NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 30, 2019*
Decided June 4, 2019

Before

DIANE P. WOOD, *Chief Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 18-2553

DELBERT HEARD,
Plaintiff-Appellant,

v.

ANDREW TILDEN, WEXFORD HEALTH SOURCES, INC., and LOUIS SHICKER,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.

No. 14-cv-1027-JBM

Joe Billy McDade,
Judge.

ORDER

Delbert Heard, an Illinois inmate, sued prison medical providers under 18 U.S.C. § 1983 for deliberate indifference to his recurrent inguinal hernia (a hernia in the groin). He argued that the prison doctor violated his Eighth Amendment rights by recklessly failing to test for the hernia, which unnecessarily prolonged his pain and delayed corrective surgery. The other defendants, he claimed, unlawfully enabled this. The

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

district court entered summary judgment for the defendants. Because a reasonable jury could not conclude that any of the defendants was deliberately indifferent to Heard's hernia, we affirm.

2 We construe the undisputed facts in the light most favorable to Heard, the party opposing summary judgment. *See Greeno v. Daley*, 414 F.3d 645, 648 (7th Cir. 2005). Heard saw Dr. Andrew Tilden in April 2011 and complained of pain that Heard believed was attributable to a reducible hernia. (A hernia surgeon deposed for this case defined a reducible hernia as one in which part of the intestine "moves back and forth [through the abdominal wall] when you cough.") Heard had a history of inguinal hernias and required emergency surgery years earlier to repair one. Dr. Tilden noted Heard's medical history but reported "no obvious" hernia. He instead diagnosed Heard with an "asymptomatic" hydrocele (scrotal swelling) and prescribed painkillers. Heard, however, refused the medication out of concern that it would dull his sensitivity to the acute pain that precedes strangulation of the intestine—the complication that triggered his emergency surgery years before.

3 Heard maintains that at this appointment, Dr. Tilden did not perform the standard "cough impulse test" to assess whether he had a hernia, and instead merely "eyeballed" him. Dr. Tilden does not remember performing the test but stated in his deposition that he "would have" done it in response to Heard's complaints because a proper hernia examination is "not only visual." The cough test is "any physician[']s routine examination for [an] inguinal hernia," Dr. Tilden added, and is "taught in … medical school."

4 Heard again visited health services eight months later complaining of variable pain that was sometimes triggered just by walking. This time, a physician's assistant performed the cough impulse test and diagnosed a reducible inguinal hernia on his left side. The physician's assistant prescribed painkillers and ice and advised Heard to stop lifting weights. Heard again refused to take the painkillers. A few days later, Heard visited Dr. Tilden and insisted that he had a hernia on his left groin requiring surgery, but Dr. Tilden noted that "no hernia [was] palpable." (Heard maintains that "palpable," referred to Dr. Tilden's observation that Heard's hernia did not visibly bulge—i.e. it was reduced during the appointment.) Dr. Tilden again failed to perform the cough impulse test during this visit, Heard states.

5 Heard's pain worsened and he repeatedly sought treatment for it. He wrote to Dr. Louis Shicker, the medical director of the Illinois Department of Corrections, requesting surgery. Dr. Shicker denied Heard's request, explained he had no

"independent knowledge" of his condition, and directed him to submit a grievance if he objected to his care. Following an unsuccessful grievance process, Heard wrote twice to the Governor's Office of Citizen's Assistance, requesting surgery. That office forwarded the letters to Dr. Shicker, who again denied Heard's requests. In response to the first letter (which is not in the record), Dr. Shicker stated, "[p]er Dr. Tilden, you do not have a hernia problem," only a hydrocele. In his next letter, Heard explained that Dr. Tilden had not performed the cough impulse test and submitted the physician's assistant's note diagnosing his hernia. Dr. Shicker, however, concluded based on the physician's assistant's notes (prescribing ice and painkillers) and the responses to the grievances that the hernia had not "progress[ed] to the point of meeting clinical criteria for surgical repair" but stated that repair would "be authorized" if it became necessary. He further explained that "[e]lective surgery, in general, is not undertaken within IDOC."

Heard visited health services again in October 2012, complaining of pain and stating that his hernia had gotten larger. Dr. Tilden performed the cough impulse test during this visit and diagnosed Heard's hernia. Dr. Tilden ordered an ultrasound and referred Heard to an outside surgeon who repaired the condition. Heard's pain subsided after the surgery.

Heard sued Dr. Tilden, Dr. Shicker, and Wexford Health Sources, Inc. (the prison's medical provider) for deliberate indifference to his pain. He claimed that Dr. Tilden violated his Eighth Amendment rights by failing to perform the cough impulse test until October 2012, thereby delaying Heard's diagnosis and surgery and prolonging his pain for more than a year. Dr. Shicker, he added, failed to intervene. Heard also asserted a claim under *Monell v. Dept. of Soc. Svcs.*, 436 U.S. 658 (1978), against Wexford and Dr. Shicker, challenging what he alleged to be a blanket policy of refusing to authorize elective hernia surgeries.

The district court ultimately granted the defendants' motions for summary judgment. Acknowledging a dispute about whether Dr. Tilden performed the cough impulse test during Heard's first two appointments, the district court concluded that the dispute was immaterial. Dr. Tilden's testimony and the treatment records revealed that Dr. Tilden believed that Heard *did not have* a hernia before October 2012, the court determined, and the doctor could not be liable for a misdiagnosis. As for Dr. Shicker, the court determined that nothing in the record showed that he should have known that Heard needed hernia surgery before October 2012. Dr. Shicker, therefore, could not be deliberately indifferent for denying surgery before then. Finally, the court ruled that

Heard's *Monell* claim failed because he had not established an underlying Eighth Amendment violation.

¶ 9 On appeal, Heard argues that a jury could conclude that Drs. Tilden and Shicker were deliberately indifferent to his pain. To survive summary judgment, Heard needed to introduce evidence showing that (1) his medical need was objectively serious, and (2) Drs. Tilden and Shicker consciously disregarded his need for treatment. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016) (en banc). Even without a corresponding exacerbation of an underlying condition, "deliberate indifference to prolonged, unnecessary pain can itself be the basis for an Eighth Amendment claim." *Smith v. Knox Cty. Jail*, 666 F.3d 1037, 1039–40 (7th Cir. 2012).

¶ 10 Although the district court found that Heard's hernia was an objectively serious condition, Dr. Tilden and Wexford disagree. (Dr. Shicker assumes on appeal that it is.) They assert that Heard's hernia was never objectively serious because it never required *emergency* surgery. But we have acknowledged that a reducible hernia accompanied by chronic pain can be an objectively serious medical problem. *See Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 2011). And Heard's testimony that his pain limited his ability to walk and increased over time is sufficient to survive summary judgment. *See Hayes v. Snyder*, 546 F.3d 516, 522–23 (7th Cir. 2008).

¶ 11 As for the subjective prong, Heard first contends that he has presented evidence that Dr. Tilden knew he should have tested for a hernia yet failed to do so for over a year. *Petties*, 836 F.3d at 728–29; *Ortiz v. Webster*, 655 F.3d 731, 735 (7th Cir. 2011). A plaintiff can show that a doctor acted with deliberate indifference if his treatment decision was "such a substantial departure from accepted professional judgment, practice or standards . . . that the person responsible did not base the decision on such a judgment." *Petties*, 836 F.3d at 729 (quoting *Cole v. Fromm*, 94 F.3d 254, 261–62 (7th Cir. 1996)). In other words, a plaintiff establishes deliberate indifference by showing that "no minimally competent professional would have so responded under those circumstances." *Collignon v. Milwaukee Cty.*, 163 F.3d 982, 989 (7th Cir. 1998).

