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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

TERRI CARLISLE, Plaintiff, v. DOUGLAS COUNTY, Oregon; CORRECT CARE SOLUTIONS, LLC; JOHN HANLIN; MIKE ROOT; STEVEN BLUM, M.D.; NURSE DOE; MEDICAL ASSISTANT DOE; CORRECTIONAL OFFICER DOE(S), Defendants.	Case No.: 6:17-cv-00837-AA PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ORAL ARGUMENT REQUESTED

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PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

LR 7-1(a) CERTIFICATION

Counsel for Plaintiff, Terri L. Carlisle, certifies that, in compliance with LR 7-1, the parties have made a good-faith effort through telephone conference to resolve this motion and have been unable to do so.

SUMMARY OF PLAINTIFF'S ARGUMENTS IN OPPOSITION

Defendants' motions have the following fatal flaws:

OPPOSITION TO MOTION 1: The record is rife with facts establishing that Dr. Blum was deliberately indifferent to Ms. Carlisle's severe pain, a serious medical need. While Defendants assert there is "no evidence" of Dr. Blum's deliberate indifference, Plaintiff can show that the undisputed facts in the record are sufficient to establish that Plaintiff should be granted summary judgment against Dr. Blum under 42 U.S.C. § 1983.

OPPOSITION TO MOTION 2: Defendants have already agreed it was a Correct Care policy—which Dr. Blum implemented in the Douglas County Jail—that was employed to deprive Ms. Carlisle of any treatment for her severe, chronic pain. The undisputed facts make clear that Dr. Blum and Correct Care vis-à-vis its policy were deliberately indifferent to Ms. Carlisle's serious medical needs in violation of 42 U.S.C. § 1983.

OPPOSITION TO MOTION 3: Private companies acting under the color of state law should be subject to *respondeat superior* liability under 42 U.S.C. § 1983. This is supported by the law and the undisputed fact that Dr. Blum "provided medical care and services to the jail inmates in the course and scope of his employment with CCS" as admitted in Defendants' Motion for Summary Judgment.

OPPOSITION TO MOTION 4: Because Plaintiff can meet the higher standard of deliberate indifference, it is undisputed that Plaintiff also meets the negligence standard.

STATEMENT OF FACTS

For purposes of brevity, Plaintiff relies on and incorporates the statement of facts included in Plaintiff's Motion for Summary Judgment. Additionally, Plaintiff relies on the supplemental facts included herein.

Two expert witnesses provided reports and testimony in this case, Dr. Marc Stern (for Plaintiff) and Dr. Michael Puerini (for Defendants). Both have extensive experience in correctional health care.[1]

Dr. Puerini testified generally about medication, gabapentin, neuropathy and providing health care to prisoners. Dr. Puerini testified that doctors, especially in a corrections setting, have to be willing to accept some level of risk when prescribing medications.[2] And to mitigate those risks, doctors can float medications in water or crush them.[3] As for gabapentin, Dr. Puerini knows this medication is "often effective" in treating nerve pain in his patients, and has prescribed it for such purposes, including for the Plaintiff.[4]

Dr. Michael Puerini also testified that a "big part" of correctional health care is working to find consensus and agreement on patient treatment.[5] In order to work toward that agreement, Dr. Puerini said he would engage in "lengthy and difficult conversations" and try to engage a staff team in the effort to work with patients.[6] Dr. Puerini testified that he "frequently" had to

[1] Simon Decl. Ex. A (*Stern Curriculum Vitae*); Simon Decl. Ex. B (*Puerini Curriculum Vitae*).
[2] Simon Decl. Ex. C p. 10 (*Puerini Dep.* 53:11-19).
[3] Simon Decl. Ex. C p. 11 (*Puerini Dep*. 55:9-11).
[4] Simon Decl. Ex. C pp. 15-22; 24-26 (*Puerini Dep*. 68:25-75:20; 87:8-89:10).
[5] Simon Decl. Ex. C p. 2 (*Puerini Dep*. 17:11-25).
[6] Simon Decl. Ex. C p. 3 (*Puerini Dep*. 18:1-10).

