IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARCUSS CHILDS,

OPINION and ORDER

Plaintiff,

11-cv-500-bbc

v.

CYNTHIA M. THORPE, DAVID BURNETT,
KEN ADLER, DALIA SULIENE, JAMES LABELLE,
CARLO GAANAN, LILLIAN TENEBRUSO,
BELINDA SCHRUBBE, W. BRAD MARTIN,
PAUL SUMNICHT and THOMAS WILLIAMS,

Defendants.

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In this civil action for monetary and injunctive relief under 42 U.S.C. § 1983, plaintiff Marcuss Childs, a prisoner at the Waupun Correctional Institution, is proceeding on claims that defendants Cynthia Thorpe, David Burnett, Ken Adler, Dalia Suliene, James LaBelle, Carlo Gaanan, Lillian Tenebruso, Belinda Schrubbe, W. Brad Martin, Paul Sumnicht and Thomas Williams violated his rights under the Eighth Amendment and state law by failing to provide him adequate medical care for his hernia. Now before the court are the parties' cross motions for summary judgment. Plaintiff contends that the undisputed evidence shows that defendants violated his state and constitutional rights by offering him only ineffective treatment for his hernia and refusing to recommend a surgical consultation. (Plaintiff filed two separate motions, one relating to his Eighth Amendment claim and one

relating to his state law medical negligence claim.) Defendants contend that no reasonable jury could conclude that they were deliberately indifferent to plaintiff's medical needs. With respect to plaintiff's state law claim, defendants contend that plaintiff has failed to present evidence of the applicable standard of care, and that without such evidence, he cannot prove his claim.

After reviewing the parties' arguments and the evidence in the record, I conclude that defendants' motion must be granted in part and denied in part. Defendants' proposed facts leave a number of questions unanswered about how plaintiff's treating physicians, defendants Gaanan, Suliene, Martin, Williams and Sumnicht, responded to plaintiff's complaints of hernia pain. Therefore, I am denying the motion for summary judgment as to those defendants. I am granting defendants' motion as to defendants LaBelle, Adler, Burnett, Tenebruso, Schrubbe and Thorpe because those defendants either did not participate in treatment decisions regarding plaintiff or were justified in relying on the information and decisions provided by plaintiff's treating physicians. However, because plaintiff is seeking specific injunctive relief, I am not dismissing Burnett from the case. Because Burnett is the director of the Bureau of Health Services, he presumably would have authority to insure that any injunctive relief is carried out. Thus, he will remain in the case in his official capacity.

I am denying plaintiffs' motions for summary judgment in full. With respect to plaintiff's state law claims, he failed to address the applicable standard of care for medical negligence and instead raised arguments about whether he gave informed consent for

treatment, a claim on which he was not granted leave to proceed. As for his Eighth Amendment claim against defendants Gaanan, Suliene, Martin, Williams and Sumnicht, there are genuine issues of fact in dispute regarding the propriety of defendants' treatment. Therefore, I am setting plaintiff's claims against those defendants for trial.

Additionally, plaintiff has filed a letter with the court that I am interpreting as a renewed motion for appointment of counsel. Dkt. #71. As discussed below, I am granting the motion and staying all further proceedings in this case temporarily in order to locate a lawyer who is willing to represent plaintiff at trial. Once a a lawyer has been located, I will schedule a status conference to reset the schedule in this lawsuit.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

At all times relevant to this case, plaintiff Marcuss Childs was a prisoner confined to the Wisconsin correctional system. Defendants are employees of the Wisconsin Department of Corrections.

A. Wisconsin Resource Center: Defendant Dr. Carlo Gaanan

On December 9, 2009, while plaintiff was incarcerated at the Wisconsin Resource Center, he submitted a health service request to be seen for pain in his groin area, saying that his groin pain "comes and goes and happens without notice." Nursing staff saw him that day

and plaintiff told them he had had a hernia since 2003 or 2004 and that it had recently started to cause pain. He complained of urinary frequency and of "throbbing" pain in his groin area, especially when exercising. Staff checked his vital signs and referred him to a physician. Plaintiff sent another request about his hernia pain on December 17, and was told that he was scheduled to see Dr. Carlo Gaanan, the institution physician.