¶ 12 No reasonable jury could conclude that Dr. Tilden acted with deliberate indifference to Heard's hernia. Before diagnosing the hernia in October 2012, Dr. Tilden examined Heard twice, diagnosed and monitored his hydrocele, and responded to Heard's complaints of pain by prescribing painkillers. Heard's decision to refuse those painkillers cannot be held against Dr. Tilden. And after Dr. Tilden did diagnose the hernia, he immediately referred Heard for an ultrasound and surgical consult. Even

assuming Heard had a hernia before October 2012, nothing in the record permits an inference that Dr. Tilden's failure to perform the cough impulse test resulted from anything more than negligence. Under the circumstances, the most Heard could prove is that Dr. Tilden's missed diagnosis amounted to malpractice, which is not a constitutional violation. *Cesal v. Moats*, 851 F.3d 714, 724 (7th Cir. 2017). Finally, not all reducible hernias require surgery. *See Johnson v. Doughty*, 433 F.3d 1001, 1014 (7th Cir. 2006). Indeed, the physician's assistant who first diagnosed the hernia decided that conservative treatment was appropriate. And Heard has no other evidence to support his theory that he needed and would have been authorized for immediate surgery in April or December 2011 if Dr. Tilden had diagnosed the hernia then. *See id.*

Nor has Heard met his burden with respect to his claims against Dr. Shicker for failing to intervene. Heard needed to offer evidence that Dr. Shicker had "reason to doubt" that Dr. Tilden and the physician's assistant based their course of treatment on something "other than medical judgment." *Rasho v. Elyea*, 856 F.3d 469, 474, 478–79 (7th Cir. 2017). And the record here suggests that in his first request, Heard asked Dr. Shicker to approve his surgery based only on Heard's own "opinion" that he had a hernia. A mere difference in opinion with Dr. Tilden's treatment plan would not have warranted intervention. *See Petties*, 836 F.3d at 729. True, Heard stated in his second letter that Dr. Tilden failed to perform the cough impulse test. But at that point, any failure by Dr. Tilden to diagnose the hernia was irrelevant to Dr. Shicker's assessment. Dr. Shicker credited the physician's assistant's hernia diagnosis but concluded that surgery was not yet required, consistent with the prison health-care unit's response to Heard's grievance. *See Rasho*, 856 F.3d at 474, 478–79 (medical director may rely on judgment of "medical professionals treating an inmate"). We cannot say that Dr. Shicker "failed to intervene with a deliberate or reckless disregard" for Heard's Eighth Amendment rights. *Fillmore v. Page*, 358 F.3d 496, 506 (7th Cir. 2004).

Heard next argues that Wexford and Dr. Shicker perpetuated a blanket policy of denying non-emergency hernia surgery that played a role in needlessly prolonging his pain. But a reasonable jury could not conclude from the record that such a policy existed. *Monell*, 436 U.S. at 694–95; *McCann v. Ogle Cty.*, 909 F.3d 881, 888 (7th Cir. 2018). Though Dr. Shicker stated that "[e]lective surgery, in general, is not undertaken within IDOC," he also told Heard that surgery would "be authorized" if his physician believed it was necessary. And indeed, Dr. Tilden ultimately authorized non-emergency hernia surgery after he and the outside doctor finally diagnosed Heard's hernia.

15 Last, Heard challenges the district court's denial of his request to transfer venue to the Northern District of Illinois. *See* 28 U.S.C. § 1404(b). The district court did not abuse its discretion in concluding that the Central District of Illinois was available, adequate, and more convenient for witnesses. *Id.* § 1404(a); *Deb v. SIRVA, Inc.*, 832 F.3d 800, 806–07 (7th Cir. 2016).

AFFIRMED

E-FILED
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Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DELBERT HEARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 14-cv-1027-JBM
	)	
DR. LEWIS SHICKER, et al.,	)	
	)	
Defendants.	)	

SUMMARY JUDGMENT ORDER

Plaintiff, Delbert Heard, filed suit as a pro se prisoner pursuant to 42 U.S.C. § 1983, alleging that Defendants Dr. Lewis Shicker, Dr. Arthur Funk, Dr. Andrew Tilden, and Wexford Health Sources, Inc. ("Wexford") caused him to suffer in pain for two years before they authorized surgery to repair his inguinal hernia, i.e., a hernia in the groin. On February 19, 2014, the Court entered a merit review order [13], finding Plaintiff stated a claim against Defendant Tilden, in his individual capacity, and against Defendant Wexford, in its official capacity, for deliberate indifference to Plaintiff's serious medical condition. The Court dismissed Defendants Shicker and Funk because it appeared Plaintiff sued them in their official capacities for damages.

On April 17, 2014, Defendants Tilden and Wexford moved for summary judgment [23], arguing Plaintiff's action was foreclosed by a release he executed in connection with the settlement of two prior lawsuits where he asserted similar claims. On March 11, 2015, the Court granted Defendants' motion [45]. Plaintiff appealed the Court's rulings in favor of Defendants Shicker, Tilden, and Wexford (but not Funk). On February 8, 2016, the Seventh Circuit vacated the judgment in favor of Tilden and Wexford because the release executed by Plaintiff did not encompass his claims in the present action. *See Heard v. Tilden*, 809 F.3d 974, 979 (7th Cir. 2016). The Seventh Circuit also vacated the judgment in favor of Shicker, finding Plaintiff sued

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Shicker in his individual capacity. *See id.* at 980. The Seventh Circuit, however, "express[ed] no view about the merits of [Plaintiff's] claim of deliberate indifference." *Id.* at 981.

On April 1, 2016, the Court appointed pro bono counsel for Plaintiff [61]. On April 12, 2016, an attorney Plaintiff had been in contact with filed a motion to substitute as Plaintiff's attorney [65], which the Court granted.

Now before the Court for consideration are two motions for summary judgment, one filed by Defendant Shicker [102] and another filed jointly by Defendants Tilden and Wexford [103]. Plaintiff filed a combined response [104] to Defendants' motions for summary judgment. Defendant Shicker filed a reply [105], and Defendants Tilden and Wexford filed a joint reply [108]. Based on the parties' pleadings, depositions, affidavits, and other supporting documents filed with the Court, Defendant Shicker's motion for summary judgment is GRANTED, and Defendants Tilden and Wexford's motion for summary judgment is GRANTED.

I. PRELIMINARY EVIDENTIARY ISSUES

Defendants Tilden and Wexford move to strike the following exhibits from Plaintiff's combined response: (1) Plaintiff's grievances; (2) responses to Plaintiff's grievances; (3) an internet article; and (4) medical records. Tilden and Wexford also move to strike the additional material facts for which Plaintiff cites to the exhibits for support. In addition, Tilden and Wexford move to strike other additional material facts, as well as some of Plaintiff's responses to Defendants' undisputed material facts, because either they are unsupported by specific citations to the record or the materials cited for support have been taken out of context.

A. Legal Standard

"[A] court may consider only admissible evidence in assessing a motion for summary judgment." *Sow v. Fortville Police Dep't*, 636 F.3d 293, 301 (7th Cir. 2011). No rule exists that

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allows a motion to strike exhibits or material facts during the summary judgment procedure. *See, e.g., In re 3RC Mech. & Contracting Servs., LLC*, 505 B.R. 818, 823 (Bankr. N.D. Ill. 2014). "[M]otions to strike are usually discouraged because of their tendency to multiply the proceedings and prolong briefing." *Smith v. Bray*, 681 F.3d 888, 903 (7th Cir. 2012); *see also Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725, 727 (7th Cir. 2006). "Instead of narrowing the issues and allowing for a more expeditious resolution of the motion for summary judgment, motions to strike generate another round of briefs that the court is required to read before it can reach the merits of the underlying dispute." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Graphic Packaging Int'l, Inc.*, No. 06-C-1188, 2007 WL 2288069, at *3 (E.D. Wis. Aug. 4, 2007).

