No. 06-1414

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DIEGO GIL,	)	Appeal from the United States
	)	District Court for the Western
	)	District of Wisconsin
	)	
Plaintiff-Appellant,	)	Case Number 00-C-0724-C
	)	
v.	)	
	)	
JAMES REED,	)	Hon. Barbara B. Crabb
JAIME PENAFLOR, and	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendants-Appellees.	)	

REPLY BRIEF FOR PLAINTIFF-APPELLANT DIEGO GIL

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ARGUMENT

Far from supporting the ruling below, appellees' brief powerfully demonstrates why trial is necessary on Gil's claims. Appellees' arguments, by and large, are not directed at disagreements about the governing law – with which both sides appear largely to agree – *but to what the facts are.* And even then appellees' showing has serious flaws. Sometimes, for example, appellees simply get the facts wrong (at least for this stage of the case):

- Appellees claim (at 57) that Gil first complained of constipation following his second rectal prolapse surgery on May 5, 2000. Gil, however, actually complained about constipation on May 2, 2000. SA122-SA123 (¶95). This three-day gap is material, because Gil was unable to get an enema until May 10, and Dr. Kim testified that a patient should receive an enema within four to five days of complaining of constipation and "[d]efinitely within a week." SA453 (33:11-17).

- Appellees state (at 50) that "there is no evidence that the plaintiff's surgical infection ('soft- non-tender') required any treatment on [March] 20th." But Gil expressly stated that, on the 20th, he told Kedrow that he was in pain in the area of his abdominal incision and showed Kedrow a bulge in the area. SA110 (¶¶42-43); SA439 (¶7). This dispute is material to whether Kedrow was negligent in doing nothing to treat Gil's infection – which grew to the size of a golf ball over the weekend – giving Gil a pamphlet on back exercises instead.

Other times, appellees' statements are highly misleading, omitting critical details that cut against their argument. For instance:

- Appellees state at (52) that "following Dr. Heise's June 14, 1999 recommendation that Gil see a specialist, he was seen by Dr. McDonald on August 4, 1999." However, Dr. Heise's recommendation was that Gil see a *colorectal* specialist. SA116 (¶66). Dr. McDonald was not a colorectal specialist, only a general surgeon. SA226; SA434 (¶7); SA474-478. Gil was unable to see a colorectal specialist until January 6, 2000. SA120 (¶85). Whereas Dr. McDonald recommended a transabdominal approach that posed the risk of nerve damage and impotence (SA117 (¶68); SA200), the

> colorectal specialist recommended an anal approach, which did not pose those risks (SA120-121 (¶85)). These facts are indisputably relevant to whether FCI-Oxford was negligent in failing to arrange a second opinion from a colorectal specialist for Gil from June 1999 to January 2000 – a period during which Gil was in severe pain and had to push his rectum back into his body after each bowel movement. SA116-117 (¶67); SA439 (¶11).

But that's not all. On numerous instances, appellees expressly acknowledge that there is a disputed issues of material fact, but they nevertheless ask this Court to discredit Gil's evidence, calling it not "credible." *See* Appellees' Br. 21-23, 29, 36, 43.

This Court previously attempted to put an end to such efforts. When hearing this case before, this Court stated that, at this stage of the case, it must "construe the facts in a light most favorable to Diego Gil, the party opposing judgment, and * * * draw *all* reasonable inferences in his favor." SA329 (emphasis added). Moreover, it explained that it was not for the Court to resolve credibility disputes on paper motions at summary judgment but for the jury at trial, where the jurors could observe the witness's demeanor under cross-examination. *See* SA342 ("To survive summary judgment [on the FTCA claims], Gil need not prove his claim[s]; he need only show that there is a genuine issue of material fact as to each of the[] elements."); SA350-51 ("Although Reed has an alternate explanation for the course of action he took, Gil has presented sufficient facts to create a genuine issue as to Reed's state of mind in refusing to follow the specialist's advice. * * * [At trial, Reed may attempt to show] that his decisions were simply an exercise of medical judgment rather than deliberate indifference.").