On January 4, 2010, plaintiff saw defendant Gaanan about his hernia. Plaintiff told Gaanan his hernia caused him pain when he exercised, but that he did not experience nausea or vomiting. At the time, plaintiff was taking pain medication for his foot. Gaanan gave plaintiff a diagnosis of an inguinal hernia that was "stable." Gaanan did not prescribe any pain medications or any other treatment to plaintiff for the hernia. Plaintiff did not see Gaanan again about hernia pain after the January 4 appointment.

B. Columbia Correctional Institution: Defendant Dr. Suliene

On May 25, 2010, plaintiff was transferred to the Columbia Correctional Institution. On June 17, he complained to nursing staff about hernia pain. Staff ordered acetaminophen for his pain, referred him to the physician and told him not to do any heavy lifting, exercises or activity that might strain the abdomen.

On June 30, 2010, plaintiff was seen by defendant Dr. Dalia Suliene about his hernia and complaints of groin pain. Plaintiff told Suliene that he had had the hernia since 2003 but that the pain had gotten worse. She examined him and noted a bulge of about five centimeters that was tender while plaintiff was standing. She gave him a diagnosis of a right

inguinal hernia that was easily reducible, meaning that it could be pushed back into plaintiff's abdomen when he was lying on his back. Suliene prescribed a "hernia belt" to plaintiff, which was intended to compress his abdominal wall and force the hernia back into his abdomen. She continued plaintiff's prescription for acetaminophen.

Plaintiff began using the belt, but his symptoms worsened and he continued to feel pain during bowel movements, when walking or standing for long periods and when trying to sleep. On August 3, 2010, plaintiff saw defendant Suliene for a followup appointment. Plaintiff complained about the pain he been experiencing while walking, standing, lying down and during bowel movements. Suliene wrote on plaintiff's medical chart that he was using the hernia belt, that the hernia was not "incarcerated" and that it had not changed in size. Suliene continued the pain medication and belt and ordered a followup in one to two months.

Plaintiff saw defendant Suliene again on October 7, 2010. Plaintiff told Suliene the belt was not working. Plaintiff's medical records show that Suliene noted the presence of a right inguinal hernia five centimeters in size that was easily reducible when plaintiff was lying down. That same day, Suliene submitted an electronic request for a herniorrhaphy (a surgical repair of a hernia) to the Department of Corrections' Bureau of Health Services. She noted on the request that she was requesting the surgical evaluation because plaintiff's inguinal hernia was "causing him significant pain in the groin." Dkt. #34-1 at 50. She also noted that the "[h]ernia is still reducible but due to significant [] pain [she was] requesting surgical eval for this hernia." Id.

The nursing coordinator for the Department of Corrections, defendant James LaBelle, reviewed defendant Suliene's request on October 7. LaBelle forwarded the request to defendant Dr. David Burnett, the medical director of the Bureau of Health Services. Burnett forwarded the request to the prior authorization committee. On October 12, the committee denied the request on the ground that "[the] hernia is not growing and his [activities of daily living] are not affected." Dkt. #34-2 at 52. The committee included defendant Kenneth Adler, associate medical director for the department, and defendant Suliene. Dfts.' Resp. to PPFOF ¶ 11, dkt. #30. (Defendants do not say whether there were other committee members, and if so, who they were.)

After plaintiff was told of the committee's decision, he wrote to defendant Lillian Tenebruso, the health services manager at Columbia Correctional Institution, about assessment of a copay and the lack of surgical intervention for his hernia. On October 26, 2010, Tenebruso responded by telling plaintiff that she had requested reimbursement of the copayment on his behalf and that he needed to follow the care plan identified by his doctor to be considered for additional interventions. She also told him to continue eating to prevent additional health issues. Plaintiff wrote Tenebruso again, complaining about his hernia. On October 28, she responded by telling plaintiff that the treatment decision for his hernia was up to the medical professionals who were treating him and that many factors were considered, including location, symptoms, type of hernia and whether the hernia and pain could be treated with a belt and medication. She told him to contact the health services unit if he experienced new symptoms or acute problems.

At some point in October 2010, plaintiff told staff that he was refusing to eat until he received treatment for his hernia. On November 10, 2010, plaintiff met with defendant Suliene. He complained to Suliene about severe abdominal pain from his hernia even when he was wearing the hernia belt. Suliene ordered a CT scan of his abdomen and told him to continue wearing the hernia belt. He received on November 29. The report from the scan stated that "[t]he paucity of abdominal pelvic fat and the presence of unopacified bowel does limit the assessment of the abdomen and pelvis, however, no enhancing masses are seen in the liver or pancreas . . . ." Dkt. #34-2 at 54-55. The report made no mention of plaintiff's hernia. Plaintiff did not see Suliene after the results of the CT scan and received no further treatment for his hernia while he was at the Columbia Correctional Institution.