Under Rule 56 of the Federal Rules of Civil Procedure, a "party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P 56(c)(2). Accordingly, "[t]he proper way to contest the opposing party's statement of facts . . . is a brief in response or reply, not a motion to strike." *United Steel*, 2007 WL 2288069, at *3 (citing *Custom Vehicles*, 464 F.3d at 727). Therefore, Defendants Tilden and Wexford's motion to strike is denied, but the Court will nonetheless address their arguments, construing them as objections under Rule 56.

B. Plaintiff's Grievances

Defendants Tilden and Wexford argue that Plaintiff's grievances and other written correspondence to IDOC officials are inadmissible hearsay and thus cannot be used to support the truth of what is contained within them, including that Plaintiff had a hernia and was in pain. Plaintiff argues that the grievances fall under the hearsay exceptions for business records, Fed. R. Evid. 803(6), and recorded recollections, Fed. R. Evid. 803(5). He also argues that the Court may

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consider the grievances to the extent they are offered to establish Defendants' knowledge of the matters contained within them.

"[H]earsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial." *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997). Under the business records exception, only material that "was created or adopted by the business record keeper" is admissible. *United States v. Santos*, 201 F.3d 953, 963 (7th Cir. 2000). The fact that statements made by inmates become part of the prison's records, "does not make them business records." *Id.*; *see also Widmer v. Hoskinson*, No. 13-CV-26-SCW, 2015 WL 1839574, at *5 (S.D. Ill. Apr. 20, 2015) (finding that prisoners' statements in unsworn grievances cannot be considered on summary judgment). Therefore, Plaintiff's statements in the grievances are not admissible under the business records exception.

For a grievance to be admissible under the recorded recollection exception, a party must first lay a proper foundation, including that "the witness now has insufficient recollection [about a matter] to testify fully and accurately." *United States v. Schoenborn*, 4 F.3d 1424, 1427 (7th Cir. 1993). Without a proper foundation, the grievance may not be considered at the summary judgment stage. *See, e.g.*, *Stockwell v. City of Harvey*, 597 F.3d 895, 902 n.3 (7th Cir. 2010); *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 382 (7th Cir. 2008); *Eisenstadt*, 113 F.3d at 743; *Overton v. City of Harvey*, 29 F. Supp. 2d 894, 901 (N.D. Ill. 1998). In the present case, Plaintiff has not shown that he cannot recall the matters described in his grievances or other written correspondence, including that he had a hernia and that it caused him pain. To the contrary, Plaintiff testified about his hernia and pain during his deposition.

Therefore, for the purposes of summary judgment, the Court will not consider Plaintiff's hearsay statements in his grievances or other written correspondence for the truth of the matter

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asserted because Plaintiff has not laid the proper foundation to establish the admissibility of the statements under either the business records exception or the recorded recollection exception. However, to the extent the grievances are used for a non-hearsay purpose, the Court will consider them when addressing Defendants' motions for summary judgment.

C. Responses to Plaintiff's Grievances

Defendants Tilden and Wexford argue that the prison officials' responses to Plaintiff's grievances are unauthenticated and hearsay. They also argue that some of the responses contain hearsay within hearsay. The Court finds that the responses could be admissible in evidence either as a business record under Rule 803(6) or as a statement of an opposing party under Rule 801(d)(2), or both in the case of hearsay within hearsay. *See Stone v. Morris*, 546 F.2d 730, 738 (7th Cir. 1976) (holding that prison records may be admissible under the business records exception to hearsay); *Bell v. EPA*, 232 F.3d 546, 552 (7th Cir. 2000) (holding that a memorandum may be admissible as a statement by an opposing party).

In addition, Plaintiff's counsel represents to the Court that the responses were tendered by Defendants as part of their discovery responses. The "very act of production [is] implicit authentication." *United States v. Brown*, 688 F.2d 1112, 1116 (7th Cir. 1982) ("Once [the defendant] voluntarily produced the document and implicitly represented them to be [the company's] records, he cannot be heard to contend that they are not [the company's] records."); *see also Thanongsinh v. Bd. of Educ.*, 462 F.3d 762, 779 (7th Cir. 2006) (stating that it would be "an empty formality" to require an authenticating affidavit where the defendant drafted the relevant documents and produced them during discovery). Therefore, the Court will consider the responses to Plaintiff's grievances in ruling on Defendants' motions for summary judgment.

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D. Plaintiff's Internet Article

Plaintiff submits a printout of an article titled "Types of Surgery" that is found on the John Hopkins Medicine website. Defendants Tilden and Wexford argue that the article printout is hearsay. Plaintiff argues that it is admissible as a reliable pamphlet under Rule 803(18).

Plaintiff cites to the article for the proposition that "[e]lective surgery does not mean optional surgery." (Pl.'s Combined Resp. 28, ECF No. 104.) The article states, "An elective surgery does not always mean it is optional. It simply means that the surgery can be scheduled in advance." (Pl.'s Combined Resp., Ex. 2.) This statement is consistent with the admissible testimony of Defendant Tilden, who states that "[e]lective [surgery] means it can be done in the future." (Tilden Dep. 37:2–5, ECF No. 109-2.) Therefore, given Tilden's testimony, the Court will not consider the article in ruling on Defendants' motions for summary judgment as it is unnecessary.

E. Unauthenticated Medical Records

Defendants Tilden and Wexford argue that the medical records Plaintiff submitted as exhibits are unauthenticated. They also argue that one of the exhibits—the December 9, 2011, medical record—lists "Rodney Heard" as the inmate, instead of Plaintiff "Delbert Heard." (Pl.'s Combined Resp., Ex. 5.) Plaintiff's counsel represents to the Court that the medical records submitted are exact copies of the documents tendered by Defendants in discovery. Plaintiff argues that Defendants cannot claim in good faith that the records they tendered in discovery are unauthenticated. Plaintiff argues that although one exhibit shows the name "Rodney Heard," it lists the inmate's identification number as "76789," which is Plaintiff's inmate number.

As already discussed above, the "very act of production [is] implicit authentication." *Brown*, 688 F.2d at 1116. The Court will rely on the representation by Plaintiff's counsel that the

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medical records attached as exhibits were produced to Plaintiff by Defendants during discovery. Thus, for summary judgment purposes, the medical records are sufficiently authenticated as Plaintiff's medical records.

Defendants do not present any evidence to rebut this authentication except to point out that there is a name discrepancy on one of the exhibits. Defendants are unsure "whether [the name discrepancy] is a mistake or a record was misfiled." (Defs.' Mot. to Strike 5, ECF No. 107.) The name discrepancy, however, does not make the record inadmissible but instead goes only to the weight of the evidence. On the record before the Court, it is equally plausible that the medical record belongs to Plaintiff (inmate number 76789) or to Rodney Heard. Moreover, the Court notes that the medical record indicates the patient reported a history of bilateral inguinal hernia surgery, which is consistent with Plaintiff's medical history.

F. No Evidentiary Support for Additional and Disputed Material Facts

Defendants Tilden and Wexford argue that some of Plaintiff's additional material facts and disputed material facts are either unsupported by specific citations to the record or the materials cited for support have been taken out of context. Regarding the facts that lack citation to the record, Plaintiff has provided those citations in his response to Tilden and Wexford's motion to strike, so the Court will consider the evidence as cited. Regarding the facts that are arguably taken out of context, the Court has taken into account the objections made by Tilden and Wexford and will consider the evidence in its full context.

II. MEDICAL TERMINOLOGY

A hernia is generally defined as a weakening of tissue that allows an organ or other tissue to leave its natural position and move to a newer and abnormal one. (Gangemi Dep. 50:20–24, ECF No. 103-3.) An inguinal hernia usually occurs when a portion of the abdominal contents

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pass through the inguinal opening into the scrotum. (Tilden Decl. ¶ 3, ECF No. 103-2.) The only successful treatment for a hernia is surgery. (Gangemi Dep. 12:18–21.) A hernia is not a condition than can be treated with medications or physical therapy. (*Id.*) A hernia may be stable and can be monitored, but it will not heal without surgery. (*Id.* at 13:2–14.)

