In the
United States Court of Appeals
For the Seventh Circuit

No. 18-3415

REGINALD YOUNG,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 17-cv-946-JPG-RJD — **J. Phil Gilbert**, *Judge*.

SUBMITTED MAY 30, 2019 — DECIDED NOVEMBER 4, 2019

Before WOOD, *Chief Judge*, and EASTERBROOK and ROVNER, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Illinois requires the plaintiff in a medical-malpractice suit to file an affidavit stating that "there is a reasonable and meritorious cause" for litigation. 735 ILCS 5/2-622. The plaintiff needs a physician's report to support the affidavit's assertions. The report must show that the physician has reviewed the plaintiff's medical records and must justify the conclusion that "a reasonable and meri-

torious cause" exists. This requirement applies to malpractice litigation in federal court because §5/2-622 is a substantive condition of liability. *Hahn v. Walsh*, 762 F.3d 617 (7th Cir. 2014).

Hahn was a private suit. Today's suit is against the United States under the Federal Tort Claims Act, which says that the United States is liable to the same extent as a private person. 28 U.S.C. §1346(b)(1). The only way to make the United States liable to the same extent as a private entity is to apply §5/2-622. So other courts of appeals have held with respect to equivalent statutes in other states. See *Frazier v. United States*, 560 F. App'x 320, 323–24 (5th Cir. 2014); *Littlepaige v. United States*, 528 F. App'x 289, 292–93 (4th Cir. 2013); *Smith v. United States*, 498 F. App'x 120, 121–22 (3d Cir. 2012); *Swails v. United States*, 406 F. App'x 124, 125 (9th Cir. 2010); *Cestnik v. Fed. Bureau of Prisons*, 84 F. App'x 51, 53–54 (10th Cir. 2003). None of those decisions carries precedential force, but the conclusion is compelling. The language of §1346(b)(1) shows that §5/2-622 must apply in suits against the national government, just as it applies in suits against private physicians. And we held in *Gipson v. United States*, 631 F.3d 448, 451–52 (7th Cir. 2011), that an Indiana statute requiring an expert's report to show the standard of medical care applies under the FTCA. The reasoning of *Gipson* is equally applicable to a statute such as §5/2-622.

Reginald Young, a federal prisoner, filed this suit alleging that physicians at his prison committed malpractice by not performing or authorizing surgery to correct a cataract that causes blurred vision and headaches. Two physicians recommended surgical intervention, but others disagreed; Young maintains that the two physicians' recommendations

prove that the lack of surgery is medical malpractice. But Young did not provide, with the complaint or later, an affidavit complying with §5/2-622, nor did he ask any physician to prepare the sort of report that would have accompanied such an affidavit. Instead he asserted that a recommendation for surgery is the only medical document he needs. The district judge disagreed and granted a motion by the United States to dismiss the complaint or for summary judgment. 2018 U.S. Dist. LEXIS 151134 (S.D. Ill. Sept. 5, 2018).

The judge did not state which of these requests was being granted, and the difference is potentially important. A motion to dismiss asserts that the complaint is defective. A motion for summary judgment asserts that the evidence of record would not permit a reasonable jury to find for the nonmoving party. A prisoner may have insuperable difficulty obtaining a favorable physician's report before filing a complaint, so if a complaint not accompanied by a §5/2-622 affidavit is defective, many a prisoner will be unable to litigate a malpractice claim. But if a prisoner or other *pro se* plaintiff has until the summary judgment stage to comply with the state law, information obtained in discovery may allow a physician to evaluate the medical records and decide whether there is reasonable cause for liability.