C. New Lisbon Correctional Institution:

Defendant Dr. W.B. Martin and Dr. Zahid Hameed

On January 12, 2011, plaintiff was transferred to the New Lisbon Correctional Institution. On January 21, 2011, plaintiff was seen by defendant Dr. W.B. Martin. Plaintiff complained about hernia pain and Martin discussed with plaintiff the results of the CT scan and plaintiff's request that medications be discontinued. (It is not clear from the record which medications were discussed and whether Martin discontinued any medications.) Martin refused to recommend surgery for plaintiff and made no changes to plaintiff's treatment.

On February 15, 2011, plaintiff saw Dr. Zahid Hameed about his hernia pain.

Hameed submitted a request to the medical review committee to refer plaintiff for a herniorrhaphy. On February 22, defendant Burnett reviewed the request and referred it to a "secondary medical reviewer." On February 23, Burnett reviewed the request again, as the secondary medical reviewer, and concluded that the request should be referred to the prior authorization committee. The committee denied the request. (The record contains no evidence about the timing of the committee's decision or the reasons why the committee denied the request.)

On February 25, 2011, plaintiff wrote to Department of Corrections Secretary Gary Hamblin to complain that the department would not authorize surgical repair of his hernia. The letter was forwarded to defendant Cynthia Thorpe, the health services nursing coordinator, for review. She responded on March 15, telling plaintiff that the physicians had followed department policy related to approval for non-urgent surgery and that he should follow the plan of care established by his treating physicians, including using the hernia belt, avoidance of heavy lifting, using extra-strength Tylenol and regular follow-up appointments.

D. Waupun Correctional Institution:

Defendants Dr. Sumnicht and Dr. Thomas Williams

On March 1, 2011, plaintiff was transferred to the Waupun Correctional Institution. On the same day, plaintiff submitted a health service request, asking to be seen for hernia pain. On March 17, plaintiff was seen by defendant Dr. Paul Sumnicht. Plaintiff told Sumnicht that he had had the hernia for seven years and that acetaminophen was not

working for his pain. Sumnicht noted that plaintiff had a hernia and a rash caused by Vitamin D deficiency. (Plaintiff says that Sumnicht told him that he could have surgery after his release and that pain was not enough to warrant surgery. Sumnicht denies this.) Sumnicht prescribed Vitamin D, Gabapentin (pain medication) and Sulindac (anti-inflammatory medication) and ordered a lower-tier housing assignment for 30 days. (It is not clear from the record whether the Gabapentin and Sulindac were prescribed for plaintiff's foot pain or his hernia.)

Later that day, plaintiff wrote to defendant Belinda Schrubbe, the health services manager at the Waupun Correctional Institution, complaining about the treatment he had been receiving for his hernia. She responded on April 1, stating that she had reviewed his chart and that his hernia did not need surgical intervention. She told him to try the medications prescribed by his doctor, wear the belt and follow up with the physician.

On May 4, 2011, plaintiff was seen again by defendant Dr. Sumnicht. Plaintiff told Sumnicht that the belt and medications were not helping and that the pain prevented him from standing or exercising. Plaintiff also complained about pain and blood during bowel movements. Sumnicht told plaintiff to pull his pants down for the examination. Plaintiff refused to pull his pants down because the door was open and he thought people would be able to see him. He also stated, "It's all playing games to avoid the cost of surgery" and that "8 years of a hernia was unacceptable." Sumnicht told plaintiff that he could not give an opinion on something he could not examine. The visit ended. Sumnicht noted in plaintiff's medical file that plaintiff had exhibited a normal gait and "spirometry" and appeared to

standing on his toes and landing on his heels without pain.

On May 29, 2011, plaintiff submitted a health services request, complaining that he had not received the surgical consultation he wanted. On May 31, he saw defendant Dr. Thomas Williams. Plaintiff told Williams that he had been suffering from pain from his hernia and had been requesting a surgical consultation for more than a year. Plaintiff told defendant that he was frustrated at being denied medical care for his hernia and that the previous staff that he had seen were incompetent. Williams told plaintiff to "Get out." Plaintiff tried to explain that he was complaining about previous doctors, not Williams. Williams terminated the evaluation and discontinued plaintiff's lower bunk and lower tier restrictions.