Three main concerns for hernias in acute setting, i.e., occurring suddenly, are incarceration, strangulation, and bowel obstruction. (*Id.* at 19:15–22.) Incarceration of a hernia means the tissue or the viscus, i.e., gastrointestinal organ, involved with the hernia cannot spontaneously return to its normal position or location. (*Id.* at 63:11–16.) Strangulation occurs when the tissue involved in the hernia suffers ischemia, i.e., an inadequate supply of oxygen, because of the pressure applied by the margins of the opening on the wall. (*Id.* at 66:5–9.) Bowel obstruction is where the stools become stuck at a point, which puts a patient at risk of bowel perforation. (*Id.* at 55:15–19, 64:3–10.)

Before a hernia becomes incarcerated, there is always a phase where it is reducible, meaning that the tissue or viscus can be pushed back through the opening. (*Id.* at 75:4–11.) A reducible hernia poses a "potential theoretical risk for strangulation or bowel obstruction." (*Id.* at 28:1–10.)

III. MATERIAL FACTS

Plaintiff is an inmate in the custody of the Illinois Department of Corrections (IDOC). (Pl.'s Dep. 4:14–16, ECF No. 102-1.) The events at issue in this case occurred while Plaintiff was housed at Pontiac Correctional Center ("Pontiac"), where he has been housed since 2008. (*Id.* at 4:17–23, 10:3–8.) Defendant Tilden is a physician licensed to practice medicine in Illinois. (Tilden Decl. ¶ 1.) He has been the medical director at Pontiac since November 23, 2010. (*Id.* ¶ 2.) His duties include attending to the medical needs of the inmates at Pontiac. (*Id.*) Defendant

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Shicker was the medical director of IDOC from November 2009 until June 2016. (Shicker Decl. ¶ 1, ECF No. 102-2.) As medical director, Shicker did not treat individual inmates. (*Id.* ¶ 3.) He was not generally involved in the treatment decisions for inmates, although he may have become involved in the event that the facility medical staff brought a case to his attention or he was contacted by an inmate directly for assistance. (*Id.* ¶ 8.)

In 2007, while at Menard Correctional Center, Plaintiff underwent emergency surgery to repair a bilateral inguinal hernia. (Pl.'s Dep. 26:7–27:18.) As a result, Plaintiff sued Wexford and its doctors, which led to a settlement agreement in September 2012. (Ebbitt Decl. 2–3, ECF No. 23-7.) Plaintiff states that he never discussed his settled lawsuits with Defendant Tilden, who was not a defendant in those lawsuits. (Pl.'s Dep. 109:23–110:3.) Tilden states that Plaintiff "mentioned something about a lawsuit" but he has "no knowledge of any follow-up or any settlements" and his "examination and actions were totally independent of any knowledge of any lawsuits." (Tilden Dep. 23:7–24:9.)

In 2011, while at Pontiac, Plaintiff started having the same type of pain, and in the same area, that he had experienced in the early stages of his bilateral inguinal hernia that had been surgically repaired in 2007. (Pl.'s Dep. 36:11–37:5.) Plaintiff believed that he was suffering from a recurrent inguinal hernia. (*Id.* at 37:2–16.)

On April 15, 2011, Defendant Tilden saw Plaintiff during sick call. (Tilden Decl. ¶ 3.) Tilden noted Plaintiff's history of a left inguinal hernia repair with complaints of occasional discomfort and a history of a left hydrocele, i.e., a fluid accumulation in the scrotum. (*Id.*) During the visit, Tilden noted that Plaintiff had a left hydrocele with a non-tender testicle and no other masses. (*Id.*) Tilden did not note an obvious left inguinal hernia. (*Id.*) He assessed Plaintiff as "status post left inguinal hernia repair and left varicocele/hematoma that was asymptomatic."

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(*Id.*) Tilden continued Plaintiff's low bunk/low gallery permits for six months. (*Id.*) Plaintiff declined pain medication on this date and refused to take medication up until the time of his July 2013 surgery because he felt it was not good for him and he feared pain medication would mask the hernia becoming incarcerated. (Pl.'s Dep. 58:2–59:5.)

On December 9, 2011, Plaintiff saw Physician Assistant Riliwan Ojelade during sick call. (Pl.'s Combined Resp., Ex. 5.) Plaintiff complained that he had an inguinal hernia that was sometimes painful when he walked. (*Id.*) Plaintiff admitted that the hernia was "reducible and less painful." (*Id.*) Ojelade assessed Plaintiff as having a left reducible inguinal hernia. (*Id.*)

On December 15, 2011, Defendant Tilden saw Plaintiff for a follow-up appointment. (Tilden Decl. ¶ 4.) Plaintiff insisted to Tilden that he had a new left inguinal hernia. (*Id.*) After examining Plaintiff, Tilden again noted a large left scrotal hematoma in the left inguinal area but no palpable hernia. (*Id.*) Tilden advised Plaintiff not to lift over twenty pounds and to avoid strenuous exercise. (*Id.*) He prescribed Plaintiff a low bunk permit for one year. (*Id.*) According to Plaintiff, his hernia was not visible on this date. (Pl.'s Dep. at 63:10–64:20.)

Plaintiff states that when Defendant Tilden saw him on April 15, 2011, and December 15, 2011, Tilden assessed Plaintiff as not having a hernia without physically palpating Plaintiff's groin area. (*Id.* at 57:15–58:1.) Instead, Tilden only visually looked at Plaintiff's groin area and "eyeball[ed]" it. (*Id.* at 46:23–47:6.) Plaintiff states that during these two visits, Tilden did not perform a "cough impulse test" on him. (*Id.* at 57:12–18.) A cough impulse test is where a doctor reaches through a patient's scrotum and instructs the patient to cough; if the patient has a hernia, the bowel is palpable when the inguinal channel opens. (Tilden Decl. ¶ 3.) Plaintiff states that he asked Tilden to perform the cough impulse test but Tilden refused. (Pl.'s Dep. 71:18–72:2.) According to Plaintiff, "[Tilden] just said put your pants back on, you don't have a hernia . . . ,

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you have a hydrocele . . . ." (*Id.*) Tilden does not have an independent recollection that he performed the cough impulse test on these dates, but he states he would have performed the test because it is the "routine examination for [an] inguinal hernia." (Tilden Dep. 19:1–9; Tilden Decl. ¶ 3.)

In January 2012, Plaintiff filed a grievance, requesting surgery to repair his hernia. (Pl.'s Combined Resp., Ex. 7.) On February 20, 2012 Teresa Arroyo, a registered nurse and Pontiac's health care unit administrator, sent a memorandum to the Grievance Office that addressed Plaintiff's grievance. (Pl.'s Combined Resp., Ex. 8.) Arroyo stated that she had reviewed Plaintiff's medical chart and noted that his "inguinal hernia [was] stable and reducible and [did] not require surgery at [that] time." (*Id.*)

In March 2012, Plaintiff sent a letter to the Governor's Office of Citizen's Assistance ("Governor's Office") seeking surgical repair for his hernia. (Pl.'s Combined Resp., Ex. 10.) This letter was forwarded to Defendant Shicker, who responded to Plaintiff by letter on March 26, 2012. (Shicker Decl. ¶ 11.) Shicker wrote to Plaintiff:

> Per Dr. Tilden you do not have a hernia problem currently but something called a hydrocele. This will give you scrotal swelling but it is generally of a benign nature. Repair of such is, in general, considered elective. Dr. Tilden will continue to follow you at Pontiac.

(Pl.'s Dep., Ex. 9.)