work with patients and adjust tactics.[7] Dr. Puerini also testified that doctors in corrections settings have to work with patients even when they are not easy to work with, are angry or are untruthful, but that things like anger or truthfulness do not change the standard of care.[8]

Dr. Puerini testified specifically about his understanding of the facts of Ms. Carlisle's case. He testified that a person reading Ms. Carlisle's communication from June 4, 2015, in which she described "stabbing, burning foot neuropathy," would have been aware that Ms. Carlisle was complaining about pain.[9] Despite options for mitigating risks associated with prescribing medication to inmates, such as putting pills in water or crushing them, none of those options were ever offered to Ms. Carlisle.[10] Further, Dr. Puerini did not question the effectiveness of gabapentin for Ms. Carlisle.[11]

In his first report, Dr. Marc Stern opined that discontinuation of medication "due to a single first-time rule infraction at a jail…would not ordinarily be consistent with the standard of care" when a physician fails to make a determination that discontinuation would not cause the patient harm, which can be done either by "establishing that the medication is no longer medically necessary or by implementing an alternative, equally effective treatment plan."[12] In a second report, Dr. Stern stated more specifically that while he shares a concern for loose pills in a correctional setting, the potential for diversion does not relieve doctors of their obligation to provide medically necessary care.[13] Further, he opined that narcotic pain medications, such as

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[7] Simon Decl. Ex. C pp. 3-4 (*Puerini Dep*. 18:23-19:1).
[8] Simon Decl. Ex. C pp. 12-14, 27 (*Puerini Dep*. p. 57:19-58:23, 60:16-23; 131:3-16); *accord* Ex. D (*Stern Report* (Sept. 10, 2018)).
[9] Simon Decl. Ex. C pp. 5-9 (*Puerini Dep*. 44:25-48:7).
[10] Simon Decl. Ex. C p. 11 (*Puerini Dep*. 55:9-15).
[11] Simon Decl. Ex. C p. (*Puerini Dep*. 78:1-6).
[12] Simon Decl. Ex. E p. 2 (*Stern Report* (Aug. 22, 2018)).
[13] Simon Decl. Ex. D p. 1 (*Stern Report* (Sept. 10, 2018)).

methadone and morphine, present greater issues than gabapentin. *Id.* And a single loose tablet of gabapentin should not always result in discontinuation of that medication. *Id.*

STANDARD OF REVIEW

When considering summary judgment, the court "must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *Masson v. New Yorker Magazine, Inc*., 501 U.S. 496, 520 (1991) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986)). Summary judgment is only proper when the entirety of the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact requiring the consideration of a fact-finder. Fed R. Civ. Pro. 56(c); *Celotex Corp v. Catrett*, 477 U.S. 317 (1986). When there is no dispute of fact, the court can enter a judgment as a matter of law. *Id*. The court, of its own accord, may also grant summary judgment for a nonmovant. Fed. R. Civ. Pro. 56(f).

OPPOSITION TO DEFENDANTS' MOTION 1

Plaintiff, in her Motion for Summary Judgment, has argued in detail how the record of this case establishes that Dr. Blum was deliberately indifferent to her serious medical need and that she is entitled to summary judgment on her first claim for relief. Therefore, Plaintiff incorporates the arguments from her Motion for Summary Judgment herein and supplements those arguments in the response below.

Defendants' Motion for Summary Judgment correctly recognizes that to establish an Eighth Amendment medical care claim, a person who is or was incarcerated need only show (1) a serious medical need, and (2) that Defendants' response to that need was deliberately indifferent.[14] Defendants do not dispute that Plaintiff has a serious medical need. And as

[14] Defs.' Mot. Summ. J. p. 7, ECF No. 49 (citing, *inter alia, Jett v. Penner,* 439 F.3d 1091, 1096

Plaintiff argued in her own Motion for Summary Judgment, there is no dispute of fact related to Dr. Blum's behavior and Plaintiff easily meets the "high standard" of deliberate indifference. As Defendants rightly note, a plaintiff only has to show that the defendant thought about plaintiff's serious medical need and chose to ignore it.[15] That is exactly what Dr. Blum did in this case.

