UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TODD WALSH, Plaintiff, v. CONMED, INC. et. al, Defendants.	CASE NO. 3:15-cv-05440-RJB ORDER ON DEFENDANT MEDICAL PROVIDERS' MOTION FOR RECONSIDERATION AND PLAINTIFF'S MOTION TO STRIKE SURREPLY

THIS MATTER comes before the Court on Defendants' Motion for Reconsideration. Dkt. 87. The Court invited Plaintiff to respond to the motion. Dkt. 88. Following Plaintiff's Response (Dkt. 89), Defendants filed a "LCR 7(g) Surreply on Motion for Reconsideration," (Dkt. 90), which is the basis for Plaintiff's Motion to Strike Surreply (Dkt. 90), also pending before the Court. The Court has considered this responsive briefing and the remainder of the file herein.

I. Plaintiff's Motion to Strike Surreply.

As a threshold matter, Plaintiff's Motion to Strike Surreply (Dkt. 91) should be stricken as improper. Plaintiff's motion amounts to an objection to Defendants' LCR 7(g) Surreply on Motion for Reconsideration (Dkt.90) on the basis that Defendants' briefing was "not allowed nor invited" by the Court. The Court will follow LCR 7(g) without the aid of Plaintiff's motion.

LCR 7(g) provides that "[r]equests to strike material contained in . . . submissions of opposing parties shall not be presented in a separate motion to strike, but shall be included in the responsive brief." The Court did not invite Defendants to file a Reply, but Defendants' briefing (Dkt. 90) should be construed as a request to strike, which is allowable under LCR 7(g). To the extent Defendants move to strike a new argument by Plaintiff, Defendants' request will be considered. *See* Dkt. 90 at 1:15-2:6. To the extent Defendants' briefing advances additional arguments, Defendants' briefing was not invited by the Court and the Court will disregard it. *See id*. at 2:6-3.

II. Defendants' Motion for Reconsideration.

For the reasons discussed below, Defendants' motion should be denied. Defendants make two main arguments, each addressed in turn.

A. Defendants' argument: The deliberate indifference claim fails because (1) the decision to provide an x-ray is a medical decision, not deliberate indifference, and (2) an individual can only be liable for their own actions.

Defendants quote *Estelle v. Gamble*, 429 U.S. 97, 107-08 (1976) at length for the proposition that x-rays as a "diagnostic technique that is . . . a classic example of medical judgment . . . [which] does not represent cruel and unusual punishment." *Estelle* is still good law, but is distinguishable. If this case boiled down to only the decision of whether to order an x-ray, *Estelle* would be on point. However, according to Plaintiff, "[t]heir suggestion was just to shut my mouth and wait [to do an x-ray] until I got out of there." Dkt. 69-1 at 18 (Walsh Dep. at 75, 76). The comment creates an issue of fact as to the intent for denying diagnostic care. Plaintiff believes the diagnosis made a difference, because after receiving an out of custody x-ray diagnosis of a compression fracture, Plaintiff received different treatment: "physical therapy, a

back brace and being in a pool. . . different pain med[ications]."[1] Dkt. 58-1 at 44 (Walsh Dep. at 124). Construing these facts in favor of Plaintiff, a reasonable juror could make a finding of deliberate indifference.

Individual liability can be inferred from the circumstances as to Nurse Devin, Nurse Beasley, and PA Zupfer. As to Nurse Devin, the only male nurse to treat Plaintiff, Plaintiff testified that the "suggestion . . . to shut my mouth and wait" for the diagnostic treatment was made by "one of the nurses, a guy – a nurse[.]" Dkt. 69-1 at 18 (Walsh Dep. at 75, 76). Plaintiff also testified that "they said, stop bothering us. You're not getting an x-ray of your back, and my suggestion to you is when you get out of here, go straight to the emergency room. So I took his suggestion." Dkt. 58-2 at 13 (Walsh Dep. at 155) (emphasis added). As to Nurse Beasley, Plaintiff testified:

> Q: Do you remember anything specifically about your appointment with Nurse Beasley?
>
> A: No. No, I just remember – the only thing I remember was that I was told to stop complaining about it because I was not going to get an x-ray of my back. And I remember – that's all I remember.
> And, if you want an x-ray of your back, you wait until you get out of here, and then you go to the emergency room and get an x-ray of your back. And that's what I remember. So that's what I focused on.