On July 12, 2012, Plaintiff sent another letter to the Governor's Office along with the reports of Physician Assistant Ojelade and Administrator Arroyo, which stated that Plaintiff had a reducible inguinal hernia. (Pl.'s Combined Resp., Ex. 10.) Plaintiff also wrote in the letter that his hernia was reducible. (*Id.*) He further wrote:

> I suffer intermittent pain in my pelvic area when my hernia intermittently forms a bulge in my pelvic area. My hernia pain varies from mild to modera[t]e, but it varies from moderate to extreme when I try to engage in

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> strenuous or athletic movements and activities. Also my hernia pain is sometimes momentarily excruciating when I sneeze or involuntarily cough.

(*Id.*) Plaintiff's description of pain in the letter is very similar to how he described the pain in his deposition. (Pl.'s Dep. 65:23–67:16.) At times, the hernia would cause Plaintiff pain when he walked, climbed stairs, or climbed onto the top bunk of his bed (before Defendant Tilden prescribed him a low bunk permit). (*Id.* at 51:8–17.)

Plaintiff's July 12, 2012, letter was also forwarded to Defendant Shicker, who responded to Plaintiff by letter on August 17, 2012. (Shicker Decl. ¶ 12.) Shicker wrote to Plaintiff:

> You supplied some data that you have a reducible inguinal hernia and you are requesting that I authorize surgery for its repair.
>
> Not all inguinal hernias require repair. Repair of most reducible hernias is considered elective surgery. Elective surgery, in general, is not undertaken within IDOC. Your hernia situation will need to be clinically monitored and when/if it progresses to the point of meeting clinical criteria for surgical repair, it will be authorized.

(Pl.'s Combined Resp., Ex. 11.)

On July 27, 2012, Plaintiff again saw Physician Assistant Ojelade, complaining of pain from a recurrent hernia. (Pl.'s Combined Resp., Ex. 12.) Ojelade examined Plaintiff and noted that he was suffering from an inguinal hernia. (*Id.*) On September 7, 2012, Jackie Miller of the IDOC Administrative Review Board responded to Plaintiff's January 2012 grievance. (Pl.'s Combined Resp., Ex. 13.) She wrote, "Per Dr. Tilden and Dr. Shicker, hernia is manageable at this time, surgery is not necessary." (*Id.*)

On October 4, 2012, Defendant Tilden saw Plaintiff for complaints of an inguinal hernia. (Tilden Decl. ¶ 5.) During this visit, Tilden performed the cough impulse test on Plaintiff. (Pl.'s Dep. 57:12–18.) Upon examination, Tilden palpated a simple reducible left inguinal hernia and a non-tender large scrotal hydrocele. (Tilden Decl. ¶ 5.) He assessed Plaintiff as having a reducible

left inguinal hernia and a left hydrocele. (*Id.*) Tilden noted the hernia to be reducible because it could be pushed back through the inguinal opening. (*Id.*) Tilden referred Plaintiff for an ultrasound, which confirmed a left inguinal hernia. (*Id.* ¶¶ 5–6.) On October 31, 2012, Tilden referred Plaintiff to a general surgeon, and on July 22, 2013, Dr. Antonio Gangemi performed surgery to repair Plaintiff's hernia. (*Id.* ¶¶ 5, 7, 12–14.)

Plaintiff states that the condition of his hernia did not change from April 2011 to October 2012. (Pl.'s Dep. 108:15–18.) Plaintiff's hernia was reducible and never became strangulated or incarcerated. (*Id.* at 28:12–14, 107:19–20.) During the time Plaintiff had the hernia, he was able to play basketball and lift weights, although sometimes he would have to moderate the amount of weight he used. (*Id.* at 15:3–9, 23:8–24:6.) Whenever Plaintiff engaged in strenuous activity, his pain would become extreme, and he would have to stop. (*Id.* at 67:6–22.) Otherwise, if his pain was moderate, he would "work through it." (*Id.*) Although Plaintiff did not work at one of the available jobs at Pontiac, he is unaware of any reason why he could not get a job. (*Id.* at 12:2–4.)

Plaintiff concedes that "any action taken after October 4, 2012 is moot" because his only claim against Defendants is that the "delay from April 2011 until October 2012 when [D]efendants took action to repair the hernia caused Plaintiff unnecessary pain and anguish."[1] (Pl.'s Combined Resp. 20–26, 38.)

[1] In Plaintiff's combined response, he specifies that his "claim encompasses the period of *February 10, 2011* through October 4, 2012." (Pl.'s Combined Resp. 20–26 (emphasis added).) In the "Introduction" section of his response, Plaintiff states that in February 2011, he "was examined by a physician's assistant who confirmed that Plaintiff was suffering from a recurrent hernia." (*Id.* at 1.) Plaintiff, however, does not include this fact in the "Additional Material Facts" section of his response and does not provide any evidence to support this assertion. Moreover, in his deposition, Plaintiff clearly states that he "first started complaining [about his recurrent hernia] in April of 2011." (Pl.'s Dep. 38:21–24.) In the "Argument" section of Plaintiff's response, which the Court quotes in the main text above, Plaintiff specifies that the start date of his claim is April 2011. (Pl.'s Combined Resp. 38.) Since this date is supported by the record, the Court will use this date as the start date of Plaintiff's claim.

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IV. EXPERT REPORT

Pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, Defendants Tilden and Wexford have submitted an expert report authored by Dr. Thomas D. Fowlkes. (Fowlkes Report, ECF No. 103-6.) In his correctional medicine practice, Dr. Fowlkes has "managed many dozens of patients with inguinal hernias." (*Id.* at 13.) He expressed his opinions in the report "to a reasonable degree of medical probability . . . based upon [his] training, experience, and a review of the records in this case."(*Id.* at 9.)

Dr. Fowlkes opined that the medical care provided to Plaintiff by Defendant Tilden and the other Wexford healthcare personnel "between April 2011 and July 2013 was completely appropriate and well within the acceptable standard of care." (*Id.*) Citing various factors regarding Plaintiff's medical history, "along with the knowledge that each subsequent operative repair of a recurrent hernia is more difficult, more risky and has a higher rate of failure," Dr. Fowlkes opined that "any prudent physician should be more conservative in recommending surgical intervention for a recurrent hernia in the absence of an urgent indication for doing so." (*Id.* at 12.) Dr. Fowlkes continued:

> [Defendant] Tilden would have delivered appropriate care for [Plaintiff's] hernia recurrence had he taken a more conservative or "wait and see" approach. [Plaintiff's] recurrent hernia certainly did not show any signs of incarceration or strangulation or other signs of a condition requiring urgent intervention. Out of an abundance of caution, . . . Tilden treated [Plaintiff] beyond what the standard of care would require by ordering an ultrasound the first day he identified a hernia on physical examination and referring him to a general surgeon on the same day the ultrasound confirmed the inguinal hernia without any evidence of incarceration or strangulation.

(*Id.* at 13.)

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V. SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A movant may demonstrate the absence of a material dispute through specific cites to admissible evidence, or by showing that the nonmovant "cannot produce admissible evidence to support the [material] fact." Fed. R. Civ. P. 56(c)(1). If the movant clears this hurdle, the nonmovant may not simply rest on his or her allegations in the complaint, but instead must point to admissible evidence in the record to show that a genuine dispute exists. *Id.*; *Harvey v. Town of Merrillville*, 649 F.3d 526, 529 (7th Cir. 2011). "In a § 1983 case, the plaintiff bears the burden of proof on the constitutional deprivation that underlies the claim, and thus must come forth with sufficient evidence to create genuine issues of material fact to avoid summary judgment." *McAllister v. Price*, 615 F.3d 877, 881 (7th Cir. 2010).

At the summary judgment stage, evidence is viewed in the light most favorable to the nonmovant, with material factual disputes resolved in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A genuine dispute of material fact exists when a reasonable juror could find for the nonmovant. *Id.* at 248.

