must show that

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[3] With respect to Wexford itself:

> Most defendants under § 1983 are public employees, but private companies and their employees can also act under color of state law and thus can be sued under § 1983. *E.g., Wyatt v. Cole*, 504 U.S. 158, 161-62, 112 S. Ct. 1827, 118 L.Ed.2d 504 (1992); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L.Ed.2d 482 (1982). In a case involving a private company, the Supreme Court took for granted that the corporate defendant would be liable under § 1983 for a constitutional tort committed by its employee.

Shields v. Illinois Dep't of Corr., 746 F.3d 782, 789-90 (7th Cir. 2014). "In other words, the Court indicated that a private corporation could be held liable under § 1983 on a theory of *respondeat superior* liability." *Id*.

[4] The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

(1) the defendant deprived the plaintiff of a right secured by the Constitution and laws of the United States, and (2) the defendant acted under the color of state law.'" *Id*. (quoting *Myers v. Coats*, 966 N.E.2d 652, 657 (Ind. Ct. App. 2012)).

[23] In the context of Section 1983 claims based upon Eighth Amendment medical claims against prison medical staff, such violations require a showing of deliberate indifference on the part of the medical staff:

> Deliberate indifference does not require a showing that the prison officials acted "maliciously and sadistically for the very purpose of causing harm." *Wilson v. Seiter*, 501 U.S. 294, 305, 111 S. Ct. 2321, 115 L.Ed.2d 271 (1991) (quotation marks omitted). But, while deliberate indifference requires showing more than "mere negligence," *id*., and "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle* [*v. Gamble*], 429 U.S. [104] 106, 97 S. Ct. 285 [(1976)], it also does not require a plaintiff to show that he was "literally ignored" by prison medical staff. *Hayes v. Snyder*, 546 F.3d 516, 524 (7th Cir. 2008) (quotation marks omitted).
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> Instead, the Supreme Court of the United States has held that "acting . . . with deliberate indifference . . . is the equivalent of recklessly disregarding" a "substantial risk of serious harm to a prisoner." *Farmer* [*v. Brennan*], 511 U.S. [825] 836, 114 S. Ct. 1970 [(1994)]. Thus, for a prison medical official to be liable for the denial of adequate medical care, the prisoner must show that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference." *Id*. at 837, 114 S. Ct. 1970.

> In other words, "an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm *actually would* befall an inmate; it is enough that the official acted or failed to act *despite his knowledge* of a substantial risk of serious harm." *Id*. at 842, 114 S. Ct. 1970 (emphases added). As the United States Court of Appeals for the Seventh Circuit has put it, the prisoner "must show only that the defendants' responses to [his serious medical conditions] were so plainly inappropriate as to permit the inference that the defendants intentionally or recklessly disregarded his needs." *Hayes*, 546 F.3d at 524. Conversely, a prison official may avoid liability under the deliberate-indifference standard if he can show that he "responded reasonably to the risk, even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 844, 114 S. Ct. 1970.

Williams v. Indiana Dep't of Correction, 142 N.E.3d 986, 1001-02 (Ind. Ct. App. 2020), *on reh'g* (Apr. 8, 2020).

[24] Dr. Schultheis averred no specific facts that established that Zaragoza's treating doctors acted with reckless disregard of a risk of serious harm. To the contrary, Dr. Schultheis averred that Zaragoza's condition:

> is [a] serious medical condition that requires treatment by a doctor, usually for life. Untreated[,] Hypothyroidism can cause numerous debilitating symptoms that can effect [sic] a patient's daily life such as extreme tiredness, depression, muscle spasms, muscle pain, joint pain, digestive issues and will put stress on the major organs eventually leading to damage.

Appellant's App. Vol. II p. 200. Zaragoza actively resisted taking prescribed medication that was vital to his health.

[25] Dr. Schultheis opined that Zaragoza's treating doctors were aware of the effects that Synthroid was having on him and chose to disregard those effects. It does not follow, however, that disregarding those effects rises to the level of serious harm, and serious harm is what the law requires. Many medications have adverse side effects. A greater showing is required to demonstrate that the prescription of one such medication amounts to a violation of the Constitution's prohibition of cruel and unusual punishment. Neither did Dr. Schultheis provide sufficient facts to establish a genuine issue about whether the treating doctor's recklessly disregarded Zaragoza's symptoms, or merely did not consider them sufficient reason to discontinue the prescription of Synthroid. Furthermore, Dr. Schultheis failed to address the issue of Zaragoza's noncompliance with taking Synthroid and the alleged symptoms Zaragoza experienced while taking Synthroid versus not taking Synthroid as prescribed. We find that Zaragoza has failed to shoulder his burden to establish the existence of genuine issues of material fact with respect to whether the defendants acted with deliberate indifference to a risk of serious harm.

Conclusion

[26] The trial court did not err in granting summary judgment to the defendants. We affirm.

[27] Affirmed.

Riley, J., and May, J., concur.