Appellees have failed to heed this Court's message. This Court should reiterate that all of Gil's claims warrant trial and reverse the district court yet again.

I. Appellees Impermissibly Seek To Have This Court Resolve Credibility Disputes.

It is hornbook law that in reviewing a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Id.* Thus, "[o]n a motion for summary judgment, we 'may only determine whether or not there exists a dispute as to a material issue of fact. [We are] not permitted to resolve that dispute.'" *Richie v. Glidden Co., ICI*, 242 F.3d 713, 723 (7th Cir. 2001) (quoting *Dreher v. Sielaff*, 636 F.2d 1141, 1144 (7th Cir. 1980)).

These propositions apply not just to *what* happened but also to *why* it happened. Indeed, this Court has held that "summary judgment is particularly inappropriate for settling issues of intent or motivation." *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1042 (7th Cir. 1993) (citing *Connor v. Reinhard*, 847 F.2d 384, 393-94, 396-97 (7th Cir. 1988); and *Kephart v. Institute of Gas Tech.*, 630 F.2d 1217, 1218 (7th Cir. 1980) (per curiam)).

To be sure, there may be instances where the evidence "is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. But that situation is the extreme exception and not the rule. As this Court explained:

> We realize that a gander at the evidence presented by [the non-movant] reveals that it is far from overwhelming. However, as we have repeatedly recognized, summary judgment is not the place to resolve

> evidentiary conflicts. "Before it can properly be granted, therefore, the court must have a very high degree of confidence that any disagreement over the facts is spurious."

Thomas & Betts Corp. v. Panduit Corp., 138 F.3d 277, 302 (7th Cir. 1998) (quoting *Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 83 F.3d 169, 170 (7th Cir. 1996)).

Credibility disputes certainly cannot be resolved merely because the factual conflicts are between a prisoner on the one hand and physicians or their assistants on the other. As this Court once stated quite unequivocally, "[i]t was improper for the district court to credit the affidavits of the physicians over those of [plaintiff and another]. Although a factfinder might ultimately give more weight to the opinion of a physician than to a pre-trial detainee and another inmate, to make that decision at the summary judgment stage usurps the role of the factfinder." *Wilson v. Williams*, 997 F.2d 348, 350 (7th Cir. 1993). The legal standard is no different merely because the claim involves deliberate indifference to a prisoner's serious medical needs and medical malpractice. Even in this context, the Court has held that "[w]e are required to accept all of [the prisoner's] evidence as true, drawing all reasonable inferences in his favor, and may not downplay his evidence, or conduct a 'paper trial' on the merits of his claim." *Reed v. McBride*, 178 F.3d 849, 852 (7th Cir. 1999).

While appellees attempt to impugn Gil's testimony as unreliable, that simply is not enough to warrant summary judgment. *See Ritchie*, 242 F.3d at 723 ("It is possible that a factfinder would indeed find Grooms' testimony unreliable, but this type of credibility assessment is not available at the summary judgment stage."); *Derrico v.*

Bungee Int'l Mfg. Co., 989 F.2d 247, 250 (7th Cir. 1993) (same). The numerous evidentiary battles appellees pick are for a jury to resolve, not this Court.

II. Gil Is Entitled To Trial Against Penaflor.

Though one would not know it from appellees' brief, this Court has already determined the applicable facts and permissible inferences relevant to Gil's claims against Penaflor. "Construing the facts in Gil's favor," the Court explained, "Penaflor simply refused to provide a prescribed antibiotic to a person with a serious infection. His angry tone of voice at the time of the refusal could indicate that he had no legitimate reason for the refusal and may have been motivated by malice." SA345; *see also* Gil Br. 5-6.