Defendants' reliance on *Sunnergren v. Tootell*, 2014 US Dist. LEXIS 8561 (N.D. Cal. 2014) provides a great example of how Dr. Blum *potentially could have* avoided liability in this case but failed to do so. In *Sunnergren*, a *pro se* plaintiff sued officials at the San Quentin State Prison alleging deliberate indifference to his serious medical needs. *Id.* The district court relied on the following key facts to partially grant defendants' motion for summary judgment:

- Plaintiff had chronic pain for which he was prescribed gabapentin for nerve pain and narcotics morphine, which was later changed to methadone, for bone pain. *Id.* at *2.
- After a nurse reported to a doctor—Dr. Grant—that plaintiff had diverted medication, that same doctor discontinued *only* plaintiff's methadone. *Id.* at *2.
- Dr. Grant's discontinuation was per prison policy that provided that "when an inmate is *found to be* diverting medication, narcotics and other restricted medications are to be discontinued *and other alternatives are explored*." *Id.* at *2 (emphasis added).
- Another doctor—Dr. Espinoza—prescribed additional pain medications, including Tylenol and amitriptyline, in place of the narcotics. *Id.* at *5

(9th Cir. 2006)).

[15] Defs.' Mot. Summ. J. p. 8, ECF No. 49 (citing *Delker v. Maass*, 843 F. Supp. 1390, 1400 (D. Or. 1994)).

- Dr. Espinoza also continued to have follow-up visits with plaintiff and recommended alternative therapies, e.g. physical therapy. *Id.*
- And finally, Dr. Espinoza *increased* plaintiff's dosage for gabapentin. *Id.*

In light of the above facts, the court found that the record showed that Dr. Espinoza's course of treatment following the discontinuation decision "was reasonable based on the potential risks of *narcotics* abuse." *Id.* at *5 (emphasis added). The court also determined that the *pro se* plaintiff did not adequately create a record that disputed Dr. Grant's concerns about the risks of narcotics diversion and his knowledge that there would be subsequent follow up and alternative treatments required by prison policy. *Id.* at *6.

The above set of facts is instructive in the case at hand as they illustrate the constitutional infirmities in Dr. Blum's failure to treat Ms. Carlisle's neuropathy pain. Unlike in *Sunnergren*, neither Correct Care's policy nor Dr. Blum ensured alternative treatments were provided. Unlike in *Sunnergren*, neither Correct Care's policy nor Dr. Blum required a finding of hoarding; instead, both relied on mere accusations to justify a decision to discontinue medication. Unlike in *Sunnergren*, Plaintiff had all of her pain medication—gabapentin and ibuprofen—discontinued without any medication that remained prescribed for pain symptoms. Unlike in *Sunnergren*, no additional pain medications were prescribed for Plaintiff's pain. Unlike in *Sunnergren*, Plaintiff is accused of hoarding gabapentin, not a narcotic. And unlike in *Sunnergren*, no doctor made any attempt to follow up with Plaintiff about her pain after making the decision to discontinue all of Plaintiff's pain medications.

Defendants' statement that "[l]ike *Sunnergren*, Dr. Blum reasoned that the discontinuation of plaintiff's gabapentin was appropriate because the risk of misuse was potentially more serious that the risk of discontinuance, particularly in light of the fact that

plaintiff refused any alternative treatment or medication for her neuropathy" mischaracterizes the facts in the record and is misleading.[16] The only time Defendants purport that Plaintiff refused an alternative treatment was on July 9, 2015, over a month after Dr. Blum decided to take all of her pain medications away. It is entirely unreasonable to assert that weighs into the reasonableness of Dr. Blum's decision; it is merely an attempt at an after-the-fact justification. Furthermore, even assuming for the sake of argument that Defendants' consideration of the risks is sufficient to protect Dr. Blum from liability in the decision to discontinue Ms. Carlisle's medication, that consideration is entirely irrelevant to his repeated failure to provide any follow-up or alternative treatment for Ms. Carlisle's severe pain. Defendants' own expert testified that treating physicians have a responsibility to ensure challenging patients receive necessary medical care. Therefore, it is insufficient for purposes of Defendants' Motion for Summary Judgment or defeating Plaintiff's Motion for Summary Judgment to rely on such a refusal.