Plaintiff saw defendant Sumnicht on December 28, 2011 and May 30, 2012. The hernia had not changed. To date, plaintiff has not received surgery for the hernia.

OPINION

A. Defendants' Motion for Summary Judgment

1. Eighth Amendment medical care

Plaintiff contends that defendants violated his rights under the Eighth Amendment by failing to refer him to a specialist to determine whether he needed surgery for his hernia and by failing to provide him effective treatment for his hernia. Defendants have moved for summary judgment as to plaintiff's claim against all defendants. In determining whether defendants' motion for summary judgment should be granted, I must view all facts and

inferences in the light most favorable to plaintiff, the nonmoving party. Wisconsin Alumni Research Foundation v. Xenon Pharmaceuticals, Inc., 591 F.3d 876, 882 (7th Cir. 2010). To survive summary judgment on his claim, plaintiff must present evidence supporting the conclusion that he had an "objectively serious medical need" and that defendants were aware of his serious medical need and were "deliberately indifferent" to it. King v. Kramer, 680 F.3d 1013, 1018 (7th Cir. 2012) (citing Estelle v. Gamble, 429 U.S. 97, 104-05 (1976)).

Plaintiff contends that his hernia and accompanying pain are a serious medical need that require treatment. Defendants concede that an inguinal hernia that causes severe pain constitutes a serious medical need. Dfts.' Br., dkt. #44, at 9. Additionally, they have not argued that plaintiff was exaggerating his pain or that his hernia and pain were not serious enough to require treatment. Thus, for the purpose of summary judgment, plaintiff has shown that his hernia and the accompanying pain constituted a serious medical need that required treatment.

The more difficult question is whether plaintiff has presented enough evidence of deliberate indifference to survive defendants' motion for summary judgment. "Deliberate indifference" means that the defendant was aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). There are three categories of defendants in this case: (1) physicians who treated plaintiff personally (defendants Gaanan, Suliene, Martin, Sumnicht and Williams); (2) defendants who evaluated the surgical requests from plaintiff's treating physicians (defendants Burnett, LaBelle and Adler); and (3) defendants in

administrative roles that responded to plaintiff's written complaints about his treatment (defendants Tenebruso, Schrubbe and Thorpe).

a. Defendants Gaanan, Suliene, Martin, Williams and Sumnicht

When the defendant is a medical professional who has provided some treatment to the plaintiff, the standard for deliberate indifference requires the plaintiff to show that the defendant's "decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the [defendant] did not base the decision on such a judgment." Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996). This means that inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996). Although this is a high standard, plaintiff is not required to show that he was "literally ignored." Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005). A plaintiff may show that a defendant recklessly disregarded his medical needs by "choos[ing] an easier and less efficacious treatment without exercising professional judgment." McGowan v. Hulick, 612 F.3d 636, 641 (7th Cir. 2010).

Defendants contend that plaintiff cannot establish deliberate indifference because the only conclusion supported by the evidence in the record is that plaintiff's treating physicians exercised their medical judgment in evaluating and treating him. According to defendants, each of the treating physicians examined plaintiff, concluded that he did not need surgery

and provided him with other treatment, including medication and a hernia belt to treat his symptoms.

The problem for defendants is that they have adduced little evidence to support their contention that they used medical judgment when making their treatment decisions. Instead, they rely primarily on vague and incomplete accounts of plaintiff's medical appointments with defendants and their own conclusory statements about the quality of their care.

Turning first to defendant Gaanan, defendants contend that he "examined [plaintiff], concluded that he did not need surgery, and made sure that he had ordered [sic] to manage his discomfort." Dfts.' Br., dkt. #44, at 11. However, there is no evidence in the record to explain why Gaanan concluded that plaintiff did not need surgery or how Gaanan "made sure" that plaintiff's discomfort was managed. Gaanan could have clarified this by addressing the issue in his affidavit. Instead, Gaanan states only that he "did not prescribe pain medications because the assessment was for the status of the hernia and [plaintiff] had analgesics already ordered for him." Gaanan Aff., dkt. #47, ¶ 13. Gaanan also states in a conclusory manner that he "provided [plaintiff] with appropriate medical care." Id. at 17. However, as plaintiff points out, the analgesics had been prescribed previously for his foot injury and had not helped to relieve his hernia pain, which is why he asked to see a doctor about it. Thus, the only evidence in the record about Gaanan's treatment of plaintiff shows that plaintiff complained to Gaanan that he was having hernia pain despite taking analgesics and that Gaanan provided no treatment to plaintiff. Without further explanation from

Gaanan about his treatment decisions, a reasonable jury could infer that Gaanan failed to exercise medical judgment when treating plaintiff.