Even though the district court accepted this formulation of the events and based its decision solely on its (erroneous) belief that Gil suffered no injury from the denial, appellees strive to relitigate the scope of permissible inferences from the evidence. For instance, they make numerous claims designed to suggest that the antibiotic was not available when Gil saw Penaflor on the 23rd (Appellees' Br. 7-8) and even argue that this Court erred in inferring that "the bottle in Penaflor's hand [which he refused to give for no reason] was actually Gil's [antibiotic]" (*Id.* at 33 n. 4). However, in attacking *what* occurred, appellees cite no new evidence explaining why the inferences this Court previously drew are no longer reasonable. To the contrary, they claim that the inferences were unreasonable "then" and "now." *Ibid.* There is absolutely no legal basis for the Court to revisit the inferences it has already drawn, which are law of the case. *See, e.g.*, *Butera v. Apfel*, 173 F.3d 1049, 1053 (7th Cir. 1999) ("[A] prior ruling of the Court

dealing with the same subject matter and same parties in the same case is conclusive and is the law of the case."); *Creek v. Village of Westhaven*, 144 F.3d 441, 446 (7th Cir. 1998) ("This court has long held that matters decided on appeal become the law of the case to be followed … on second appeal, in the appellate court, unless there is plain error of law in the original decision.") (internal quotation marks omitted).

Moreover, appellees fail to mention other facts indicating that the bottle was Gil's antibiotic:

- Gil was advised to take the antibiotic "that very day, and that [it] would be available at the medication line." SA111-SA112 (¶47).
- Medical records and pill bottle labels indicates that both the pain reliever and the antibiotic "were countersigned for dispensing" "at around noon" on the 23rd. SA113 (¶52); SA176; SA180.

Based on this evidence, it was reasonable "then" and "now" for this Court to infer that the antibiotic was ready on the 23rd, but that Penaflor simply refused to give it to Gil.

Appellees' attempt to explain why Penaflor's malicious conduct caused Gil no injury is even more unfounded. For one, appellees seem to argue that the only sort of recoverable injury is additional pain. See Appellees' Br. 29 (citing *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002); and *Vance v. Peters*, 97 F.3d 987, 991 (7th Cir. 1996)). If this is appellees' argument, it is flat wrong. Courts have held that prolonged suffering for no reason supports an Eighth Amendment violation, even when there is no pain. *See, e.g.*, *Koehl v. Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (denial of eyeglasses is actionable under the Eighth Amendment). Indeed, this Court effectively recognized as much in its prior decision here. It stated that Gil's potential injury was not just additional pain, but

also unnecessary "discomfort and a spreading of the infection." SA345. Each was a form of "needless suffering for no reason." SA348. "That is enough to survive summary judgment." *Id*.

Neither *Walker* nor *Vance* are to the contrary. Each of those cases merely indicates that the wanton infliction of pain could form the basis of a constitutional claim. *Walker*, 293 F.3d at 1037; *Vance*, 97 F.3d at 991. Neither even remotely suggests that other forms of "suffering" cannot be a recoverable injury. We are not aware of any case so holding.

In any event, there is evidence that Gil experienced pain because of Penaflor's actions. As this Court observed, "Gil presented testimony as to the pain caused by the infection, which required lancing and draining multiple times, and he also presented evidence that within 24 hours of taking the antibiotic he began to feel better." SA348. This is sufficient evidence of injury at this stage of the proceedings. Gil Br. 19.

Appellees attempt to discredit Gil's testimony by calling him an "uninformed lay[person]." Appellees' Br. 31. They claim that "his uninformed lay testimony is of no aid to a trier of fact as to whether the *cause of the pain* was helped or harmed by the medical treatment provided or denied by PA Penaflor." *Id.* This is a weak argument at the summary judgment stage in general. *See supra* p. 4. But it is even more remarkable when applied to a *res ipsa* claim! The whole point of the *res ipsa* doctrine is that the challenged action is of such a sort that causation can reasonably be inferred *without expert testimony*. *See Maroules v. Jumbo, Inc.*, 452 F.3d 639, 644 (7th Cir. 2006) ("[T]he doctrine of res ipsa loquitur does not require a plaintiff to submit evidence of causation. After all, res ipsa loquitur is a doctrine of common sense. It allows a trier of fact to draw

an inference of negligence when evidence of causation is lacking."). This Court has already held that the doctrine of *res ipsa loquitur* applies to Penaflor's refusal to give the antibiotic and "thus no expert testimony is needed" to prove causation or anything else. SA345. As this Court explained, "[i]t is within a layperson's purview" to know the sorts of injuries that can be caused by the "failure to supply or delay in supplying [an] antibiotic." *Id*.