The record, including testimony from Dr. Blum and his expert witness, also disputes that at the time Dr. Blum discontinued Ms. Carlisle's gabapentin, the risk of discontinuation outweighed the benefit of keeping her on it. Both Dr. Blum and Dr. Puerini testified that there are alternative methods of dispensing medication available in a jail setting that allow incarcerated patients to continue receiving medications while mitigating risks. Dr. Blum admitted that he never considered those alternatives for Ms. Carlisle. That fact alone is clear evidence of Dr. Blum's deliberate indifference to Ms. Carlisle's severe pain—that he knew of options to continue treatment but chose to ignore both those options along with her pain.

Defendants' statement that "[l]ike *Sunnergren*, plaintiff's belief that Gabapentin [sic] was the most effective medication for neuropathy pain is insufficient to defeat summary judgment" is

[16] Defs.' Mot. Summ. J. p. 9, ECF No. 49

immaterial.[17] Deliberate indifference is about what Dr. Blum knew and his response to that knowledge. Ms. Carlisle's thoughts on effectiveness do not change what the facts make clear: Dr. Blum knew of Ms. Carlisle's severe pain and chose repeatedly to ignore it.

While Defendants make specious attempts to point out dispositive similarities between *Sunnergren* and Ms. Carlisle's cases, they fail to point out how Dr. Blum defeats the "bare minimum" in an Eighth Amendment deliberate indifference case—that he did not consciously ignore Plaintiff's serious medical need. Defendants do no assert that Ms. Carlisle lacked a serious medical need. Defendants do not assert that Dr. Blum was either unaware of or failed to consider Ms. Carlisle's serious medical need. And Defendants do not assert that Dr. Blum responded at all to Ms. Carlisle's severe pain, let alone in a way that was constitutional. Therefore, this Court should deny Defendants' first motion.

OPPOSITION TO DEFENDANTS' MOTION 2

Again, Plaintiff, in her Motion for Summary Judgment, has argued in detail how the record of this case establishes that Correct Care was deliberately indifferent to her serious medical need and that she is entitled to summary judgment on her third claim for relief. Therefore, Plaintiff incorporates the arguments from her Motion for Summary Judgment herein and supplements those arguments in the response below.

Counties and private entities acting under the color of state law are liable for Eighth Amendment violations under 42 U.S.C. § 1983. *See, e.g., Monell v. Department of Social Servs. of NYC*, 436 U.S. 658, 690 (1978); *Tsao v. Desert Palace Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012). We agree with Defendants that a plaintiff can show a violation of § 1983 under *Monell* against a private entity when: (1) the entity was acting under the color of state law, (2) the entity

[17] Defs.' Mot. Summ. J. p. 9, ECF No. 49

had customs or policies that were deliberately indifferent to her constitutional rights, and (3) the customs or policies were the moving force behind the constitutional violations. *See, e.g., Gant v. Cty. of Los Angeles*, 772 F.3d 608, 617 (9th Cir. 2014) (citations omitted); *accord* Defs.' Mot. Summ. J. p. 10, ECF No. 49 (citing *Funez v. Guzman*, 687 F. Supp. 2d. 1214, 1224 (D. Or. 2009)). Defendants argue that there is "no evidence" of a policy and summarily assert without any discussion that there is no evidence of Correct Care's deliberate indifference. Both arguments woefully fail to accurately reflect the record in this case, a record that makes clear that Correct Care had a policy that was deliberately indifferent to Ms. Carlisle's serious medical need.