VI. ANALYSIS

"Prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when their conduct demonstrates 'deliberate indifference to serious medical needs of prisoners.'" *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). To succeed on a claim of deliberate indifference to a serious medical need, a plaintiff must satisfy a test that contains both an objective and subjective component. *Vance v. Peters*, 97 F.3d 987, 991 (7th Cir. 1996). Under the objective component, a plaintiff

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must demonstrate that his medical condition is sufficiently serious. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Under the subjective component, the prison official must have acted with a "sufficiently culpable state of mind." *Id.* In the medical care context, a "deliberate indifference" standard is used. *Estelle*, 429 U.S. at 104. A plaintiff may establish deliberate indifference by showing that a defendant "knew of a substantial risk of harm to the inmate and disregarded the risk." *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005). A defendant "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

Treatment decisions made by medical professionals are presumptively valid. *Collignon v. Milwaukee County*, 163 F.3d 982, 989 (7th Cir.1998). "A medical professional is entitled to deference in treatment decisions unless 'no minimally competent professional would have so responded under those circumstances.'" *Sain v. Wood*, 512 F.3d 886, 894–95 (7th Cir. 2008) (quoting *Collignon*, 163 F.3d at 989). To be deliberately indifferent, a medical professional's decision must be "such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Collignon*, 163 F.3d at 989 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)). "[M]edical malpractice in the form of an incorrect diagnosis or improper treatment does not state an Eighth Amendment claim." *Gutierrez*, 111 F.3d at 1374.

A. Objective Component

Defendants Tilden and Wexford argue that Plaintiff's hernia was not objectively serious because it was stable and reducible. The Seventh Circuit has held that "a hernia can be an objectively serious medical problem." *Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 2011). "A serious medical condition is one that has been diagnosed by a physician as mandating

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treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention." *Greeno*, 414 F.3d at 653. Where prison doctors treat a prisoner's medical condition, a court has "no hesitation" concluding that the prisoner's condition is objectively serious. *See Gutierrez*, 111 F.3d at 1373.

In the present case, Dr. Gangemi recommended surgery to repair Plaintiff's inguinal hernia. The surgery was approved by Defendants Tilden and Wexford, and Plaintiff underwent surgery on July 22, 2013. While it is true that Defendants' expert, Dr. Fowlkes, opined that Tilden treated Plaintiff beyond what the standard of care would require, it is unreasonable to conclude that surgery would be performed on a prisoner who did not have an objectively serious condition. Therefore, the Court finds that Plaintiff's hernia was objectively serious.

B. Subjective Component

1. Plaintiff's Claim Against Defendant Tilden

Defendant Tilden argues he was not deliberately indifferent to Plaintiff's inguinal hernia because once he diagnosed the hernia on October 4, 2012, he provided adequate care to Plaintiff, including approving Plaintiff for surgery, which Plaintiff underwent on July 22, 2013. Any claim of deliberate indifference prior to October 4, 2012, fails as a matter of law, Tilden argues, because a missed diagnosis does not violate the Eighth Amendment. In support of his argument, Tilden presents evidence that he saw Plaintiff only twice before October 4, 2012, and on both occasions he believed Plaintiff did not have a hernia. When Tilden examined Plaintiff on April 15, 2011, he noted that Plaintiff had a left hydrocele with a non-tender testicle but no other masses. When he examined Plaintiff on December 15, 2011, he noted a large left scrotal hematoma in the left inguinal area but no palpable hernia.

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Assuming Plaintiff had a hernia during this time, as suggested by Physician Assistant Ojelade who assessed Plaintiff as having a hernia on December 9, 2011, the evidence shows only that Defendant Tilden misdiagnosed Plaintiff, which does not state an Eighth Amendment claim. *See Gutierrez*, 111 F.3d at 1374 ("[M]edical malpractice in the form of an incorrect diagnosis or improper treatment does not state an Eighth Amendment claim."). Therefore, the Court finds that Tilden has met his initial burden of showing an absence of a material dispute and that he is entitled to judgment as a matter of law. The burden now shifts to Plaintiff, who must present "sufficient evidence to create genuine issues of material fact to avoid summary judgment." *McAllister*, 615 F.3d at 881.

Plaintiff responds to Defendant Tilden's motion by arguing that Tilden acted with deliberate indifference when he "refus[ed] to surgically repair Plaintiff's hernia," which exposed Plaintiff to a risk of death and prolonged Plaintiff's pain unnecessarily. (Pl.'s Combined Resp. 41.) Plaintiff's argument, on its face, is difficult to understand logically. Plaintiff argues that Tilden refused to repair his hernia, yet Plaintiff admits that Tilden did not diagnose him with a hernia until October 4, 2012. By Plaintiff's own admission, then, the only time period Tilden could have refused Plaintiff surgery for his hernia is after October 4, 2012, when Tilden first diagnosed Plaintiff with a hernia—yet Plaintiff affirmatively states that any action taken after that date is moot because his claim does not encompass that time period.

Plaintiff, however, further argues that Defendant Tilden turned a "blind eye" towards his condition by not performing the cough impulse test on April 15, 2011, and December 15, 2011. Essentially, Plaintiff is arguing that had Tilden performed the cough impulse test, he would have discovered Plaintiff's hernia, and then after having discovered the hernia, he should have promptly scheduled Plaintiff for surgery to repair it. Apparently, then, Plaintiff is arguing that

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Tilden "refused" Plaintiff hernia surgery by deliberately avoiding the knowledge that Plaintiff had a hernia.

Although Defendant Tilden does not have an independent recollection that he performed the cough impulse test on either April 15, 2011, or December 15, 2011, he states that he would have performed the test because it is a "routine examination" for an inguinal hernia. (Tilden Dep. 19:1–9.) Plaintiff, on the other hand, states that Tilden did not perform the cough impulse test but instead just "eyeball[ed]" his groin area. (Pl.'s Dep. 46:23–47:6.) Given this factual dispute, the Court must determine whether it is material. *See Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 978 (7th Cir. 1996) ("The nonmovant must do more . . . than demonstrate some factual disagreement between the parties; the issue must be 'material.' Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute.").

To be deliberately indifferent, a prison official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. "The official must know there is a risk and consciously disregard it. It is not enough that he 'should have known' of the risk; the standard is not the same as it would be for a medical malpractice claim." *Higgins v. Corr. Med. Servs.*, 178 F.3d 508, 511 (7th Cir. 1999). Nevertheless, "an official cannot deliberately avoid knowledge of a risk that he strongly believes to be present." *Id.* An official will not escape liability if he "declined to confirm inferences of risk that he strongly suspected to exist." *Farmer*, 511 U.S. at 843 n.8.

Under Supreme Court and Seventh Circuit precedent, then, whether Defendant Tilden performed the cough impulse test is material only if it shows that he deliberately avoided knowledge of Plaintiff's hernia and that he *strongly believed or strongly suspected the hernia to exist. See id.*; *Higgins*, 178 F.3d at 511. Plaintiff has not presented any evidence that Tilden

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strongly believed or strongly suspected that Plaintiff had a hernia on either April 15, 2011, or December 15, 2011. In fact, the evidence Plaintiff presents shows that Tilden did not believe Plaintiff had a hernia on those dates. Plaintiff states that when he asked Tilden to perform the cough impulse test, "[Tilden] just said put your pants back on, you don't have a hernia . . . , you have a hydrocele . . . ." (Pl.'s Dep. 71:18–72:2.) Therefore, without subjective awareness of a risk of harm to Plaintiff, Tilden may be liable for medical malpractice for not performing the cough impulse test, but he cannot be held liable for deliberate indifference.