Section 5/2-622(a) requires the affidavit and report to be attached to the complaint unless an exception applies, and the litigants in *Hahn* assumed that this is when the documents must be filed. Because timing was not contested in *Hahn*—the debate concerned whether the affidavit and report were required at all—our decision did not produce a holding on that topic. And having given the matter some thought, we now conclude that a complaint in federal court

cannot properly be dismissed because it lacks an affidavit and report under §5/2-622. As we observed in *Cooke v. Jackson National Life Insurance Co.*, 919 F.3d 1024, 1027 (7th Cir. 2019): "Many cases hold that federal, not state, rules apply to procedural matters—such as what ought to be attached to pleadings—in all federal suits, whether they arise under federal or state law. See, e.g., *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010); *Burlington Northern R.R. v. Woods*, 480 U.S. 1 (1987); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Mayer v. Gary Partners & Co.*, 29 F.3d 330 (7th Cir. 1994)."

Rule 8 of the Federal Rules of Civil Procedure specifies what a complaint must contain. It does not require attachments. One can initiate a contract case in federal court without attaching the contract, an insurance case without attaching the policy, a securities case without attaching the registration statement, and a tort case without attaching an expert's report. Supporting documents come later. Section 5/2-622 applies in federal court to the extent that it is a rule of *substance*; but to the extent that it is a rule of *procedure* it gives way to Rule 8 and other doctrines that determine how litigation proceeds in a federal tribunal.

Section 5/2-622 itself allows delay in filing the affidavit and report when, for example, the time to obtain a report would prevent suing within the statute of limitations (§5/2-622(a)(2)) or records needed for evaluation are unavailable (§5/2-622(a)(3)). At least the second of these exceptions likely applies to Young's suit. But these exceptions are accompanied by language that excuses the defendant from answering the complaint until the affidavit and report have been filed. Just as Rule 8 specifies what must be in a complaint, so Fed.

R. Civ. P. 12(a)(1) tells us when the answer is due. A defendant in federal court may ask a district court for an extension but cannot rely on state law as canceling or deferring the need to answer a complaint.

Illinois wants insubstantial medical-malpractice suits resolved swiftly. That goal can be achieved in federal court under summary-judgment practice, because Fed. R. Civ. P. 56(b) allows such a motion to be filed "at any time". A defendant may submit a motion with its answer and ask the court to grant summary judgment because the plaintiff has not supplied the required affidavit and report. And just as §5/2-622(a)(3) allows extra time if necessary to provide the reviewing physician with vital information, so Rule 56(d) allows a district court to grant extra time to the nonmovant to gather essential evidence. The state substantive goal and the federal procedural system thus can exist harmoniously.

By requesting summary judgment as an alternative to its motion to dismiss the complaint, the United States put Young on notice of the need for an affidavit and report. In the ensuing six months he did not try to comply. Instead he argued that two physicians' recommendations in favor of surgery sufficed. The district judge replied:

> No medical record Young has submitted indicates (1) that the doctors making the records had reviewed all of Young's medical records and other relevant documents, (2) that there was "reasonable and meritorious cause" for filing a medical malpractice action, or (3) the reasons for that conclusion. It is true that the authors of [some] medical records recommended a different course of treatment than Young received, but in medicine there is often a range of reasonable treatments, and a doctor's recommending one course does not necessarily imply that a doctor who choses [sic] another commits malpractice. This is why the certificate of merit [i.e., the documents under §5/2-622] requires not a state-

> ment that a *course of treatment* desired by the plaintiff is "reasonable and meritorious" but a statement that the medical malpractice *cause of action* is. Young has provided no such statement in this case.

2018 U.S. Dist. LEXIS 151134 at *6 (emphasis in original). We agree with this analysis, which means that the judgment must be

AFFIRMED.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

REGINALD YOUNG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:17-cv-946-JPG-RJD
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

DALY, Magistrate Judge:

This matter has been referred to United States Magistrate Judge Reona J. Daly by United States District Judge J. Phil Gilbert pursuant to 28 U.S. C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72(b), and SDIL-LR 72.1(a) for a Report and Recommendation on the United States of America's Motion to Dismiss or in the Alternative Motion for Summary Judgment (Doc. 11). For the reasons set forth below, it is **RECOMMENDED** that the Motion be **GRANTED IN PART AND DENIED IN PART**, and that the Court adopt the following findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiff Reginald Young, an inmate in the custody of the United States Bureau of Prisons ("BOP"), filed this lawsuit alleging he received inadequate medical care for his vision problems while he was incarcerated at the Federal Correctional Institution located in Greenville, Illinois ("FCI Greenville"). Following an initial screening of Plaintiff's complaint pursuant to 28 U.S.C. §1915A, he was allowed to proceed on a claim under the Federal Tort Claims Act ("FTCA") against the United States of America for federal officials' failure to adequately treat his vision

problems.