A. Defendants have already agreed that a Correct Care policy exists.

As the parties agreed in their Joint Statement of Facts and as Plaintiff argued in her own Motion for Summary Judgment, it is Correct Care's policy to discontinue medications when hoarding is suspected, except for the rare case where a medication was "critical." Furthermore, Dr. Blum made all final clinical decisions for the Jail, so he had final policymaking authority for purposes of medical care services provided to patients in the Jail. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986); *Streit v. Cty. of Los Angeles*, 236 F.3d 552, 559 (9th Cir. 2001). And liability can be imposed for a single decision by an official whose "acts or edicts may fairly be said to represent official policy." *Pembaur*, 475 U.S. at 481 (quoting *Monell*, 436 U.S. at 694). As the medical director at the Jail, Dr. Blum's consistent and repeated practice of terminating inmate medication upon an accusation of hoarding amounts to a policy that was deliberately indifferent to Ms. Carlisle's serious medical need. Therefore, Defendants cannot credibly refute the existence of a policy. To the extent the import or character of the policy is in question, Defendants are arguing there is a dispute of a material fact.

The policy that all the parties have agreed exists can be characterized as a punishment policy as a matter of law. The Eighth Amendment analysis is an analysis to determine whether a certain action or condition amounts to punishment that is cruel and unusual. If a policy is deliberately indifferent to incarcerated people's serious medical needs, then it is punishment. Just because a policy does not expressly state that it is a punishment policy, does not insulate it from Eighth Amendment scrutiny. That would be an absurd result. Defendants do not get to decide what amounts to "punishment," rather, it is up to the Court here to evaluate the policy under the Eighth Amendment. And the record of this case is filled with evidence of the deliberate indifference enshrined in Correct Care's policy.

The policy that all the parties have agreed exists also fails to consider the medical needs of incarcerated patients, including Ms. Carlisle. Dr. Blum admitted that he knew the reason Ms. Carlisle was taking gabapentin—neuropathy pain—yet acted according to the policy to take away her pain medication. He also admitted he never contemplated alternative distribution methods nor alternative treatments for Ms. Carlisle. His only consideration was the risk to the facility weighed against the previous course of prescribing gabapentin and a broad understanding of hoarding (i.e. hoarding could be anything from a single pill to a large cache of pills). Finally, Dr. Blum admitted he never followed up with Ms. Carlisle's treating physician in the community to understand her history or why Dr. Jorgenson felt a need to intervene. These admissions make evident that Correct Care's policy does not require—but instead militates against—consideration of an incarcerated patient's individual medical needs or circumstances. The policy only considers general and potential facility risks without making any specific findings or conclusions about the individual patient. Ms. Carlisle had one pill, yet she was presumably treated the same as a drug-seeking inmate selling a large number of pills throughout the facility. Ms. Carlisle also suffered

severe, chronic pain, yet she was presumably treated the same as somebody who had no pain at all. That is due to the policy's failure to consider her individual medical needs.

B. There is ample evidence in the record showing Correct Care's policy was deliberately indifferent.

Defendants' blanket assertion that there is no evidence of the deliberate indifference behind Correct Care's policy fails to consider a number of pieces of evidence that make such indifference clear. Defendants' unsupported assertion ignores Dr. Blum's admission that the only protected medications were the "minority" of cases. Defendants' unsupported assertion ignores the fact that Dr. Blum admitted that reports of hoarding can come from either security or medical staff, showing that hoarding decisions are deeply and problematically intertwined with Jail disciplinary processes. Defendants' unsupported assertion ignores the fact that Correct Care's policy clearly worked to deny pain medication to a chronic pain patient, a medication prescribed by two doctors, including the Jail's own medical director. Defendants' unsupported assertion ignores the fact that the policy does not require alternative treatments, nor any meaningful follow up with or oversight of patients whose medications are terminated. And Defendants' unsupported assertion ignores the fact that the policy amounts to an unconstitutional blanket ban. *See* Pl.'s Mot. Summ. J. p. 24-25, ECF No. 51.