With respect to defendant Suliene, the record shows that Suliene saw plaintiff on four occasions regarding his hernia and associated symptoms. It is clear from the evidence in the record that Suliene provided plaintiff *some* treatment at each of these visits. After the first visit in June 2010, Suliene prescribed a hernia belt and pain medications to plaintiff; on the second visit in August 2010, Suliene told plaintiff to continue using the belt; in October 2010, Suliene requested a surgical consultation for plaintiff. Finally, in November 2010, Suliene requested a CT scan for plaintiff.

However, as with defendant Gaanan's treatment of plaintiff, the evidence in the record raises questions about whether Suliene's treatment decisions were based on medical judgment. At each of plaintiff's visits with Suliene, he told her that he was experiencing significant pain from his hernia and that pain medication was not helping. It would have been helpful if Suliene had explained in her affidavit why she made certain treatment decisions, such as prescribing a hernia belt to plaintiff instead of requesting surgical repair. Instead, she states only that she "made a treatment plan to issue [plaintiff] a hernia belt for use for 1 year, continue the [acetaminophen] for 6 months, and to follow-up as needed." Suliene's Aff., dkt. #50, ¶ 13. The record contains no evidence about whether a hernia belt is an appropriate treatment for plaintiff's type of hernia. However, assuming that Suliene's prescribing the hernia belt was not "blatantly inappropriate" initially, plaintiff has adduced evidence that his symptoms worsened and that he continued to feel severe pain during bowel

movements and when walking, standing or lying down. Nonetheless, Suliene declined to prescribe any additional treatment to plaintiff. She does not explain in her affidavit why she thought it was appropriate to continue plaintiff on the hernia belt and pain medication instead of trying alternative treatments.

As the court of appeals explained in Gonzalez v. Feinerman, 663 F.3d 311 (7th Cir. 2011), "physicians [a]re obligated not to persist in ineffective treatment." Id. at 314. In that case, the court of appeals reversed a district court's dismissal of a prisoner's complaint at the screening stage. The prisoner had alleged in his complaint that two prison physicians had failed to provide him adequate care for his inguinal hernia, which was causing him significant pain. Id. at 312. The physicians had given the prisoner pain medication, but had refused to authorize surgery, telling the prisoner that so long as the hernia was reducible he did not need surgery. Id. at 313. The court of appeals held that the district court dismissed the case improperly, noting that the prisoner could prevail on his claim by proving that "defendants' response to more than two years of complaints has been blatantly inappropriate in the face of his pain and the risk the worsening hernia poses to his present and future health." Id. at 314. The court concluded that "a factfinder reasonably could infer that [the defendants] substantially departed from professional judgment by refusing to authorize surgical repair for Gonzalez's painful hernia." Id. at 314. The court found it significant that plaintiff alleged that the doctors "never altered their response to his hernia as the condition and associated pain worsened over time." See also Arnett v. Webster, 658 F.3d 742, 754 (7th Cir. 2011) ("A prison physician cannot simply continue with a course of treatment that

he knows is ineffective in treating the inmate's condition.").

Although Suliene eventually requested a surgical consultation for plaintiff, she later participated in the committee that denied her own request. Suliene does not explain why she changed her mind or even what facts the committee discussed or considered in denying the request. It may be that the committee discussed plaintiff's case, consulted medical guidelines and concluded that his hernia was not so serious as to require surgery. The committee did note that the hernia was not interfering with plaintiff's "activities of daily living," but Suliene provides no explanation of how she came to this determination in light of plaintiff's complaints about severe pain while walking, standing and sleeping. As plaintiff's treating physician, Suliene had a responsibility to insure that the committee considered plaintiff's symptoms. Similarly, although Suliene ordered a CT scan of plaintiff's abdomen, she does not explain what the CT scan was intended to accomplish and makes no attempt to interpret the results for the court. Thus, there are several genuine factual issues remaining regarding whether Suliene's treatment of plaintiff constituted deliberate indifference to his serious medical needs.

