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Attorneys for Defendants Correct Care Solutions, LLC and Steven Blum, M.D.

Honorable Judge Anne Aiken

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

TERRI CARLISLE,

Plaintiff,

v.

DOUGLAS COUNTY, Oregon; CORRECT CARE SOLUTIONS, LCC; 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

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS CORRECT CARE SOLUTIONS, LLC AND STEVEN BLUM, M.D.

ORAL ARGUMENT REQUESTED

REPLY

There is no genuine dispute of the material facts. Plaintiff was serving a six month sentence in the Douglas County Jail when jail officials performed a sweep of her cell and located contraband, which included among other prohibited items and medications, "gabapentin tablets."

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Among the contraband found in the cell, plaintiff had at least one Neurontin pill. Dr. Blum discontinued plaintiff's Neurontin prescription based on widely accepted jail policy to discontinue medications when it is discovered that the medication had been "hoarded" or not taken as prescribed. Plaintiff wanted her Neurontin prescription reinstated and was not interested in alternative treatments or to otherwise consult with Dr. Blum or CCS staff regarding the hoarding incident or her alleged pain.

There is no evidence from which a reasonable juror could conclude that Dr. Blum was deliberately indifferent to plaintiff's constitutional rights or that Dr. Blum was negligent. Additionally, there is no evidence from which a reasonable juror could conclude that CCS maintained a policy, custom or practice that was deliberately indifferent to plaintiff's constitutional rights. The court should grant defendants' motions for summary judgment because, based on the undisputed material facts, plaintiff's claims fail as a matter of law.

REPLY IN SUPPORT OF MOTION 4

I. PLAINTIFF'S NEGLIGENCE CLAIMS AGAINST DR. BLUM AND CCS FAIL AS A MATTER OF LAW.

There is no evidence from which a reasonable juror could find that Dr. Blum violated the standard of care. Defendants' expert, Dr. Puerini, opined that the "standard of care was met in this case."[1] Plaintiff's expert, Dr. Stern, had an opportunity to review, analyze and rebut Dr. Puerini's opinions. Plaintiff presents no countering opinion to Dr. Puerini's conclusion that the standard of care was met.[2]

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[1] Dkt. 50-13, p. 5 of 6, ¶24.
[2] Dkt. 60-4.

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Because there is no genuine issue of material fact that the standard of care was met in this case, defendants' motion for summary judgment on plaintiff's negligence claims against Dr. Blum and CCS should be granted as a matter of law.

REPLY IN SUPPORT OF MOTION 1

II. PLAINTIFF'S §1983 CLAIM AGAINST DR. BLUM FAILS AS A MATTER OF LAW.

As plaintiff cannot meet her burden that the standard of care was violated to support her negligence claims, plaintiff cannot meet the higher burden of establishing that Dr. Blum was deliberately indifferent to any serious medical need. Plaintiff has not demonstrated that there is an issue of fact that Dr. Blum's decision to discontinue plaintiff's Neurontin was medically unacceptable under the circumstances, or that Dr. Blum chose this course in conscious disregard of an excessive risk to plaintiff's health. To be clear, defendants do not concede that plaintiff has or had a serious medical need.[3] Rather, defendants assert that there is no evidence of deliberate indifference to any serious medical need.

The unrebutted evidence is that the presence of one or more loose Neurontin tablets in plaintiff's cell represented a genuine risk to her health and well-being and the safety of others.[4] As discussed in defendants' motion (Dkt. 49) and response (Dkt. 57), there is a wealth of legal authority that discontinuing medications following an incident or accusation of hoarding is not evidence of deliberate indifference. *See Taylor v. Spraga*, 236 F Supp 3d 875, 879-880 (D Del 2017) ("plaintiff may be unhappy that he is no longer prescribed Neurontin, but that does not rise to the level of a constitutional violation"); *Vanzant v. Weissglass*, Civil Action No. 8:15-cv-02876-RBH-JDA, 2016 US Dist LEXIS 120875, at *18 (DSC June 13, 2016) ("Courts have

[3] Pl's Response, Dkt. 59, p. 6 & 10 of 20
[4] Dkt. 50-13, p. 3 of 6; *see also* Dkt. 60-4.