As Plaintiff articulated in her Motion for Summary Judgment, it is undisputed that Correct Care maintained a policy that was deliberately indifferent to her serious medical need. Therefore, the Court should deny Defendants' second Motion for Summary Judgment and grant summary judgment in favor of Plaintiff.

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OPPOSITION TO DEFENDANTS' MOTION 3

The Court has sufficient undisputed evidence to hold Defendant Correct Care liable under § 1983 for having a policy that is deliberately indifferent to Plaintiff's serious medical need. This Court, however, can also hold Defendant Correct Care liable under a theory of *respondeat superior* for the constitutional harm Defendant Dr. Blum caused Plaintiff.

The Supreme Court has never foreclosed § 1983 *respondeat superior* liability for private entities, and the court's jurisprudence suggests that it supports it. Plaintiff recognizes that the Ninth Circuit held that 42 U.S.C. § 1983's causation requirement bars *respondeat superior* liability for private-entity defendants in *Tsao v. Desert Palace,* 698 F.3d 1128, 1138-39 (9th Cir. 2012). The *Tsao* court's conclusory reasoning, however, misapplied *Monell* and failed to consider other controlling Supreme Court precedents. As explained below, *Monell*'s causation analysis in the *respondeat superior* context relied heavily on the defendant municipality's public character. Elsewhere, the court has indicated that causation may have a broader meaning when applied to private § 1983 defendants acting under color of state law. Construing causation broadly enough to allow *respondeat superior* liability for private § 1983 defendants is consistent with both the history and policy of § 1983. *See Richardson v. McKnight,* 521 U.S. 399, 404 (1997) (interpreting § 1983 in context with "firmly rooted" history and public policy).

Monell's holding that "the [causation] language of § 1983, *read against the background of the same legislative history* […]" precludes § 1983 *respondeat superior* liability against municipalities is best understood as being limited to public-entity defendants. *Monell,* 436 U.S. at 691 (emphasis added). The rejected-Sherman amendment was the principal piece of legislative history driving the court's analysis. *Id.* at 693, n. 57. That proposal would have imposed liability on municipalities under the Civil Rights Act of 1871, from which § 1983 derives, "for damage

done to the person or property of its inhabitants by *private* persons 'riotously and tumultuously assembled.'" *Id.* at 654 (emphasis in the original). Critics alleged that the amendment created a species of vicarious liability amounting to a federally-imposed duty on municipalities to keep the peace. *Id.* at 668. This duty, they claimed, violated federalism principles. *Id.* at 673-74. Because federalism concerns are inherently governmental, they apply less, if at all, to private defendants acting under color of state law. Thus, the court's reasoning that when Congress rejected the Sherman amendment, it also rejected *respondeat superior* liability, is limited to public-entity defendants. *See id.* at 692, n. 57, 693-94; *accord Shields v. Illinois Department of Corrections,* 746 F.3d 782, 793 (7th Cir. 2014) (discussing why *Monell's* analysis of § 1983's text and legislative history does not preclude *respondeat superior* liability for private entities), *cert. denied* 135 S.Ct. 1025 (2015).

In *West v. Atkins*, the court suggested that causation may have a broader meaning for private § 1983 defendants. 487 U.S. 42 (1988).[18] There, the court held that a private physician who contracts to provide medical care in state prisons satisfied the "under color of [state law]" requirement of § 1983. *Id.* at 54. The court marked the parameters of § 1983 causation when it noted that the state, acting through the private contract physician, caused plaintiff's injury "in the sense relevant for state-action[19] inquiry, by the State's exercise of its right to punish […]

[18] The *West* court spoke approvingly of *Monell*'s decision to bar § 1983 *respondeat superior* liability. *West*, 487 U.S. at 54, n. 12. The court did so, however, when it rejected the distinction between professionals and those performing "custodial or supervisory functions" for the purposes of determining when an *individual* acted under color of state law under § 1983. *Id.*, *see also* 487 U.S. at 51-54. The *West* court was not addressing the *availability* of *respondeat superior* liability for private-entity defendants, as opposed to public defendants.