Perhaps realizing this problem, appellees ask this Court to reconsider its holding that *res ipsa* applies to Penaflor's refusal. Appellees argue that "[t]he professional opinions of both Dr. Kim and Dr. Harms directly contradict [this Court's] finding" that a "failure to supply or delay supplying the antibiotic can result in unnecessary pain, discomfort, and a spreading of the infection." Appellees' Br. 35 (emphasis omitted). Appellees, however, grossly misread the doctors' testimony, construing it in their favor, rather than Gil's.

As Gil explained before (at 19-21), the doctors' testimony *supports* a finding that Gil was injured by Penaflor's conduct. Dr. Kim, for instance, expressly stated that Cephalexin was useful "to cover the soft tissue infections." SA454 (39:24). He did opine that "[a] twelve-hour delay in antibiotic *probably* has *very little* outcome" (SA453 (36:16-17) (emphasis added)) and that the delay might not "*make that much difference per se*" (SA455 (41:7) (emphasis added). But both of those statements imply some injury. Dr. Kim *never* stated that the twelve-hour delay could not have injured Gil.[1] The same is

[1] Dr. Kim did state that a "twelve-hour delay probably wouldn't make any difference" if the antibiotic was prescribed *after* a lancing-and-draining session. SA455 (41:10-14) (emphasis

true for Dr. Harms. He specifically addressed the question "did the failure to provide prescribed antibiotic Cephalexin on 03/23/98 cause *any* additional harm, pain, or suffering or affect the treatment of Mr. Gil's incisional abscess." SA356 (emphasis added). He did not answer "no." To the contrary, he said that "[t]he failure to administer an antibiotic for a period of time did not cause *undo* problems * * *." *Id.* (emphasis added). Appellees implicitly concede this distinction twice. *See* Appellees' Br. 30 (Dr. Harms opined "that a 'twelve hour delay in the delivery would not *significantly* affect or delay the healing of the abscess.'") (emphasis added); *id.* ("Dr. Harms testified that a delay in beginning the prescribed antibiotic course would not *materially* effect either the amount of pain Gil had as a result of the infection or the course of its healing * * *.").

This distinction between "no injury" and "no significant injury" is crucial. There is no requirement that the resulting injury be severe – only that the plaintiff have a serious medical need. Gil Br. 22 (citing *Parrish v. Johnson*, 800 F.2d 600, 610-11 (6th Cir. 1986); *Cummings v. Roberts*, 628 F.2d 1065, 1068 (8th Cir. 1980); and *Cooper v. Casey*, 97 F.3d 914, 917 (7th Cir. 1996)). Appellees offer no contrary authority. Nor do they challenge this Court's previous holding that Gil had a serious medical need when Penaflor refused to give him the antibiotic. Gil Br. 17. In these circumstances, whether

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added). But that does not describe Gil's situation. Gil's infection required *three* lancing-and-draining sessions, *all of which occurred after Penaflor's refusal to give him the antibiotic*. SA113 (¶53).

Gil's injury was "significant" goes only to the quantum of damages, not to the fact of injury and whether Gil has a viable claim. [2]

III. Gil Is Entitled To Trial Against Dr. Reed.

Appellees' attempt to have the claims dismissed against Dr. Reed is even more bewildering. Gil's opening brief identified several factual and legal deficiencies in the district court's ruling. Gil Br. 26-27. *Appellees do not take issue with any of them* (at least explicitly). Instead, they pick several other evidentiary battles, such as:

- Is there evidence of animus?
- Is Tylenol III more constipating than Vicodin?
- Are Metamucil and Milk of Magnesia dehydrating?