On January 2, 2018, Defendant filed a motion to dismiss, or in the alternative, a motion for summary judgment that is now before the Court (Doc. 11). Plaintiff filed a timely response (Doc. 13). Defendant argues that Plaintiff's FTCA claim should be dismissed, or summary judgment granted, due to Plaintiff's failure to comply with 735 ILCS 5/2-622. Defendants contend that Plaintiff failed to attach a report and affidavit to his complaint demonstrating he has a reasonable and meritorious cause of action.

LEGAL STANDARDS

A. Dismissal Pursuant to Rule 12(b)(6)

In considering a motion to dismiss, the Court accepts as true all well-pleaded allegations in the complaint and draws all possible inferences in favor of the plaintiff. *See Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 618 (7th Cir. 2007) (quotations omitted). A plaintiff need not set out all relevant facts or recite the law in his or her complaint; however, the plaintiff must provide a short and plain statement that shows that he or she is entitled to relief. *See* FED. R. CIV. P. 8(a)(2). Thus, a complaint will not be dismissed if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. Additionally, "[a]llegations of a pro se complaint are held 'to less stringent standards than formal pleadings drafted by lawyers … Accordingly, *pro se* complaints are liberally construed." *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001) (quoting *Haines v. Kerner*, 404 U.S. 519,

520 (1972)) (other citations omitted).

B. Summary Judgment Standard

Summary judgment is proper only if the moving party can demonstrate that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED.R.CIV.P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Ruffin Thompkins v. Experian Information Solutions, Inc*., 422 F.3d 603, 607 (7th Cir. 2005); *Black Agents & Brokers Agency, Inc. v. Near North Ins. Brokerage, Inc*., 409 F.3d 833, 836 (7th Cir. 2005). The moving party bears the burden of establishing that no material facts are in genuine dispute; any doubt as to the existence of a genuine issue must be resolved against the moving party. *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 160 (1970); *Lawrence v. Kenosha County*, 391 F.3d 837, 841 (7th Cir. 2004). A moving party is entitled to judgment as a matter of law where the non-moving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex,* 477 U.S. at 323. "[A] complete failure of proof concerning an essential element of a nonmoving party's case necessarily renders all other facts immaterial." *Id*. The Seventh Circuit has stated that summary judgment is "the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007) (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005) (other citations omitted).

CONCLUSIONS OF LAW

In the motion now before the Court, Defendant seeks dismissal of Plaintiff's complaint, or in the alternative, summary judgment on Plaintiff's FTCA claim. Defendant attaches a number of exhibits in support of its motion. When a party attaches a document to a motion to dismiss, Rule

12(d) prescribes that the court must either convert the 12(b)(6) motion into a motion for summary judgment, or exclude the documents attached to the motion to dismiss and continue its analysis under Rule 12. *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998); *see also* FED. R. CIV. P. 12(d). However, a court may consider documents attached to a motion to dismiss without converting it to a motion for summary judgment if they are referred to in the plaintiff's complaint and if they are central to the plaintiff's claim. *Levenstein*, 164 F.3d at 647 (quoting *Wright v. Associated Ins. Cos., Inc.,* 29 F.3d 1244, 1248 (7th Cir. 1994)). This narrow exception is "aimed at cases interpreting, for example, a contract" and "is not intended to grant litigants license to ignore the distinction between motions to dismiss and motions for summary judgment." *Id.* The district court ultimately has discretion in determining whether to convert a motion to dismiss into a motion for summary judgment. *Levenstein*, 164 F.3d at 347 (citing *Venture Associations Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)).