[19] Section 1983's under color of law requirement is satisfied when Fourteenth Amendment state action is present. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 935 (1982). In some cases, however, there can be action "under color of state law" where there is no state action. *See id.* at 935, n. 18.

[plaintiff] by incarceration and to deny him a venue independent of the State to obtain needed medical care." *Id.* at 55 (footnote inserted). Causation must, then, be flexible enough to impute enough private conduct to serve § 1983's purposes. As the court indicated, imputing such private actions to the state prevents it from evading constitutional "rights, whose protection has been delegated to private actors […]." *Id.* at 56, n. 14 (internal quotation marks and citation omitted). As discussed below, *respondeat superior* increases deterrence, especially for private entity defendants, advancing this objective.

Policy considerations, like deterrence, are one of the two criteria that the United States Supreme Court considers in interpreting § 1983. *See Richardson*, 521 U.S. at 404. History is the other. *See id.* When it addressed whether private prison guards may receive § 1983 qualified immunity, the court noted that these two criteria indicate legislative intent. *Id.* at 403, citing *Wyatt v. Cole*, 504 U.S. 158, 637 (1992). As Plaintiff demonstrates below, both indicia of legislative intent counsel a broader conception of causation that would provide *respondeat superior* liability for private § 1983 defendants. *Monell* does not foreclose this conception of causation, and *West* and *Richardson* may require it.

i. The Supreme Court has historically recognized *respondeat superior* liability of private entities that employ constitutional tortfeasors like Dr. Blum.

There is a "firmly-rooted" history of holding private entities liable for their employees' constitutional torts under a *respondeat superior* doctrine. In *Adickes v. S.H. Kress & Co.*, a pre-*Monell* decision, the court imposed liability on a company for the constitutional torts of its employees when they conspired with local law enforcement to refuse to serve, and later arrest, a White teacher who shared a lunch counter with her Black students. 398 U.S. 144, 152 (1970). In so doing, the court imposed § 1983 *respondeat superior* liability on the private company. *Id.* It explained that a § 1983 plaintiff could recover against a private entity if its "employee, in the

course of employment" and a police officer conspired to deny her federal rights. *Id.* The court thus employed a quintessential *respondeat superior* analysis. *See e.g.*, *Monell*, 436 U.S. at 691, 692 (describing *respondeat superior* as imposing liability "*solely* because [an entity] employs a tortfeasor" or "solely on the basis of the existence of an employer-employee relationship"); Restatement (Third) of Agency § 2.04 (2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment.").

Lugar, a post-*Monell* decision, affirmed *Adickes*' conception of private action under color of state law, indicating that the court did not intend to disturb its previous decision to impose *respondeat superior* liability on a private § 1983 defendant. *See Lugar*, 457 U.S. at 941. The court's § 1983 jurisprudence thus maintains its fidelity to the well-established tradition of imposing *respondeat superior* liability on private employers. *See* Dobbs, Hayden, and Bublick, Hornbook on Torts (2nd ed. 2016) at 754, n. 8 (*Respondeat superior* was a "widespread" and "generalized rule" since the 18th century).

ii. Sound policy demands imposing *respondeat superior* liability on private entities that employ constitutional tortfeasors like Dr. Blum.

Imposing *respondeat superior* liability on private entities is good policy that advances the purpose of § 1983. As the Seventh Circuit observed: "Private prison employees and prison medical providers have frequent opportunities, through their positions, to violate inmates' constitutional rights. It is also generally cheaper to provide substandard care than it is to provide adequate care." *Shields*, 746 F.3d at 794. Because private entities are subject to market pressures, different deterrents are required to discourage these constitutional violations. *See id.*

Respondeat superior liability is such a deterrent. It serves this function "by imposing liability on the employer, who will then seek to avoid his own liability by exercising his considerable control over employees to discourage their torts." Dobbs, Hayden, and Bublick,