Plaintiff also argues that the timing of when Defendant Tilden performed the cough impulse test—six days after Plaintiff's prior lawsuit was settled and Defendant Wexford was released from liability in that case—is circumstantial evidence that Tilden turned a "blind eye" towards Plaintiff's condition. Plaintiff points out that Tilden argued in his April 17, 2014, motion for summary judgment (jointly with Wexford) that he believed the release relieved him of responsibility from Plaintiff's hernia in the present case. In response, Tilden points out that this was a legal argument made by counsel. Plaintiff states that he never discussed with Tilden the settlement, and Tilden states the same, except that Tilden states Plaintiff "mentioned something about a lawsuit," although he states it had no bearing on his examinations of Plaintiff. (Tilden Dep. 23:7–24:9.)

Plaintiff's argument—that Defendant Tilden performed the cough impulse test only after he believed he was released from liability for what he would discover—is based solely on speculation, which is insufficient to defeat summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (stating that non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts"); *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (stating that challenges to witnesses' credibility

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without some evidence of independent facts is insufficient to defeat summary judgment); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 981 (7th Cir. 2004) ("'[M]ere temporal proximity' is not enough to establish a genuine issue of material fact."). Therefore, for all these reasons, the Court finds that Plaintiff has failed to present sufficient evidence to create genuine issues of material fact regarding his claim against Defendant Tilden.

2. Plaintiff's Claim Against Defendant Shicker

Plaintiff argues that Defendant Shicker is liable for deliberate indifference because he "made a deliberate choice to determine that Plaintiff's hernia did not require surgery." (Pl.'s Combined Resp. 43.) Prison officials may not intentionally delay surgery after learning it is medically necessary. *Heard v. Tilden*, 809 F.3d 974, 980 (7th Cir. 2016). A prison official who is "involved directly in the choice to stall necessary surgery and prolong [a prisoner's] pain" may be liable for deliberate indifference. *Id.* at 981. Therefore, to succeed on his claim, Plaintiff must provide sufficient evidence that Shicker was directly involved in a decision to delay Plaintiff's surgery and that the surgery was medically necessary. *See id.* at 980–81.

a. Direct involvement

Defendant Shicker argues that he was not involved in Plaintiff's medical treatment, that he never assumed responsibility or asserted authority over Plaintiff's primary care, and that he had no face-to-face interactions with Plaintiff. In response, Plaintiff presents three pieces of evidence to support his allegation that Shicker was directly involved in the decision to delay surgery for his hernia: Plaintiff's March 2012 and July 2012 letters to the Governor's Office that were forwarded to Shicker, and Jackie Miller's September 2012 response to Plaintiff's January 2012 grievance.

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When Defendant Shicker responded to Plaintiff's March 2012 letter to the Governor's Office, he informed Plaintiff that Defendant Tilden did not believe Plaintiff had a hernia but rather a hydrocele and that Tilden would continue to monitor Plaintiff's condition. In response to Plaintiff's July 2012 letter, Shicker first summarized Plaintiff's request: "You supplied some data that you have a reducible inguinal hernia and you are requesting that I authorize surgery for its repair." (Pl.'s Combined Resp., Ex. 11.) Shicker then informed Plaintiff that not all inguinal hernias require repair and that Plaintiff's "hernia situation will need to be clinically monitored and when/if it progresses to the point of meeting clinical criteria for surgical repair, it will be authorized." (*Id.*)

Viewed in the light most favorable to Plaintiff, the inference from Defendant Shicker's response to the July 2012 letter is that Shicker believed Plaintiff's reducible inguinal hernia did not meet the clinical criteria for surgical repair at that time. Shicker's statement, "it will be authorized [when it meets the clinical criteria]," provides no indication of whom is responsible for authorizing surgery. Shicker, however, understood that Plaintiff was asking him to authorize surgery, and instead of informing Plaintiff that he is not the one who authorizes surgeries, he told Plaintiff that surgery will be authorized once it met certain criteria. Thus, when viewed in the light most favorable to Plaintiff, Shicker may be one of the persons responsible for authorizing surgery.

Moreover, Jackie Miller of the IDOC Administrative Review Board responded to Plaintiff's grievance by writing, "Per Dr. Tilden and Dr. Shicker, hernia is manageable at this time, surgery is not necessary." (Pl.'s Combined Resp., Ex. 13.) Therefore, the Court finds that Plaintiff has presented sufficient evidence that Defendant Shicker was directly involved in the decision to delay Plaintiff's hernia surgery. To succeed on his claim, however, Plaintiff must also

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present sufficient evidence that his surgery was medically necessary prior to October 4, 2012, when Defendants took action to repair the hernia. *See Heard*, 809 F.3d at 981.

b. Medically necessary surgery

The record before the Court reveals that Plaintiff experienced pain from a hernia that was reducible and not strangulated or incarcerated. These facts alone, however, do not establish whether it was medically necessary to perform surgery on Plaintiff's hernia. *See Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 2011) (painful yet reducible hernia required surgery); *Johnson v. Doughty*, 433 F.3d 1001, 1014 (7th Cir. 2006) (painful yet reducible hernia did not require surgery).

In *Gonzalez*, the Seventh Circuit concluded that a jury could find it was medically necessary to perform surgery on a painful yet reducible hernia. 663 F.3d at 314. The Court found the following facts relevant to its analysis: The plaintiff "regularly complained as his pain increased over time." *Id.* at 313. The doctors gave him "minimal or no medication for the ongoing pain, which [was] so debilitating that he [could not] carry on his daily activities or sleep comfortably." *Id.* at 314. The bulge from the plaintiff's hernia "was consistently visible and caused abdominal pain and numbness in his leg." *Id.* His hernia was "getting worse and causing constant pain for which he [was] not receiving sufficient pain medication." *Id.* at 313. After one examination where the doctor pushed the plaintiff's hernia back into his lower abdomen, the bulge returned when the plaintiff came off the examining table. *Id.* The plaintiff "had been suffering from his hernia for almost seven years, and during the last two of those years his hernia continued to worsen, was constantly protruding, and was causing extreme pain." *Id.* at 314. The doctors, however, "never altered their response to his hernia as the condition and associated pain worsened over time." *Id.*

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In *Johnson*, the Seventh Circuit held that it was not clearly erroneous for the district court to find after a bench trial that it was not medically necessary to perform surgery on a painful yet reducible hernia. 433 F.3d at 1014. The Court found the following facts relevant to its analysis: The plaintiff had requested surgery "because of the significant pain he was experiencing." *Id.* at 1003. After examining the plaintiff, the doctor prescribed pain medication to alleviate the plaintiff's pain, as well as a "hernia belt/truss to stop the hernia from protruding." *Id.* The doctor "instructed [the plaintiff] to avoid heavy lifting and strenuous activity, and, to that end, [the plaintiff] received a lower bunk permit." *Id.* at 1004. The relevant length of time that the plaintiff had his hernia was seven months. *Id.* The doctor monitored the plaintiff's condition, and the doctor's diagnosis of a reducible hernia did not change. *Id.* The doctor "did not observe any worsening of the condition that would make surgery a medical necessity." *Id.*

In the present case, the pain from Plaintiff's hernia was intermittent and varied from mild to moderate. The pain became extreme only when he engaged in strenuous activity. During the time Plaintiff had the hernia, he was able to play basketball and lift weights, although sometimes he would have to moderate the amount of weight he used or stop when he strained too hard, which caused extreme pain. When his pain was moderate, though, he could work through it. The pain from Plaintiff's hernia also was apparently not great enough to prevent him from getting a job, as he did not offer that as a reason when asked whether there was any reason why he could not get a job at Pontiac. After examining Plaintiff, Defendant Tilden prescribed Plaintiff a low bunk permit and advised Plaintiff not to lift over twenty pounds and to avoid strenuous exercise. Tilden also offered Plaintiff pain medication to alleviate his pain, but Plaintiff refused it. During one of Plaintiff's visits with Tilden, Plaintiff's hernia was not visible. The condition of Plaintiff's

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hernia did not change from April 2011 to October 2012. It was reducible and never became strangulated or incarcerated.