The evidence in the record regarding the treatment decisions of defendants Martin, Williams and Sumnicht is similar. Plaintiff saw defendant Martin on January 21, 2011 and complained about his hernia pain. Martin refused to recommend surgery for plaintiff and made no changes to plaintiff's treatment. In his affidavit, Martin states that "[a]t no time did I fail to provide [plaintiff] with adequate medical care, knowingly disregard an excessive risk to [plaintiff's] health and safety, or knowingly subject [plaintiff] to pain and physical

injury." Martin Aff., dkt. #32, at ¶ 18. This may be true, but defendants provide no facts to support the statement. With respect to his treatment decisions for plaintiff, Martin says only that "[b]ased on my evaluation, I made no changes to [plaintiff's] current treatment plan because it was not discussed or needed." Id. at ¶ 9. This statement provides no explanation about why Martin declined to authorize surgery or change plaintiff's treatment and provides no basis for concluding that Martin's decisions were based on medical judgment.

Plaintiff saw defendant Sumnicht about his hernia and accompanying pain on four occasions. After the first visit, Sumnicht prescribed Vitamin D, pain medication, anti-inflammatory medication and a lower level tier for 30 days. Sumnicht does not explain why he made any of these treatment decisions or even whether the medications were for plaintiff's hernia or his foot. Sumnicht made no changes to plaintiff's treatment after his next three visits, stating in his affidavit that plaintiff had a normal gait, normal spirometry, was standing on his toes and landing on his heels without obvious pain and that the "hernia was reducible and no surgery [was] indicated." Sumnicht's Aff., dkt. #51, at ¶¶ 13, 15-16. Sumnicht does not explain why "no surgery [was] indicated" and how it was relevant to his treatment decisions that plaintiff's hernia was reducible and that plaintiff could stand and jump without obvious pain. It could be that hernia surgery is appropriate only for non-reducible hernias, but unfortunately, there is no evidence in the record on this issue.

Finally, defendant Williams saw plaintiff only once, on May 29, 2011. Plaintiff told Williams that he had been suffering from hernia pain and requesting a surgical consultation

for more than one year. Plaintiff also complained that his previous doctors were incompetent. Williams then told plaintiff the visit was over and terminated plaintiff's lower bunk and tier restrictions. Williams does not explain why he terminated the appointment, discontinued plaintiff's restrictions or failed to provide plaintiff any other treatment. He states in his affidavit only that "[b]ased on the visit with [plaintiff,] I discontinued the order for lower bunk and lower tier." Williams Aff., dkt. #52, at ¶ 11.

In sum, it is possible, and maybe even probable, that defendants Gaanan, Suliene, Martin, Sumnicht and Williams used medical judgment in making treatment decisions regarding plaintiff. However, the evidence of record raises questions about defendants' actions to which they have responded with little explanation of the reasoning behind their decisions. Thus, if a jury drew all inferences from the evidence in the record in favor of plaintiff, they could conclude reasonably that the treatment decisions by Gaanan, Suliene, Martin, Sumnicht and Williams were not based on medical judgment and were blatantly inappropriate.

Finally, although defendants contend that plaintiffs claim must fail because he "has not made any showing that surgical repair of his hernia is medically necessary," Dfts.' Br., dkt. #44, at 11, plaintiff does not have to show that surgery is medically necessary to prevail on his Eighth Amendment claim. Defendants have conceded that plaintiff's hernia and accompanying pain constitutes a serious medical need that requires treatment. Plaintiff contends that defendants were deliberately indifferent to his serious medical need not simply because they refused to recommend or authorize surgery, but because they failed to provide

him any adequate or effective treatment for his hernia despite knowing that he was experiencing severe pain. A jury viewing the evidence in the light most favorable to plaintiff could reasonably conclude that defendants knew that plaintiff had a hernia that was causing him severe pain and that defendants' actions in response to plaintiff's hernia fell outside the bounds of professional judgment. Therefore, I will deny defendants' motion for summary judgment with respect to plaintiff's Eighth Amendment claim against defendants Gaanan, Suliene, Martin, Williams and Sumnicht.

b. Defendants LaBelle, Adler and Burnett

Plaintiff contends that defendants Burnett, LaBelle and Adler exhibited deliberate indifference to his serious medical needs when they refused to approve a surgical consultation for him. Defendant LaBelle's only connection to plaintiff was his review of Dr. Suliene's October 2010 request for a surgical consultation. However, LaBelle did not deny the request; instead, he recommended that it be referred for secondary review because a medical expert needed to look at it. No jury could reasonably infer that LaBelle's actions constituted deliberate indifference to plaintiff's medical needs.