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consistently determined that prison medical doctors have not been deliberately indifferent to a prisoner's medical needs by terminating certain medications after discovering that the prisoner has been cheeking, stowing, or otherwise abusing their prescribed medications"); *Sunnergren v. Tootell*, No. C 12-0979 LHK , 2014 US Dist LEXIS 8561, at *17 (ND Cal Jan. 22, 2014); *Johnson v. Fields*, No. 2:14-cv-38-FDW, 2017 US Dist LEXIS 189448, at *27 (WDNC Nov. 16, 2017) (the "decision to discontinue Plaintiff's Neurontin fails to establish a deliberate indifference claim….[s]ignificantly, [medical] discontinued the Neurontin after Plaintiff "hoarded").

Additionally, the unrebutted evidence is that Neurontin was not a "critical" medication for plaintiff.[5] There is no dispute that while alternative treatments to Neurontin were available, Dr. Blum could not help plaintiff with alternative treatments for her condition unless she agreed to see him for further evaluation.[6] Per the undisputed record, plaintiff refused alternative treatment:[7]

> "OK – Just got back. Medical came to get me. Seems my atty badgered them to put me back on my neurontin. However, the nurse informed me that they would not be putting me back on the neurontin, but something else. So – I informed her that, no, they were not going to put me on something else. That I've already been tried on all the 'something else's' and that Neurontin is what works. She said no, they weren't going to do it and I said fine – Don't charge me for a medical visit since you've done nothing for me except raise my B.P. Yeah – like I'm going to start on some new drug under these idiots supervision??!! Fat chance."

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[5] *Cf*. Dkt. 50-13, p. 4 of 6, ¶11, and Dkt. 60-4.
[6] *Cf*. Dkt. 50-13, p. 5 of 6, ¶15 and Dkt. 60-4.
[7] Dkt. 50-5.

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The undisputed evidence is that plaintiff refused to see Dr. Blum for complaints of pain unless she would be assured that "her" Neurontin be resumed.[8] "A difference of opinion with the medical staff as to the optimal pain-management regimen does not amount to deliberate indifference." *Todd*, 497 F App'x at 842.

Deliberate indifference is a stringent standard of fault. *Lavender v. Lampert*, 242 F Supp 2d 821, 842 (D Or 2002). The court should grant defendants' motion for summary judgment on plaintiff's §1983 claim against Dr. Blum because there is no genuine issue of material fact that the decision to discontinue plaintiff's Neurontin was medically unacceptable under the circumstances, or that any of Dr. Blum's actions were in conscious disregard of an excessive risk to plaintiff's health.

REPLY IN SUPPORT OF MOTION 2

III. PLAINTIFF'S *MONELL* CLAIM AGAINST CCS FAILS AS A MATTER OF LAW

Policies to discontinue medications when an inmate is caught hoarding are routinely held to be legitimate policies that are not deliberately indifferent to inmates' constitutional rights. *See Hicks v. Dotson*, 73 F Supp 3d 1296, 1303-04 (ED Wash 2014); *Todd*, 497 F App'x at 841-842; *Armfield v. La. Corr. Servs*., No. 3:10-CV-0175, 2010 US Dist LEXIS 43019, at *7-8 (WD La Mar. 29, 2010).

Contrary to plaintiff's characterization of the alleged CCS policy as "an unconstitutional blanket ban,"[9] the undisputed evidence is that the CCS policy required medical staff to consider the medication and, if the medication was "critical," to consider alternative methods of distribution.[10] Defendants' expert, Dr. Puerini, opined that "Neurontin was not a 'critical'

[8] *Cf*. Dkt. 50-13. P. 4 of 6, ¶14 and Dkt. 60-4.
[9] Dkt. 59, p. 13 of 20.
[10] Dkt. 51, p. 12 of 29 and Dkt. 52-3 (46:21 – 47:8).