On each of these evidentiary issues, appellees do not contest that there is a factual dispute; they insist only that the dispute is not "credible." But, as explained above (at 3-4), resolving such credibility disputes is improper at this stage – especially on issues of motivation. As this Court held previously, "Reed has an alternate explanation for the course of action he took * * * [and] may be able to show at trial that his decisions were simply an exercise of medical judgment rather than deliberate indifference. * * * [But] Gil has demonstrated a genuine issue of material fact regarding whether Reed was deliberately indifferent to his serious medical needs." SA350-SA351. Nothing justifies a different conclusion now.

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[2] The district court also held that Penaflor's actions did not support an FTCA claim because of the lack of injury. Gil Br. 23-24. That is wrong for the reasons explained above.

A. Appellees do not dispute that the district court erred in resolving Gil's claims against Dr. Reed.

Amidst appellees' attempt to deny Gil the factual inferences to which he is entitled, they actually leave untouched much of Gil's showing. Three uncontested points bear mentioning.

1. *The district court got the facts wrong.* Gil explained (at 26) that the district court committed two factual errors. First, the district court stated that Dr. Reed prescribed both Milk of Magnesia and Metamucil after four days. In fact, the Metamucil was not prescribed then, but was provided a week later. Though appellees repeat the district court's erroneous statement (at 37), they do not contest this error (or point it out).[3] Second, Gil explained (at 26-27) that the district court misleadingly suggested that there was no "express warning" that Gil should not take Tylenol III because of its tendency to cause constipation, when, in fact, Dr. Kim had given such a warning to Gil, which Gil conveyed to Dr. Reed. Instead of denying that Dr. Reed was warned not to give Gil Tylenol III, appellees laud Dr. Reed for ignoring the warning. *See* Appellees' Br. 40 (Dr. Reed "choo[se to] disregard Dr. Kim's 'warning' communicated to him by his patient" because he thought it was in Gil's interest).[4]

2. *The district court erred in concluding that the Eighth Amendment inquiry turned on whether the standard of care was met.* The district court ruled that Gil could not establish an Eighth Amendment violation because Gil could not prove that Dr. Reed's actions

[3] Appellees also fail to mention the error when they state (at 42) that "[t]hree days later, when Gil still had not had a bowel movement, Dr. Reed reconsidered his prescriptive decision."

[4] Appellees primarily defend Dr. Reed's choice to give Tylenol III by arguing Motrin was not a viable substitute. Their argument is unpersuasive. *See* Gil Br. 31-32 n.11.

violated the standard of care. A15 ("In light of [the evidence] that plaintiff's post-operative care was not inappropriate, there is no basis for a finding that defendant Reed was deliberately indifferent to plaintiff's serious medical needs when he altered plaintiff's post-operative care."). Gil's opening brief explained that this holding was wrong. Because the Eighth Amendment test is subjective — focusing on the official's motivation for his actions – it is unnecessary to prove a violation of the standard of care to state a claim. Gil Br. 28-29 (citing *Ledford v. Sullivan*, 105 F.3d 354, 359 (7th Cir. 1997); *Hathaway v. Coughlin*, 37 F.3d 63, 68 (2d Cir. 1994); and *Durmer v. O'Carroll*, 991 F.2d 64, 67-68 nn. 8-10 (3d Cir. 1993)). Moreover, Gil explained (at 28-30) that he could have a viable Eighth Amendment claim against Dr. Reed if Dr. Reed's actions were motivated by animus against Gil, even if the standard of care was met. This not just a theoretical point: the record contains evidence that Dr. Reed was hostile to Gil because Gil sued him previously and once made Gil wait uncomfortably for six and a half hours for an appointment, telling Gil "that [he] should not expect to come to him for medical assistance now that [Gil had] sued him." Gil Br. 29-30; *see also* SA219 ("I was forced to the wait – knowing I was uncomfortable sitting due to my medical problem").