In this instance, it is apparent that the documents submitted by Defendant do not fit the narrow exception articulated by the Seventh Circuit. As such, this Court would need to exercise its discretion and convert Defendant's motion into a motion for summary judgment, pursuant to Rule 12(d), in order to consider the attachments appended to Defendant's motion. However, the Court does not find it necessary to convert Defendant's motion to a motion for summary judgment and notes that consideration of the pertinent documents would not change its analysis. The Court will consider the documentary evidence submitted by Plaintiff in response to Defendant's motion as it is limited to affidavits and certain medical records that Plaintiff contends satisfy the requirements of § 2-622 and it is presented to meet basic pleading requirements.

The Court notes that Plaintiff's FTCA claim is governed by the substantive law of the State

of Illinois (as the facts underlying said claim occurred at FCI Greenville). *See* 28 U.S.C. § 1346(b), 2674; *see also Bowen v. United States*, 570 F.2d 1311, 1315-16 (7th Cir. 1978). Under Illinois law, a plaintiff "[i]n any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art medical practice," must file an affidavit along with the complaint, declaring one of the following: (1) that the affiant has consulted and reviewed the facts of the case with a qualified health professional who has reviewed the claim and made a written report that the claim is reasonable and meritorious; (2) that the affiant was unable to obtain such a consultation before the expiration of the statute of limitations, and the affiant has not previously voluntarily dismissed an action based on the same claim; or (3) that the plaintiff has made a request for records but the respondent has not complied within 60 days of receipt of the request (and in this case the written report shall be filed within 90 days of receipt of the records). *See* 735 ILL. COMP. STAT. § 5/2-622(a). Failure to file the required affidavit is grounds for mandatory dismissal of the claim. *See* 735 ILCS § 5/2-622; *Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000). However, whether dismissal should be with or without prejudice is up to the sound discretion of the court. *Sherrod*, 223 F.3d at 614.

The prevailing rule in this Court (and elsewhere in this Circuit), is that the certificate of merit requirement is a substantive rule of Illinois law for purposes of claims brought under the FTCA. Accordingly, Plaintiff was required to file a certificate of merit along with his complaint. Plaintiff failed to submit any such certificate. The Court's screening order noted this deficiency, but allowed Plaintiff to proceed on his claim as he had indicated he was awaiting receipt of additional medical records. Plaintiff now submits three medical records to satisfy the certificate of merit requirements. First, Plaintiff has provided a medical record from his April 4, 2011 exam

with Dr. Jeffery Maher. The record is difficult to read; however, Plaintiff attests that Dr. Maher discussed and diagnosed his progressive loss of vision and recommended OS (left eye) cataract surgery. Plaintiff also provides the medical record from a July 19, 2011 exam with Dr. Maher in which he again recommended OS cataract surgery. Finally, Plaintiff submits a letter written by Dr. Bart Brine dated November 3, 2008, in which Dr. Brine recommends "cataract removal, the OD followed shortly by the OS."

Illinois courts have remarked that "[t]he technical requirements of [§ 2-622] should not interfere with the spirit or purpose of the statute [and] [t]he absence of strict technical compliance with the statute is one of form only and not of substance." *Cutler v. Northwest Suburban Community Hospital*, 939 N.E.2d 1032, 1043 (Ill. App. Ct. 2010). In this instance, the records Plaintiff points to are not merely deficient in that they fail to meet the technical requirements of § 2-622, but they also fail to the meet the "spirit or purpose of the statute" in that they fail to establish that Plaintiff has a reasonable and meritorious malpractice claim. The records provided merely evidence what certain physicians have recommended as a treatment protocol for Plaintiff's condition. Notably, the records *do not* reflect a determination on behalf of the providers that this lawsuit is meritorious and reasonable. Indeed, the records provided do not include any opinion on the care and treatment Plaintiff received at FCI Greenville. As Plaintiff has had ample time and opportunity to provide the appropriate documentation pursuant to § 2-622, the Court recommends dismissal with prejudice.