Hornbook on Torts (2nd ed. 2016) at 755; *see also* Restatement Third of Agency § 2.04, cmt. b (2006). This deterrence potential is stronger for private defendants than public defendants for two reasons. First, private entities have more latitude "to reward, or to punish, individual employees." *Richardson v. McKnight*, 521 U.S. 399, 410-11 (1997). *Respondeat superior* is thus a more powerful deterrent, since its effectiveness flows from private employers' control over employees. Second, private entities "have flexibility that governments lack; they can choose which fields to enter, can choose to leave the business, and have more control over how they structure their operations." Barbara Kritchevsky, Civil Rights Liability of Private Entities, 26 Cardozo L. Rev. 35, 78 (2004). As a result, they may be more responsive to stricter liability because they have more options for how they manage their exposure. These considerations make *respondeat superior* liability an appropriate and necessary mechanism for encouraging constitutional compliance of private entities acting under color of state law.

Accordingly, consistent with FRCP 56(f), this Court should grant summary judgment to Plaintiff on her fifth claim for relief. As previously discussed, when an employee acting within the scope of his employment commits a constitutional tort against a plaintiff, his employer is subject to *respondeat superior* liability. Defendants concede in their Motion for Summary Judgment that Dr. Blum was an employee acting within the scope of his employment. As Plaintiff's Motion for Summary Judgment established, Dr. Blum was deliberately indifferent to Plaintiff's serious medical need in violation of the Eighth Amendment. Therefore, this Court should, of its own accord, grant summary judgment to Plaintiff on her fifth claim for relief.

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OPPOSITION TO DEFENDANTS' MOTION 4

The undisputed facts that show Defendants' deliberate indifference necessarily establish Defendants' negligence. As the Supreme Court described in *Farmer v. Brennan*, 511 U.S. 825, 835 (1994), deliberate indifference is "a degree of culpability greater than mere negligence." Because Plaintiff can show Defendants were deliberately indifferent to her serious medical needs, it follows that Defendants' culpability well-exceeded that required for her negligence claims. Furthermore, Plaintiff's expert witness, Dr. Marc Stern, made clear that Defendants did not meet the standard of care in this case.

Defendants misinterpret a number of Oregon cases to assert that Plaintiff is required to have evidence from an expert that Defendants breached a duty owed to Plaintiff that caused her harm. Defendants first cite *Getchell v. Mansfield*, 260 Or. 175, 179, 489 P.2d 953(1971), but in this case, the Supreme Court of Oregon explicitly states that "if the jury is capable of deciding what is reasonable conduct without assistance from an expert medical witness no expert testimony is necessary." *Id.* at 179-180. In the context of a complete failure to provide any treatment for a patient's severe and chronic pain, both expert and lay persons can easily understand why such inaction is entirely unreasonable. Next, Defendants cite *Tiedemann v. Radiation Therapy Consultants, P.C.*, 299 Or. 238, 246-247, 701 P.2d 440 (1985). But this case merely holds that uncontroverted expert testimony may indicate the absence of a factual issue, not that expert evidence is affirmatively required on every element. *Id.* at 244. Finally, Defendants cite *O'Dee v. Tri-County Metropolitan Transp. Dist. Of Oregon*, 212 Or. App. 456, 460-61, 463, 157 P.3d 1272 (2007). While this bus accident case identifies evidence that *could have* been established by an expert, the case does not even mention the word "expert," let alone posit that such a particular type of evidence is required for purposes of summary judgment.

Regardless whether expert testimony is required, testimony from both experts in this case provide plenty of evidence that a jail physician has an obligation to treat all people in custody, and as part of that obligation, are required to ensure *some* treatment is provided to incarcerated patients experiencing severe pain. Defendant Dr. Blum abruptly stopped Plaintiff's pain regimen and made no effort to provide an alternative. As a direct and proximate result of that decision and inaction, Ms. Carlisle suffered over two months of pain.

Therefore, this Court should deny Defendants' Motion for Summary judgment on Plaintiff's sixth and seventh claims for relief.

CONCLUSION

For the reasons stated above, Ms. Carlisle respectfully requests that this Court deny each of Defendants' motions for summary judgment and enter judgment in favor of Plaintiff.

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ACLU FOUNDATION OF OREGON, INC.

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