Though appellees seek to distinguish *Durmer* on its facts (at 43-44), appellees do not challenge the broader proposition for which it – and *Ledford* and *Hathaway* – stand: that Dr. Reed's actions are constitutionally actionable if they were motivated by animus against Gil, regardless of whether those actions violated the standard of care. Rather, appellees merely argue that there is no "credible evidence" of animus here, because the statements Gil cited in his opening brief "preceded the facts of this case by nearly two

years, are not related to this case, and are not part of the record considered by the district court." Appellees' Br. 36-37 & n.5. This response is quite perplexing. To begin with, the evidence of animus is undoubtedly part of the record here. The statements were mentioned in Gil's first declaration (SA124 (¶100)), and included among the materials he attached as exhibits to that declaration (SA218-SA219). Appellees have cited to this declaration and the attached exhibits repeatedly in their brief. *See* Appellees' Br. 9-10, 25, 42, 44, 52-54 (citing SA116, SA187, SA199-SA200, SA208, SA216, SA221-SA226, SA230-SA233, SA239, SA248). Thus, this evidence is in the record.[5]

Appellees' other arguments – that the statements "preceded the facts of this case by nearly two years, and are not related to this case" – go only to the statements' weight. Indeed, in our view, the fact that these statements were memorialized in an administrative report before Dr. Reed changed the prescriptions, *adds* significant weight to the statements' probative value because there can be no argument that Gil made them up for this case. Moreover, we disagree that they are not "related to this case." The statements speak for themselves and more than suffice to create a triable issue regarding Dr. Reed's motivation.

[5] Perhaps appellees mean that the animus evidence was not listed in Gil's proposed findings of fact (which is true). But appellees themselves did not propose a finding of fact on this point either. *See* Dkt. 70, 89. Moreover, before the district court held that there cannot be an Eighth Amendment violation if the standard of care was met, *nobody* had ever made that claim (only the boilerplate argument that medical malpractice, without more, does not establish a constitutional violation). In these circumstances, where the district court went beyond the parties' legal arguments and undisputed facts in resolving a claim, this Court can consider the entire record on review. *See Nabozny v. Podlesny*, 92 F.3d 446, 450 (7th Cir. 1996); *Brown v. United States*, 976 F.2d 1104, 1110 (7th Cir. 1992).

3. *The district court's ruling contradicts applicable precedent.* While appellees argue that the evidence here shows, at most, "'[m]ere differences of opinion among medical personnel regarding a patient's appropriate treatment'" (Appellees' Br. 38, 41 (quoting *Estate of Cole v. Fromm*, 94 F.3d 254, 261 (7th Cir. 1996)), they offer no response to Gil's claim (at 33-34) that, "to our knowledge, the medical judgment defense has never been applied [at the summary judgment stage] where a generalist doctor explicitly ignores a specialist's instructions, where there is evidence that the doctor was motivated by malice, or where there is evidence that the 'medical judgment' aggravated the very (warned-about) condition it was supposed to address." Nor do they respond to Gil's claim (at 34) that applying the medical judgment defense here would contradict this Court's prior ruling in *Jones v. Simek*, 193 F.3d 485 (7th Cir. 1999), which this Court said applied here (SA350). Thus, appellees appear to agree that the ruling they seek is not only novel, but also *contrary* to applicable precedent.

B. Appellees improperly construe the evidence in their favor, not Gil's.

Appellees' effort to defend the substance of Dr. Reed's conduct also fails. Appellees attempt a "divide and conquer" strategy, inviting the Court to view evidence in isolation so that hopefully it will miss the overall picture. Thus, appellees (i) show why the substitution of Tylenol III for Vicodin was acceptable (at 38-41) and then (ii) separately explain (at 41-43) why the cancellation of the prescriptions for Metamucil and Milk of Magnesia was justifiable. But it was the *combination* of those two actions that this Court found particularly "curious." SA350. Appellees never try to justify Dr. Reed's conduct as a whole.