RECOMMENDATIONS

Based on the foregoing, the Court **RECOMMENDS** that the United States of America's Motion to Dismiss or in the Alternative Motion for Summary Judgment (Doc. 11) be **GRANTED**

IN PART AND DENIED IN PART; that Plaintiff's FTCA claim (and the entirety of this lawsuit) be **DISMISSED WITH PREJUDICE**; and that the Court adopt the foregoing findings of fact and conclusions of law.

Pursuant to 28 U.S.C. § 636(b)(1) and SDIL-LR 73.1(b), the parties shall have fourteen (14) days after service of this Report and Recommendation to file written objection thereto. The failure to file a timely objection may result in the waiver of the right to challenge this Report and Recommendation before either the District Court or the Court of Appeals. *See, e.g., Snyder v. Nolen*, 380 F.3d 279, 284 (7th Cir. 2004).

DATED: August 14, 2018

s/ Reona J. Daly
Hon. Reona J. Daly
United States Magistrate Judge

Appendix C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

REGINALD YOUNG, Plaintiff, v. UNITED STATES OF AMERICA, FEDERAL BUREAU OF PRISONS and DEPARTMENT OF JUSTICE, Defendants.	Case No. 17-cv-946-JPG-RJD

MEMORANDUM AND ORDER

This matter comes before the Court on the Report and Recommendation ("Report") (Doc. 16) of Magistrate Judge Reona J. Daly recommending that the Court grant the motion of the United States to the extent it seeks dismissal and to deny the motion to the extent it seeks summary judgment (Doc. 11). Plaintiff Reginald Young has objected to the Report (Doc. 17), and the United States has responded to his objection (Doc. 18).

The Court may accept, reject or modify, in whole or in part, the findings or recommendations of the magistrate judge in a report and recommendation. Fed. R. Civ. P. 72(b)(3). The Court must review *de novo* the portions of the report to which objections are made. *Id.* "If no objection or only partial objection is made, the district court judge reviews those unobjected portions for clear error." *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999).

Young filed this case under the Federal Tort Claims Act, ("FTCA"), 28 U.S.C. §§ 1346, 2671-2680, alleging that medical personnel at the Federal Correctional Institute in Greenville, Illinois ("FCI-Greenville") provided inadequate medical care for his vision problems. Specifically, he alleges they were negligent in not providing surgery for his left eye after it was

recommended by doctors.

Under the FTCA, the United States can be liable for the wrongful conduct of its employees acting within the scope of their employment to the same extent a private person would be liable under the law where the conduct occurred. This means that at FCI-Greenville, the United States can be liable if one of its employees committed medical malpractice under Illinois law. The Illinois Healing Arts Malpractice Act requires that a *pro se* plaintiff filing a medical malpractice case must file, either with his complaint or within a subsequent specified period afterward, an affidavit declaring that he has consulted a knowledgeable health professional who has reviewed the medical records and documents and has determined in a written report that "there is a reasonable and meritorious cause" for the filing of the malpractice action. 735 ILCS 5/2-622(a). The written report must be attached to the affidavit. *Id.* This is often referred to as the certificate of merit requirement. The purpose of the certificate of merit requirement is to reduce the number of frivolous malpractice suits. *Ebbing v. Prentice*, 587 N.E.2d 1115, 1117 (Ill. App. Ct. 1992). The failure to file the certificate of merit is grounds for dismissal of the action. 735 ILCS 5/2-622(g). Federal courts interpret this requirement to be a substantive aspect of a medical malpractice claim under Illinois law. *See Hahn v. Walsh*, 762 F.3d 617, 633 (7th Cir. 2014).