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medication for [plaintiff]."[11] That opinion is unrebutted.[12]

There is no evidence from which a reasonable juror could find that any CCS policy was deliberately indifferent.

REPLY IN SUPPORT OF MOTION 3

IV. PLAINTIFF'S §1983 RESPONDEAT SUPERIOR CLAIM AGAINST CCS FAILS AS A MATTER OF LAW.

A. Precedent does not support liability.

Established precedent provides that *Monell* liability extends to private corporations, and as such, precludes §1983 *respondeat superior* claims against private entities. *See Shields v. Ill. Dep't of Corr*., 746 F3d 782, 794 (7th Cir 2014); *Rabieh v. Paragon Sys.*, 316 F Supp 3d 1103, 1112 (ND Cal 2018), *citing Tsao v. Desert Palace, Inc*., 698 F.3d 1128, 1140 (9th Cir 2012); *Annan-Yartey v. Securitas Sec. Serv*. USA, No. 18-00107 HG-KJM, 2018 US Dist LEXIS 117064, at *13 (D Haw June 18, 2018)(identifying a number of other courts that follow *Tsao* to preclude §1983 *respondeat superior* claims against private entities); *Powell v. Shopco Laurel Co*., 678 F2d 504, 506 (4th Cir 1982); *Revilla v. Glanz*, 8 F Supp 3d 1336, 1341 (ND Okla 2014).

The policy arguments offered by plaintiff echo the discussion in *Shields*, in which the Seventh Circuit Court explored reasons why *respondeat superior* liability for §1983 claims should apply to private corporations. Notably, however, the court in *Shields* adhered to controlling precedent. *See Shields*, 746 F3d at 796 ("for now, this circuit's case law still extends *Monell* from municipalities to private corporations"); *see also Revilla*, 8 F Supp 3d at 1341. In *Revilla*, the court stated:

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[11] Dkt. 50-13, p. 4 of 6, ¶11.
[12] Dkt. 60-4.

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> "The reasoning of *Shields*, and its thorough analysis of Supreme Court precedent, provides potent arguments for not extending *Monell* to private corporations. However, this Court is bound to follow Tenth Circuit precedent, and the settled law in all Circuits to have decided the issue is that *Monell* extends to private corporations and thus they cannot be held liable on a *respondeat superior* basis for their employees' conduct." *Id*.

Plaintiff's fifth claim for relief alleges that Dr. Blum and CCS employees were acting in the course and scope of their employment with CCS when their actions resulted in violations of plaintiff's constitutional rights.[13] Plaintiff seeks to hold CCS vicariously liable for the alleged constitutional violations of its employees. Courts have repeatedly held that "a private corporation is not vicariously liable under §1983 for its employees' deprivations of others' civil rights." *Shields*, 746 F3d at 790 (citing a number of opinions from the Seventh Circuit and observing that "all other circuits that have addressed the issue have reached the same conclusion, extending the *Monell* standard to private corporations).

Plaintiff cites to no controlling authority that would demand a departure from well-established precedent that *Monell* extends to private corporations and as such, CCS cannot be held liable on *respondeat superior* basis for its employees' allegedly unconstitutional conduct. Based on the applicable legal authority, plaintiff's fifth claim for relief against CCS for *respondeat superior* liability of alleged § 1983 constitutional violations fails as a matter of law.

B. The undisputed facts do not support liability.

As a factual matter, plaintiff has failed to establish an underlying constitutional violation by Dr. Blum or any CCS employee. As such, even if the law supported plaintiff's theory of liability, this claim still fails.

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[13] Dkt. 1, p. 17 of 19, ¶¶ 70-73.

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CONCLUSION

Based on the undisputed facts on the record and the applicable laws, plaintiff's claims against defendants CCS and Dr. Blum fail as a matter of law. As such, defendants respectfully request that this Court grant defendants' motions for summary judgment and deny plaintiffs' motion for summary judgment.

DATED this 25th day of January, 2019.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS CORRECT CARE SOLUTIONS, LLC AND STEVEN BLUM, M.D.** on the following attorneys by the method indicated below on the 25th day of January, 2019:

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