In addition, appellees significantly overreach in their arguments. Try as they might to paint Tylenol III and Vicodin as equivalent, they cannot avoid Dr. Kim's statement that they are not: while "there is little difference between codeine and hydrocodone" "from purely a pain management point of view," "it's been known, or at least from my experience, that Tylenol #3 tend to give more constipations (sic) than Vicodin, and it's one of the reason I don't use Tylenol #3." SA450 (21:10-15); SA451 (27:17-21) (same). Appellees presented no evidence that Dr. Reed knew as much as Dr. Kim about the relative side-effects of both drugs following rectal prolapse surgery. Gil Br. 34. Based on that fact and Dr. Kim's testimony, Gil is entitled to the inference, at this stage, that Tylenol III is more constipating than Vicodin. This inference is material because Gil just had rectal surgery, and Dr. Reed cancelled two of the three prescribed laxatives.

Appellees do no better justifying Dr. Reed's decision to cancel the prescription for those laxatives. They claim (at 42) that Dr. Reed feared "excessive dehydrat[ion]." But Dr. Kim testified that Milk of Magnesia and Metamucil "shouldn't cause dehydration" (SA452 (29:16-30:1)) and that Vicodin and Metamucil were the "standard" post-operative treatment (SA448 (15:8-10)). When Dr. Kim learned that his prescription had been changed, he was upset and rewrote his original prescription. SA449 (20:7-21).

Appellees' try to trivialize Dr. Kim's contemporaneous, angry reaction by pointing to Dr. Kim's subsequent characterization of it as only a "professional disagreement." Appellees' Br. 41. However, a jury need not accept Dr. Kim's subsequent testimony, given in a litigation context, if his prior actions and statements

could reasonably support a different conclusion, which is true here. Indeed, it is worth re-mentioning that this Court previously held that this same evidence was sufficient to create a genuine issue of material fact on Gil's claims, and none of the evidence supporting that holding his been withdrawn. Gil Br. 25. Although some new evidence has been entered into the record, and that evidence may create additional genuine issues of material fact, the addition of that evidence does not eliminate the genuine issues of material fact that this Court previously identified. Gil Br. 15-16.

Appellees, again, take no issue with this argument. Thus, even if appellees were right about the "new" evidence, which they are not, they still would not be entitled to summary judgment.

IV. Gil Is Entitled To Trial On His Remaining FTCA Claims.

Appellees' arguments on Gil's remaining FTCA claims also fail. For one, appellees intimate that state evidentiary law should apply (at 46), but give no reason for this Court to disregard its prior holding that, in federal court, "the Federal Rules of Evidence apply exclusively." SA343. Appellees assert (at 46 n.6) that the choice of evidentiary law is immaterial. But that is true only in the sense that Gil's evidence suffices to create a genuine issue of material fact regardless of which law applies. It is not true in the sense appellees' suggest: that expert testimony is required on Gil's claims under federal law, too. As this Court stated previously, under federal law, "no expert testimony is needed when the symptoms exhibited by the plaintiff are not beyond a layperson's grasp." SA343. That descriptor applies to Gil's FTCA claims – pain is obviously a symptom in a layperson's grasp.

Furthermore, appellees say nothing about Gil's common-law negligence claims. Gil Br. 38-39. Thus, while appellees critique the lack of expert testimony on certain issues (at 48, 50) and deem the expert testimony insufficient to raise a genuine issue of material fact on other issues (at 54, 57), they ignore that expert testimony is *not* required for Gil's common-law negligence claims. Gil Br. 39.

Finally, appellees again overreach with the facts, either making outright factual errors or ignoring facts that undercut their account of the events. Gil is entitled to trial on all his FTCA claims.

1. Gil's first set of claims involve several acts from March 19, 1998, to March 23, 1998, over which Gil's infection at his incision site grew to the size of golf ball.

i. Gil's inability to get evening medical care. Appellees suggest that it was acceptable for Gil to have no night-time recourse to medical personnel, despite his severe pain, because his injuries were "obviously, not life threatening." Appellees' Br. 24; *id.* at 47-48. But the test for negligence is not whether Gil's injury was life-threatening; it is whether the risk of injury outweighed the cost of obtaining treatment. Gil Br. 40-41. While life-threatening injuries will satisfy that requirement, so will other injuries. *See, e.g.*, *Lama v. Borras*, 16 F.3d 473, 481-82 (1st Cir. 1994) (deficient charting causing infection following herniated disc surgery was negligent). Appellees do not dispute that Officer Harris tried to obtain immediate treatment for Gil but failed.[6]

[6] Appellees are correct in asserting (at 47) that there is no evidence that Gil's injury was life threatening, that Officer Harris ever said the injury was life threatening when requesting care for Gil, and that medical care would have been unavailable to Gil had his life been in danger.