In her Report, Magistrate Judge Daly found that Young had not submitted the required certificate of merit with his complaint. She further found that three medical records Young submitted in his response to the United States' motion do not satisfy the certificate of merit requirement. All three records, Magistrate Judge Daly noted, recommend certain medical care but do not indicate that the medical professionals generating those medical records deemed Young's malpractice lawsuit "reasonable and meritorious." Nor do the authors of those medical

records express any opinion on the adequacy of the treatment Young actually received. Magistrate Judge Daly found that the medical reports simply did not comply with the technical aspects or the spirit of the certificate of merit requirement. Magistrate Judge Daly further found that Young had had ample time to obtain the required certificate, so he should not be allowed more time. Instead, she recommended the Court dismiss Young's FTCA claim with prejudice.

In his objection, Young asserts that the Court has already determined that Young has satisfied the certificate of merit requirement of 735 ILCS 5/2-622(a)(1) by providing a medical record in which surgery on his left eye was recommended. He further points to additional medical records he submitted to the Court in response to the United States' motion and argues they satisfy the certificate of merit requirement because they essentially demonstrate a "reasonable and meritorious cause" for surgery on Young's left eye. He further points to a case, *Stoces v. Obaisi*, No. 15-cv-277-DGW, 2017 U.S. Dist. Lexis 14794 (S.D. Ill. Feb. 2, 2017), in which the court found a nurse's assessment of the merits of a grievance against a doctor to be a sufficient certificate of merit.

In response, the United States argues that the nurse's certificate found acceptable in *Stoces* should not have qualified as a certificate of merit and urges the Court not to repeat that error by finding Young's medical records adequate. It also notes that there is no indication that, unlike the nurse in *Stoces*, Young's doctors reviewed all of the relevant medical records or had any opinion on the merits of Young's complaint of malpractice.

The Court reviews the matter *de novo*. As a preliminary matter, Young is incorrect to suggest the Court determined in its October 26, 2017, order (Doc. 6) that Young had satisfied the certificate of merit requirement. In fact, it specifically noted it did not decide the question—"Although the Court will allow Count 1 to proceed against the United States at this time, the

Court *has not decided* whether Plaintiff's Complaint and accompanying paperwork comply with 735 ILCS § 5/2-622." (emphasis added)—but it gave him a further opportunity for compliance.

The Court further notes *Stoces* is neither binding on this Court nor persuasive. In fact, it involved a factual scenario not at all like the one in this case.

Finally, the Court agrees with Magistrate Judge Daly that the medical records provided by Young do not comply with the letter or spirit of 735 ILCS § 5/2-622(a). That provision requires "that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action," and it requires submission of "[a] copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists. . . ." No medical record Young has submitted indicates (1) that the doctors making the records had reviewed all of Young's medical records and other relevant documents, (2) that there was "reasonable and meritorious cause" for filing a medical malpractice action, or (3) the reasons for that conclusion. It is true that the authors of the medical records recommended a different course of treatment than Young received, but in medicine there is often a range of reasonable treatments, and a doctor's recommending one course does not necessarily imply that a doctor who choses another commits malpractice. This is why the certificate of merit requires not a statement that a *course of treatment* desired by the plaintiff is "reasonable and meritorious" but a statement that the medical malpractice *cause of action* is. Young has provided no such statement in this case.

For these reasons, the Court agrees with Magistrate Judge Daly that Young has failed to comply with 735 ILCS § 5/2-622(a), and his case should therefore be dismissed. Accordingly,

the Court hereby:

- **ADOPTS** the Report in its entirety (Doc. 16);
- **GRANTS** the United States' motion to dismiss or, in the alternative, for summary judgment (Doc. 11);
- **DISMISSES** Count 1 against the United States **with prejudice** ; and
- **DIRECTS** the Clerk of Court to enter judgment accordingly.

IT IS SO ORDERED.
DATED: September 5, 2018

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 30, 2019

Before

DIANE P. WOOD, *Chief Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 18-3415

REGINALD YOUNG,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

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

No. 17-cv-946-JPG-RJD
J. Phil Gilbert, *Judge*.

Order

Plaintiff-Appellant filed a petition for rehearing and rehearing en banc on November 18, 2019. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Federal Rules of Civil Procedure, Rule 8

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses; Admissions and Denials.

(1) *In General.* In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials—Responding to the Substance.* A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials.* A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation.* A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information.* A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny.* An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;

- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation.* If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense.* A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

Federal Rules of Civil Procedure, Rule 9

(a) Capacity or Authority to Sue; Legal Existence.

(1) *In General.* Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) *Raising Those Issues.* To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) Special Damages. If an item of special damage is claimed, it must be specifically stated.

(h) Admiralty or Maritime Claim.

(1) *How Designated.* If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) *Designation for Appeal.* A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. §1292(a)(3).

Federal Rules of Civil Procedure, Rule 11

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions*. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order*. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Federal Rules of Civil Procedure, Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. 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. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* 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.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

735 ILCS 5/2-622, Healing art malpractice.

(a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:

1. That the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in the particular action; and (iii) is qualified by experience or demonstrated competence in the subject of the case; that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action. If the affidavit is filed as to a defendant who is a physician licensed to treat human ailments without the use of drugs or medicines and without operative surgery, a dentist, a podiatric physician, a psychologist, or a naprapath, the written report must be from a health professional licensed in the same profession, with the same class of license, as the defendant. For affidavits filed as to all other defendants, the written report must be from a physician

licensed to practice medicine in all its branches. In either event, the affidavit must identify the profession of the reviewing health professional. A copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists, must be attached to the affidavit, but information which would identify the reviewing health professional may be deleted from the copy so attached.

2. That the affiant was unable to obtain a consultation required by paragraph 1 because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations. If an affidavit is executed pursuant to this paragraph, the certificate and written report required by paragraph 1 shall be filed within 90 days after the filing of the complaint. The defendant shall be excused from answering or otherwise pleading until 30 days after being served with a certificate required by paragraph 1.

3. That a request has been made by the plaintiff or his attorney for examination and copying of records pursuant to Part 20 of Article VIII of this Code and the party required to comply under those Sections has failed to produce such records within 60 days of the receipt of the request. If an affidavit is executed pursuant to this paragraph, the certificate and written report required by paragraph 1 shall be filed within 90 days following receipt of the requested records. All defendants except those whose failure to comply with Part 20 of Article VIII of this Code is the basis for an affidavit under this paragraph shall be excused from answering or otherwise pleading until 30 days after being served with the certificate required by paragraph 1.

(b) Where a certificate and written report are required pursuant to this Section a separate certificate and written report shall be filed as to each defendant who has been named in the complaint and shall be filed as to each defendant named at a later time.

(c) Where the plaintiff intends to rely on the doctrine of "res ipsa loquitur", as defined by Section 2-1113 of this Code, the certificate and written report must state that, in the opinion of the reviewing health professional, negligence has occurred in the course of medical treatment. The affiant shall certify upon filing of the complaint that he is relying on the doctrine of "res ipsa loquitur".

(d) When the attorney intends to rely on the doctrine of failure to inform of the consequences of the procedure, the attorney shall certify upon the filing of the complaint that the reviewing health professional has, after reviewing the medical record and other relevant materials involved in the particular action, concluded that a reasonable health professional would have informed the patient of the consequences of the procedure.

(e) Allegations and denials in the affidavit, made without reasonable cause and found to be untrue, shall subject the party pleading them or his attorney, or both, to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with reasonable attorneys' fees to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal. In no event shall the award for attorneys' fees and expenses exceed those actually paid by the moving party, including the insurer, if any. In proceedings under this paragraph (e), the moving party shall have the right to depose and examine any and all reviewing health professionals who prepared reports used in conjunction with an affidavit required by this Section.

(f) A reviewing health professional who in good faith prepares a report used in conjunction with an affidavit required by this Section shall have civil immunity from liability which otherwise might result from the preparation of such report.

(g) The failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619.