Defendant Adler's only connection to plaintiff was his participation in the prior authorization committee that reviewed Dr. Suliene's request for a surgical consult. The committee denied the request, noting that plaintiff's hernia "is not growing and his [activities of daily living] are not affected." It would have been helpful if Adler had explained how he made his decision to deny the surgical consult, including why it mattered

that plaintiff's hernia was not growing and whether the committee members considered plaintiff's complaints of severe pain. That being said, plaintiff has not adduced enough evidence to suggest that Adler intentionally or recklessly disregarded a serious harm to plaintiff of which Adler was aware. The evidence in the record suggests that Adler had very limited information about plaintiff's condition, provided only by Suliene. Plaintiff has not shown that the committee had access to plaintiff's medical records or knew that plaintiff's hernia was causing severe pain that interfered with his ability to stand, walk and sleep. The only reasonable inference to draw from the record is that Suliene told the committee that although plaintiff's hernia was causing him pain, it was not serious enough to affect his activities of daily life. Thus, although Suliene had personal knowledge of plaintiff's condition, that knowledge cannot be imputed to other committee members. In light of this limited information, Adler's participation on the committee that denied a surgical consultation for plaintiff is not enough to make him liable to plaintiff under the Eighth Amendment.

Defendant Burnett was in a position similar to that of defendant LaBelle. Burnett was aware of plaintiff's hernia issues through the surgical consultation requests filed by Dr. Suliene and Dr. Hameed. He neither approved or denied them; instead, he referred the requests to prior authorization committees for review. As with LaBelle, Burnett cannot be held liable for denying plaintiff medical treatment through these actions. Nevertheless, I will not dismiss Burnett from this case at this time. Plaintiff is seeking injunctive relief in the form of an order requiring his treating physician to refer him to a specialist for a surgical

consult. As the director of the Bureau of Health Services, Burnett would be in a position to insure that any injunctive relief is carried out. Therefore, Burnett will remain in the case in his official capacity, solely because of plaintiff's request for injunctive relief. Gonzales, 663 F.3d at 315 (holding that it was improper to dismiss warden who had no personal involvement in alleged Eighth Amendment violated because warden could "ensur[e] that any injunctive relief is carried out").

c. Defendants Tenebruso, Schrubbe and Thorpe

Finally, plaintiff seeks to hold defendants Tenebruso, Schrubbe and Thorpe liable for not insuring that plaintiff's treating physicians gave him proper treatment. Plaintiff made these defendants aware of his medical condition through his letters to them complaining about the treatment he had received for his hernia. Each defendant investigated plaintiff's complaints and determined that plaintiff was being treated by physicians. Tenebruso, Schrubbe and Thorpe are not physicians and were justified in relying on the judgment of plaintiff's treating physicians. They cannot be liable for deferring to the professional opinions of the treating physicians. Hayes v. Snyder, 546 F.3d 516, 527–28 (7th Cir. 2008).

2. Medical negligence

Plaintiff is also proceeding on claims against defendants for medical negligence in violation of Wisconsin law. To prevail on a claim for medical negligence, plaintiff must

prove that defendants breached their duty of care and he suffered injury as a result. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865. Defendants have moved for summary judgment on plaintiff's negligence claim, contending that plaintiff cannot prove that defendants failed to use the required degree of skill exercised by an average professional. In particular, they contend that because a lay person would not know the appropriate standard of care to which defendants were subject in this case, plaintiff must present expert testimony to establish the requisite standard of care. Carney-Hayes v. Northwest Wisconsin Home Care, Inc., 2005 WI 118, ¶ 37, 284 Wis. 2d 56, 699 N.W.2d 524. Defendants contend that because plaintiff has not named an expert to testify about the standard of care, his medical negligence claims should be dismissed.

In his brief in response to defendants' motion for summary judgment, plaintiff does not respond to defendants' argument about the standard of care. By failing to respond to defendants' argument, plaintiff waived any argument in opposition on the issue and has failed to meet his burden at summary judgment of showing that there are material facts in dispute regarding this issue. Wojtas v. Capital Guardian Trust Co., 477 F.3d 924, 926 (7th Cir. 2007) ("A failure to oppose an argument permits an inference of acquiescence and 'acquiescence operates as a waiver.'") (quoting Cincinnati Insurance Co. v. East Atlantic Insurance Co., 260 F.3d 742,747 (7th Cir. 2001)). Therefore, I am granting defendants' motion for summary judgment with respect to plaintiff's state law claims.