Dkt. 58-2 at 13 (Walsh Dep. at 154, 155) (emphasis added). PA Zupfer appears to be the gatekeeper for approving x-rays, because she approved the x-ray for Plaintiff's nose, and she supervised Nurse Devin in issuing pain medicine. Dkt. 54 at ¶6; 56 at ¶6. When asked about whether PA Zupfer made a reasonable assessment of Plaintiff's injury, Plaintiff testified that "I can say I begged for an x-ray of my back[.]" *See* Dkt. 58-2 at 2, 3 (Walsh Dep. at 139-40) and Dkt.

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[1] Defendants move to strike the "new argument regarding pain medication," but this argument was raised in Plaintiff's Response. Dkt. 75 at 6:27; 16:6; 29:18-27; 31:25.

58-3 at 29-33. Construing the facts in favor of Plaintiff, a reasonable juror could find deliberate indifference by Nurse Allen, Nurse Beasley, and PA Zupfer.

B. Defendants' argument: The § 1983 claim and negligence claim fail on proximate cause and damages, where (1) the court erred by considering an unsigned, unsworn, and incompetent document as evidence, and (2) even if the unsigned, unsworn report is considered, it does not raise genuine issue of material fact as to proximate cause and damages.

Defendants are correct: the Court erred in considering reports submitted by Plaintiff's expert, Nurse Robert Malaer. Nurse Malaer's reports do not contain anything resembling a signature. *See* Dkt. 75-1 at 2-10. Plaintiff argues that "electronic signatures on PDF documents is now a long established practice," but Plaintiff provides no authority for this proposition. Plaintiff may be referring local ECF filing rules, but these local rules allow only for electronic signatures by an "attorney, pro se litigant[s], judicial officer, or deputy clerk using a valid . . . login and password." W.D.Wash. Electronic Procedures, §IB. The local rule also requires that electronic filers sign their cases with an "/s/," *id.* at §IIIL, and Nurse Malaer did not use any similar demarcation. Dkt. 75-1 at 7, 10.

Because the Court will disregard Nurse Malaer's reports, the next issue raised by Defendants is whether the remainder of the record is sufficient to create an issue of fact as to proximate cause and damages. Regarding the § 1983 claim, the Court has addressed the sufficiency of the record without reliance on Plaintiffs' expert. *See above* §II(A).

Regarding the negligence claim, Defendants' argument is unpersuasive. Defendants cite the general rule that medical testimony is required to show breach and proximate cause where symptoms are not readily observable by a layperson and describable by a person without medical training. Dkt. 87 at 7. *See, e.g., Berger v. Sonneland*, 144 Wn.2d 91, 110-11 (2001). Applying this rule, Defendants argue that (1) Plaintiff received treatment for a lumbar sprain (in-custody

diagnosis), rather than a compression fracture (out of custody diagnosis), (2) Plaintiff, a layperson, cannot distinguish between the two diagnoses, and (3) the only expert with admissible testimony has testified that "[Plaintiff's] condition is the same as it would have been had these things been provided by the jail." *Id.* However, Plaintiff's broken back was apparent to Plaintiff, who testified from his personal experience of a prior broken back injury. Dkt. 58-1 at 40. Plaintiff testified that he insisted on an x-ray because he believed his back was broken, and after the change in diagnosis, Plaintiff's treatment changed to include "physical therapy, a back brace and being in a pool. . . different pain med[ications]." *Id.*

Defendants' motion for reconsideration should be granted to the extent that the Court should disregard Nurse Malaer's reports, but the motion should be denied to the extent Defendants seek to dismiss all claims.

THEREFORE, Defendant's Motion for Reconsideration (Dkt. 87) is GRANTED IN PART insofar as the Court has disregarded Nurse Robert Malaer's reports when considering Defendants' Motion for Summary Judgment. Defendants' Motion for Reconsideration is OTHERWISE DENIED.

Plaintiff's Motion to Strike Surreply (Dkt. 91) is stricken.

It is so ordered.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 20th day of October, 2016

ROBERT J. BRYAN
United States District Judge