The Court finds that these facts, viewed in the light most favorable to Plaintiff, are more similar to *Johnson* than *Gonzalez*. Plaintiff did not present any evidence that his pain was constant or so debilitating that he could not carry on his daily activities. In fact, Plaintiff testified that he was able to continue playing basketball and lifting weights. Plaintiff's pain was intermittent, and it did not increase over time. Plaintiff's hernia was reducible, and his condition did not worsen over time. Moreover, Defendants Tilden and Wexford's correctional medical expert, Dr. Fowlkes, opined to a reasonable degree of medical certainty that Plaintiff's hernia could have been managed non-surgically and that Plaintiff being referred for surgery was beyond what the standard of care required.

In his response, Plaintiff does not present any evidence that supports his claim that it was medically necessary to perform surgery on his hernia between April 2011 and October 2012. Plaintiff argues that he needed surgery because his hernia exposed him to a risk of death and prolonged his pain. Plaintiff points to the testimony of Dr. Gangemi who opined that a reducible hernia poses a "potential theoretical risk for strangulation or bowel obstruction," which could lead to death. (Gangemi Dep. 28:1–10.) Plaintiff also points to the pain that he suffered as a result of his hernia. That Plaintiff had a reducible, painful hernia, however, does not mean surgery was medically necessary. *See Johnson*, 433 F.3d at 1014. Any pain or theoretical risk of death from a reducible hernia must be weighed against "the dangers and risks inherent in any operation." *Id.* Moreover, as Dr. Fowlkes opined, "each subsequent operative repair of a recurrent hernia is more difficult, more risky and has a higher rate of failure." (Fowlkes Report 12.) Plaintiff already had one hernia surgery, making a second surgery more risky, according to

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Dr. Fowlkes. Therefore, "any prudent physician should be more conservative in recommending surgical intervention for a recurrent hernia in the absence of an urgent indication for doing so." (*Id.*)

To borrow the Seventh Circuit's language in *Johnson*, "This is an unfortunate case because [Plaintiff] clearly experienced pain from his reducible (not strangulated) hernia." 433 F.3d at 1015. Plaintiff, however, has failed to present sufficient evidence that would allow a jury to conclude it was medically necessary to surgically repair Plaintiff's hernia prior to October 4, 2012.[2]

C. Plaintiff's Claim Against Wexford

Plaintiff argues that Defendant Tilden, as Wexford's medical director at Pontiac, was responsible for implementing IDOC policy. Plaintiff argues that Defendant Shicker set forth the IDOC policy as follows: "Not all inguinal hernias require repair. Repair of most reducible hernias is considered elective surgery. Elective surgery, in general, is not undertaken within IDOC." (Pl.'s Combined Resp., Ex. 11.)

"[T]he *Monell* theory of municipal liability applies in § 1983 claims brought against private companies that act under color of state law." *Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 664 (7th Cir. 2016); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). "[T]o maintain a viable § 1983 action against a [private corporation], a plaintiff must demonstrate that a constitutional deprivation occurred as the result of an express policy or custom of the [corporation]." *Jackson v. Ill. Medi-Car, Inc.*, 300 F.3d 760, 766 (7th Cir. 2002); *see also Iskander v. Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982) (applying § 1983 to private corporations). If a plaintiff fails to prove the existence of a constitutional violation, then that

[2] As discussed earlier, Plaintiff concedes that any action taken after October 4, 2012 is moot. Nevertheless, the evidence Plaintiff presents also does not establish that it was medically necessary to surgically repair his hernia prior to July 22, 2013, the date Dr. Gangemi surgically repaired Plaintiff's hernia.

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failure precludes a determination that the private corporation caused a constitutional injury to the plaintiff. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Jackson*, 300 F.3d at 766; *see also Pyles v. Fahim*, 771 F.3d 403, 407, 412 (7th Cir. 2014) (holding that the defendant, a private corporation, could not be held liable for its alleged "policy of limiting the medical care it provides in order to cut costs" because there was no underlying constitutional violation).

Although a corporation can be held liable for its policies in cases where an individual defendant is not liable, a plaintiff must still present sufficient evidence of an underlying constitutional harm that the corporation's policies caused. *See Thomas v. Cook Cty. Sheriff's Dep't*, 588 F.3d 445, 454 (7th Cir. 2009) (holding that a municipality can be held liable under *Monell* even when its officers are not, but the evidence still must demonstrate that the municipality "had a widespread practice that caused the alleged constitutional harm").

As already discussed, Plaintiff has not presented sufficient evidence to establish that it was medically necessary to surgically repair his hernia prior to October 4, 2012. Without an underlying constitutional harm, Wexford cannot be held liable for its alleged policies.

IT IS THEREFORE ORDERED:

1) Defendant Shicker's motion for summary judgment [102] and Defendants Tilden and Wexford's motion for summary judgment [103] are both GRANTED pursuant to Federal Rule of Civil Procedure 56. The Clerk of the Court is directed to enter judgment in favor of Defendants and against Plaintiff. The case is terminated, with the parties to bear their own costs. All deadlines and internal settings are vacated. All pending motions not addressed in this Order are denied as moot. Plaintiff remains responsible for any unpaid balance of the filing fee.
2) Defendants Tilden and Wexford's motion to strike [106] is DENIED. Nonetheless, the Court addressed their arguments, construing them as objections under Federal Rule of Civil Procedure 56.
3) Plaintiff's motion to correct his combined response to Defendants' motions for summary judgment [110] is GRANTED.
4) Plaintiff's renewed motion for a Qualified Protective Order pursuant to HIPAA [111] is DENIED as moot.
5) Plaintiff has filed a "Motion to Withdraw Counsel's Representation" [112], stating that an irreconcilable conflict between him and his attorney has made it impossible for the

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attorney to represent him. On April 1, 2016, the Court appointed pro bono counsel for Plaintiff, but thereafter, Plaintiff filed, and the Court granted, a motion to substitute the pro bono counsel for an attorney with whom Plaintiff had already been in contact. As Plaintiff retained his current attorney himself, Plaintiff has the power to fire the attorney if he so chooses, and to direct the attorney to file a motion to withdraw as counsel. Unfortunately, this option is made impossible by this Order granting summary judgment to Defendants and terminating this case.

6) If Plaintiff wishes to appeal this judgment, he must file a notice of appeal with this Court within 30 days of the entry of judgment. Fed. R. App. P. 4(a)(4). A motion for leave to appeal in forma pauperis MUST identify the issues Plaintiff will present on appeal to assist the Court in determining whether the appeal is taken in good faith. *See* Fed. R. App. P. 24(a)(1)(c); *see also Celske v Edwards*, 164 F.3d 396, 398 (7th Cir. 1999) (stating that an appellant should be given an opportunity to submit a statement of his grounds for appealing so that the district judge "can make a reasonable assessment of the issue of good faith"); *Walker v O'Brien*, 216 F.3d 626, 632 (7th Cir. 2000) (providing that a good faith appeal is an appeal that "a reasonable person could suppose . . . has some merit" from a legal perspective). If Plaintiff does choose to appeal, he will be liable for the $505.00 appellate filing fee regardless of the outcome of the appeal.

May 23, 2018
ENTERED

s/ Joe Billy McDade
JOE BILLY MCDADE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

for the
Central District of Illinois

DELBERT HEARD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case Number: 14-1027**
	)	
LEWIS SHICKER, ARTHUR FUNK, ANDREW TILDEN, and WEXFORD HEALTH SOURCES INC.,	)	
	)	
Defendants.	)	

JUDGMENT IN A CIVIL CASE

DECISION BY THE COURT. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff recover nothing on his claims against each of the named defendants. The case is terminated, with the parties to bear their own costs.

Dated: 5/23/2018

s/ Denise Koester
Denise Koester
Acting Clerk, U.S. District Court