B. Plaintiff's Motions for Summary Judgment

Plaintiff moved for summary judgment against all defendants on his Eighth Amendment claims. Dkt. #25. As discussed above, I am granting defendants' motion for summary judgment with respect to plaintiff's claims as to defendants Adler, LaBelle, Tenebruso, Schrubbe and Thorpe. Thus, I need not consider plaintiff's motion as to those defendants.

Although I am denying defendants' motion as to defendants Gaanan, Suliene, Martin, Williams, Sumnicht and Burnett, I must deny plaintiff's motion as to those defendants also. There are simply too many disputed issues of fact regarding defendants' treatment decisions.

Plaintiff filed a successive motion for summary judgment regarding his state law claims. Dkt. #53. As I discussed above, I am granting defendants' motion for summary judgment on these claims because plaintiff failed to address the appropriate standard of care in his response to defendants' motion. Plaintiff also fails to discuss the standard of care in his own motion. Additionally, he makes several arguments in his motion about whether some of the physicians failed to obtain his informed consent to treatment. Plaintiff was not granted leave to proceed on a claim about informed consent and he cannot raise new claims or theories at the summary judgment stage.

C. Appointment of Counsel

I rejected the motion for appointment of counsel plaintiff filed at the outset of this case, holding that it was too early to determine whether plaintiff would be able to litigate

this case on his own. In a recent letter to the court, dkt. #71, plaintiff states that he is in segregation, suffering from mental and physical problems and that he prepared a renewed motion for appointment of counsel that was lost during a stay in observation. Under the circumstances and because this case will proceed to trial, I conclude that appointment of counsel is appropriate. The trial will involve primarily testimony from medical providers and experts and an attorney will be more capable at preparing for and conducting examinations of such witnesses. Additionally, plaintiff showed early in this case that he made reasonable efforts to find a lawyer by submitting the names and addresses of three lawyers whom he asked to represent him on the issues in this case and who turned him down.

Accordingly, I will stay all further proceedings in this case temporarily in order to locate a lawyer who is willing to represent plaintiff. A lawyer accepting appointments in cases such as this takes on the representation with no guarantee of compensation for his or her work. Plaintiff should be aware that in any case in which a party is represented by a lawyer, the court communicates only with counsel. Thus, once counsel is appointed, the court will no longer communicate with plaintiff directly about matters pertaining to this case. Plaintiff will be expected to communicate directly with his lawyer about any concerns and allow the lawyer to exercise his or her professional judgment to determine which matters are appropriate to bring to the court's attention and what motions and other documents are appropriate to file. Plaintiff will not have the right to require counsel to raise frivolous arguments or to follow every directive he makes. He should be prepared to accept his lawyer's strategic decisions even if he disagrees with some of them and he should understand

that it is highly unlikely that this court would appoint another lawyer to represent him if he chooses not to work cooperatively with the first appointed lawyer. After the court locates a lawyer to represent plaintiff, I will schedule a status conference to reset the schedule in this lawsuit.

ORDER

IT IS ORDERED that

1. Plaintiff Marcuss Childs's motions for summary judgment, dkt. ##25, 53, are DENIED.

2. The motion for summary judgment filed by defendants Cynthia Thorpe, David Burnett, Ken Adler, Dalia Suliene, James LaBelle, Carlo Gaanan, Lillian Tenebruso, Belinda Schrubbe, W. Brad Martin, Paul Sumnicht and Thomas Williams, dkt. #43, is GRANTED IN PART and DENIED IN PART. The motion is GRANTED as to plaintiff's claims against defendants Adler, LaBelle, Tenebruso, Schrubbe and Burnett, in his individual capacity, as well as plaintiff's claims under Wisconsin state law against all defendants. The motion is DENIED as to plaintiff's claims under the Eighth Amendment against defendants Suliene, Gaanan, Martin, Sumnicht and Williams, as well as plaintiff's claims against Burnett in his official capacity.

3. Plaintiff's renewed motion for appointment of counsel, dkt. #71, is GRANTED. The current schedule is this case is STRICKEN and further proceedings are STAYED pending appointment of counsel for plaintiff. As soon as I find counsel willing to represent plaintiff, I will advise the parties of that fact. Soon thereafter, a status conference will be

held to establish a new schedule for this case.

Entered this 20th day of August, 2012.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge