[Cite as *Jennings v. Ohio State Univ.*, 2023-Ohio-4634.]

IN THE COURT OF CLAIMS OF OHIO

MATTHEW JENNINGS Plaintiff v. THE OHIO STATE UNIVERSITY, et al. Defendants	Case No. 2022-00035JD Judge Lisa L. Sadler DECISION

{¶1} On July 21, 2023, the Court granted summary judgment to Defendants on Plaintiff's claims of negligence but denied summary judgment on Plaintiff's claim of willful, wanton, or reckless conduct. On August 31, 2023, Defendants filed a Motion for Summary Judgment on Plaintiff's Remaining Claim. That motion has been fully briefed and is now before the Court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4.

{¶2} As a preliminary matter, Plaintiff argues that Defendants' August 31, 2023 motion should be considered a motion for reconsideration of the Court's July 21, 2023 decision to deny summary judgment on Plaintiff's claim of willful, wanton, or reckless conduct instead of as a motion for summary judgment on that claim. In the July 21, 2023 decision, the Court concluded that "genuine issues of material fact exist about whether Rule's conduct in response to Plaintiff's requests to see a doctor for the injury he sustained to his elbow amounts to willful, wanton, or reckless conduct." (July 21, 2023 Decision, p. 13.) However, the Court reached this conclusion summarily because Defendants failed to argue in their Motion for Summary Judgment that the record was devoid of any evidence that the conduct was willful, wanton, or reckless, and only made that argument in their Reply brief. Ultimately, the manner in which the Court reached that conclusion did not foreclose Defendants from filing their August 31, 2023 Motion for

Summary Judgment.[1] Furthermore, Defendants' second Motion for Summary Judgment is based on a different legal theory than the first Motion for Summary Judgment. Therefore, the Court will consider Defendants' motion under the standard for a motion for summary judgment instead of the standard for a motion for reconsideration. For the reasons stated below, Defendants' Motion for Summary Judgment will be granted.

Standard of Review

{¶3} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C), which states, in part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

"[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id.* at 292-293. "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Keaton v. Gordon Biersch Brewery Rest. Group*, 10th Dist. No. 05AP-110, 2006-Ohio-2438, ¶ 15.

{¶4} If the moving party meets its initial burden, the nonmoving party bears a reciprocal burden outlined in Civ.R. 56(E), which provides that "an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts

[1] Nothing in the Civil Rules or the Local Rules of the Court of Claims prohibits the filing of multiple motions for summary judgment. Multiple motions for summary judgment may be filed so long as they are timely filed prior to the deadline for dispositive motions.

showing that there is a genuine issue for trial." It is well-established that it is not appropriate to grant summary judgment unless,

> construing the evidence most strongly in favor of the nonmoving party: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party.

Robinette v. Orthopedics, Inc., 10th Dist. Franklin No. 97AP-1299, 1999 Ohio App. LEXIS 2038, 7 (1999).

Facts

{¶5} The parties submitted various depositions, an affidavit, and exhibits in support of and in opposition to Defendants' November 30, 2022 Motion for Summary Judgment and August 31, 2023 Motion for Summary Judgment. The following facts are derived from the evidence submitted.

{¶6} Plaintiff received a cut on his elbow during a hockey game on December 17, 2020. (Jennings Depo., 69:1-22.) One of the team doctors, Dr. Vowler, stitched up the laceration, and Plaintiff was given an antibiotic. (Jennings Depo., 73-75.) However, the stiches popped out during a practice on December 23 or 24. (Jennings Depo., 79:11-17.) According to Plaintiff, Assistant director for athletic training Jason Rule told Plaintiff that the wound could not be restitched. (Jennings Depo., 78:10-17.) Rule testified in his deposition that Dr. Nolan, another team doctor, told him over the phone that the wound could not be restitched. (Rule Depo., 49:21-50:12.) The phone call is not reflected in Plaintiff's medical record. (Rule Depo., 50:13-18.)

{¶7} Rule looked at Plaintiff's wound every day of practice both before and after practice. (Jennings Depo., 32:14-17.) Before practice, Rule looked at the wound, had Plaintiff bend his arm, and then wrapped his elbow to protect it. (Jennings Depo., 32:5-17, 81:18-21.) After practice, Rule looked at Plaintiff's wound, cleaned it, and iced it. (Jennings Depo., 32:5-17, 81:18-21.)

{¶8} Plaintiff recalled at least three times when puss or fluid leaked out of his wound as Rule was wrapping it. (Jennings Depo., 19:20-20:1.) The wound began to swell around the new year. (Jennings Depo., 26:19-21.) As the wound was getting worse,

Plaintiff asked Rule multiple times if he should see a doctor. (Jennings Depo., 33:1-15, 81:11-82:3; Rule Depo., 100:2-101:2.) Rule answered that this was normal wound care, and he did not have to see a doctor. (*Id*.)

{¶9} Although Rule can treat an infection, he is not able to diagnose an infection. (Rule Depo., 21:16-24.) Rule testified in his deposition that the fluid that leaked out of Plaintiff's wound was not puss but serous fluid, which is inflammation fluid resulting from the elbow joint being inflamed. (Rule Depo., 53-55.) Rule testified that the wound did not exhibit signs of infection. (Rule Depo., 55:20-56:20.) However, Dr. Nolan testified in his deposition that he prescribed a generic drug for the antibiotic Bactrim for Plaintiff on January 1, 2021 because Rule suspected that Plaintiff had an infection.[2] (Nolan Depo., 53:5-22.) Dr. Nolan stated that, "based on our decision to initiate this antibiotic, I would imagine [Rule] either saw purulent drainage [pus] or something that was new or different." (Nolan Depo., 54:2-4.) The infection was not documented in Plaintiff's medical records. (Nolan Depo., 61:22-62:4.)

{¶10} Plaintiff continued to experience swelling around his elbow. During a game against the University of Michigan on January 16, 2021, Plaintiff felt his elbow "pop." (Jennings Depo., 87-88.) He continued to play the remainder of the game. (*Id*.) An appointment was scheduled for him to see Dr. Flanigan, one of the team doctors. (Jennings Depo., 91:16-22.)

{¶11} On January 18, 2021, Plaintiff was seen by Dr. Flanigan after practice. (Jennings Depo., 41, 93.) His arm was in significant pain, warm to the touch, and so swollen that he could not bend his elbow to 90 degrees. (Jennings Depo., 30:3-10; 41:12-20.) Dr. Flanigan told him to go to the hospital. (Jennings Depo., 42:4-6.) Plaintiff was seen in the ER and told that he needed to have surgery the next day to deal with the infection in his arm. (Jennings Depo., 42:8-43:22.) His triceps tendon was also torn. (Jennings Depo., 43:9-17.)

Law and Analysis

[2] Bactrim is the name brand of the antibiotic; Dr. Nolan prescribed a generic for Bactrim, sulfamethoxazole-trimethoprim. (Rule Depo., Ex. D, p. 2.)

{¶12} The Court previously granted summary judgment to Defendants on Plaintiff's claims for ordinary negligence and medical negligence because Plaintiff waived those claims against Defendants. In this motion, Defendants argue that they should be granted summary judgment on Plaintiff's remaining claim because Plaintiff has not submitted any evidence that Jason Rule's conduct was willful, wanton, or reckless. Defendants assert that Plaintiff never asked Rule to see a doctor; he instead asked Rule whether he should see a doctor.

{¶13} In response, Plaintiff argues that Defendants' conduct was willful or wanton in several ways: The infection of Plaintiff's left elbow was never noted on his medical chart, as required by the OSU Athletic Training and Medical Services Manual, which is evidence of a lack of collaboration between Rule and treating team physicians. Instead, Rule documented that there was no infection. Rule failed to refer Plaintiff to a physician immediately after Plaintiff repeatedly requested to see a physician. Lastly, Plaintiff argues that Plaintiff's expert opined that the "failure to properly document [Plaintiff's] medical chart detailing 'the nature / extent of the interaction between that [sic] the two' resulted in 'a gross breach in the standard of care.' (Ex. F-2 at 2-3.)" (Plaintiff's Response, 13.)

{¶14} The Ohio Supreme Court has explained that "'willful,' 'wanton,' and 'reckless' describe different and distinct degrees of care and are not interchangeable." *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 31. "Willful misconduct implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." *Id*. at ¶ 32, citing *Tighe v. Diamond*, 149 Ohio St. 520, 527, 80 N.E.2d 122 (1948). "Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result." *Anderson* at ¶ 33, citing *Hawkins v. Ivy*, 50 Ohio St.2d 114, 117-118, 363 N.E.2d 367 (1977). "Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Anderson* at ¶ 34, citing *Thompson v. McNeill*, 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705 (1990), adopting 2 Restatement of the Law 2d, Torts, Section 500 at 587 (1965).

{¶15} In the same case, the Court stated: "it is well established that the violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct." *Anderson* at ¶ 37. "'[W]ithout evidence of an accompanying knowledge that the violations "will in all probability result in injury" * * * evidence that policies have been violated demonstrates negligence at best.'" *Id*. at ¶ 38, quoting *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 92, quoting *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, 639 N.E.2d 31.

{¶16} Plaintiff first argues that there was a lack of collaboration between Rule and the treating team physicians, as evidenced by the lack of documentation of the infection in Plaintiff's medical chart. However, Dr. Nolan's deposition testimony and the Bactrim prescription (Rule Depo, Ex. D, p. 2.) indicate that a conversation took place between Rule and Dr. Nolan regarding a possible infection on January 1, 2021, and Dr. Nolan prescribed an antibiotic. Plaintiff does not argue that Bactrim was the wrong antibiotic to treat his infection or that it was improper to prescribe a generic. Instead, he essentially argues that Defendants did not properly document his treatment as required by Defendant Ohio State University's (OSU) policies. A mere policy violation is not willful, wanton, or reckless conduct when the underlying facts show that Dr. Nolan prescribed what was presumably an appropriate antibiotic on January 1, 2021 to treat Plaintiff's infection. *Anderson* at ¶ 37; *see also Leygraff v. Andren*, 8th Dist. Cuyahoga No. 65811, 1994 Ohio App. LEXIS 5387, 12 (the central issue in a medical malpractice action is whether malpractice was committed, not whether records were properly kept). Therefore, Plaintiff's first argument does not raise an issue of material fact as to whether Defendants acted willfully, wantonly, or recklessly.

{¶17} Plaintiff next argues that it was willful and wanton misconduct when Rule ignored Plaintiff's repeated requests to see a physician. However, Plaintiff's argument is not supported by the record. Both Rule and Plaintiff testified in their depositions that Plaintiff asked Rule if he should go see a doctor, and Rule told Plaintiff that he did not need to see a doctor. That is different from Plaintiff requesting to see a doctor and Rule acting as a barrier to treatment. Instead, it appears that Rule considered Plaintiff's

question and answered it. His behavior was not akin to doing nothing while Plaintiff was clearly in danger or acting as an obstacle to treatment. S*ee Bennett v. Biernacki*, 2022-Ohio-4449, 204 N.E.3d 39 (12th Dist.) (If a personal fitness trainer merely watched and did not intervene while his client performed an exercise incorrectly and in a dangerous manner, then that would be willful misconduct sufficient to overcome the waiver of liability.). Construing the evidence most strongly in favor of Plaintiff, the Court cannot conclude that Rule intentionally deviated from a clear duty, had a deliberate purpose not to discharge a duty necessary to safety, or purposefully committed a wrongful act with knowledge or appreciation of the likelihood of resulting injury. Therefore, Rule's recommendation that Plaintiff did not need to see a doctor was not willful misconduct. *Anderson*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at ¶ 32.

{¶18} Additionally, construing the evidence most strongly in favor of Plaintiff, the Court cannot conclude that Rule engaged in wanton misconduct by not referring Plaintiff to a doctor. "Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result." *Anderson* at ¶ 33, citing *Hawkins*, 50 Ohio St.2d 114, 117-118, 363 N.E.2d 267. Rule owed a duty of care towards Plaintiff, but Rule did not fail to exercise any care towards him. Although Rule advised Plaintiff multiple times that he did not need to see a doctor, he continued to care for Plaintiff's wound before and after providing that advice. In his deposition, Plaintiff stated that Rule was not paying the most attention to him, was brushing him off, and did not do a thorough job of taking care of him. (Jennings Depo., 31:2-12.) However, it is uncontested that Rule looked at Plaintiff's wound before each practice, had Plaintiff bend his arm, and then wrapped his elbow to protect it. Rule also looked at the wound after each practice, cleaned it, and iced it. This care exceeds the "failure to exercise any care" standard. *Anderson* at ¶ 33; s*ee also Hawkins*, 50 Ohio St.2d 114, 363 N.E.2d 267 (construing the evidence in favor of appellant, the appellee was wantonly negligent when he left a broken-down car on the road in the dark and failed to take any precaution to make the car more visible or warn other drivers). Therefore, Rule was not wantonly negligent.

{¶19} The Court also concludes that Rule was not reckless by not referring Plaintiff to a doctor. Reckless conduct requires a "conscious disregard or indifference to a known

or obvious risk of harm" that is "substantially greater than negligent conduct." *Anderson* at ¶ 34. Rule's decision not to refer Plaintiff to a doctor was not substantially greater than negligence. Therefore, it was not reckless conduct.

{¶20} Plaintiff's last argument is that Plaintiff's retained expert, Dr. Singer, opined that Rule and Dr. Nolan's failure to properly document their interactions in Plaintif's medical chart resulted in a gross breach of the standard of care. Plaintiff argues that this is evidence of wanton misconduct. In his report, Dr. Singer states:

> Mr. Rule testified that he was in regular contact with Dr. Nolan to provide updates regarding Mr. Jennings' condition and care. However, his testimony, in that regard, was not corroborated by Dr. Nolan's. Regardless, no records apparently exist to document the nature/extent of the interactions between the two that may have occurred. Consequently, the evidence fails to support Mr. Rule's contention that Dr. Nolan provided appropriate guidance on Mr. Jennings' care, thereby resulting in a gross breach in the standard of care as well as a violation of the principles set forth in OSU's own Standard Operating Procedures Manual.

(Plaintiff's Response, Ex. F-2, p. 3.)

{¶21} As noted above, a failure to properly document medical care is not in and of itself medical malpractice. *See Leygraff*, 1994 Ohio App. LEXIS 5387. Additionally, "violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct." *Anderson*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at ¶ 37. Plaintiff's argument, therefore, boils down to arguing that the conduct of Defendants' employees was wanton misconduct because Dr. Singer opines that there was a gross breach in the standard of care. However, the expert's use of the term "gross breach" does not create an issue of material fact as to whether Defendants' conduct was willful, wanton, or reckless. *Michael v. Worthington Ohio City School Dist.*, 10th Dist. Franklin No. 19AP-145, 2020-Ohio-1134, ¶ 36. Such an assertion, even by an expert, is merely a legal conclusion. *Id*. Instead, it is necessary to examine the facts underlying the expert's opinion to determine if there is an issue of material fact. *Blair v. Columbus Div. of Fire*, 10th Dist. Franklin No. 10AP-575, 2011-Ohio-3648, ¶ 33.

{¶22} The main facts underlying Dr. Singer's opinion are that Rule's testimony that he was in regular contact with Dr. Nolan was not corroborated by Dr. Nolan and that no record of their interactions exists. (Plaintiff's Response, Ex. F-2, p. 3.) Essentially, Dr. Singer drew his conclusions from a lack of evidence, not from the existence of evidence showing willful, wanton, or reckless conduct. Furthermore, Dr. Nolan did corroborate that he was in contact with Rule, such as when Rule reached out regarding the changes in Plaintiff's symptoms. (Nolan Depo., 42:7-11.) Dr. Nolan stated that he "was kept updated regarding the continued symptoms." (Nolan Depo., 42:11.) Therefore, the opinion of Dr. Singer, Plaintiff's expert, does not create an issue of material fact as to whether Defendants' employees were willful, wanton, or reckless in their care and treatment of Plaintiff.

Conclusion

{¶23} Construing the evidence most strongly in Plaintiff's favor, the Court finds that there are no genuine issues of material fact and Defendants are entitled to summary judgment as a matter of law on Plaintiff's remaining claim of willful, wanton, or reckless conduct. Therefore, summary judgment is GRANTED to Defendants on Plaintiff's remaining claim. In conclusion, summary judgment has now been granted to Defendants on all of Plaintiff's claims.

LISA L. SADLER
Judge

[Cite as *Jennings v. Ohio State Univ.*, 2023-Ohio-4634.]

MATTHEW JENNINGS Plaintiff v. THE OHIO STATE UNIVERSITY, et al. Defendants	Case No. 2022-00035JD Judge Lisa L. Sadler JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶24} A non-oral hearing was conducted in this case upon Defendants' August 31, 2023 Motion for Summary Judgment on Plaintiff's Remaining Claim. For the reasons set forth in the decision filed concurrently herewith, Defendants' Motion for Summary Judgment on Plaintiff's Remaining Claim is GRANTED. Summary Judgment has now been granted to Defendants on all of Plaintiff's claims. Court costs are assessed against Plaintiff. The Clerk shall serve upon all parties notice of this judgment and its entry upon the journal.

LISA L. SADLER
Judge

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Sent to S.C. Reporter 12/20/23