Appellees claim (at 48) that Gil's allegations of pain should be disbelieved because "[e]ighteen hours later, when he made sick call, he did not even mention a complaint of surgical site pain to PA Kedrow." But, again, appellees are simply wrong on the facts. *See supra* p. 1. Besides, appellees' arguments are based completely on Kedrow's notes, which are neither comprehensive nor infallible. At most, the notes create a disputed issue of material fact to be resolved at trial.[7]

Indeed, appellees are wrong in suggesting (at 47) that, if the Court rules for Gil on this claim, "then every prisoner's complaint of pain would have to be [] referred [for immediate treatment], or the BOP would need to provide 24-hour medical service at all federal prisons." Not every prisoner had a severe rectal prolapse surgery a couple weeks before he sought treatment. And not every prisoner has a noticeable growth in the size of the infection because he could not obtain treatment. Gil's case is undoubtedly sufficiently unique as not to cause an avalanche of unwarranted litigation.

ii. Kedrow's failure to treat Gil's infection. Appellees, again, are simply wrong on the facts. They assert "there is no evidence that the plaintiff's surgical infection ('soft-non-tender') required any treatment on the 20th." Appellees' Br. 50; *see also id.* at 48 (quoted *supra*). But the record is clear: Gil told Kedrow that he was in pain in the area of

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But those facts do not mean that Gil's situation was not an "emergency," as appellees claim (*id.*). How one chooses to characterize the severity of Gil's condition is merely a matter of semantics.

[7] Appellees also point to Dr. Harms's statement that "the recognition, treatment and management of Gil's wound infection was within the standard of care in the community." Appellees' Br. 48. Of course, that is nothing more than Dr. Harms's legal conclusion, which the jury can disregard. Gil Br. 30-31. Moreover, it is clear that Dr. Harms did not view the evidence in Gil's favor, as is required at this stage, when reaching this conclusion. Otherwise – to take one example – his conclusion would mean that Penaflor met the standard of care in refusing to provide an antibiotic for no reason – an unsupportable position.

his abdominal incision and showed Kedrow a bulge in the area. *See supra* p. 1; *cf.* SA167, SA170 (complaints of abdominal pain to other personnel). How much more could Gil do? Appellees claim that this is insufficient to prove "that *immediate emergency medical intervention* was necessary to treat the problem." Appellees' Br. 49 (emphasis added). But that is not the relevant inquiry. The issue is whether a lay person could reasonably conclude that Kedrow erred in doing nothing to investigate Gil's complaints of pain at his abdominal incision site, instead simply giving Gil a pamphlet on back exercises. Indeed, appellees admit (at 49) that Gil's infection became noticeably more severe over the weekend. It is thus hard to comprehend how appellees could even attempt to defend Kedrow's choice to do nothing about the infection.

iii. Penaflor's angry refusal. In addition to what is discussed above (at 5-10), we note that appellees have not responded to Gil's argument (at 43 n.16) that negligence in treating Gil's infection at the site of his incision also may have contributed to the development of a "relatively large ventral hernia" "in the incision area." SA116 (¶65).

2. Appellees' attempt to dismiss the eleven-month delay in arranging Gil's second rectal prolapse surgery is also unpersuasive. Appellees try to blame Gil for the delay, pointing to the fact the he did not immediately consent to the surgery. Appellees' Br. 51-54. But appellees neglect to mention the reason for Gil's concern: the surgeon he was able to consult (Dr. McDonald) was the same one who performed his prior unsuccessful operation, and that surgeon was now recommending a procedure that posed the risk of impotence and nerve damage. Gil understandably wanted a second opinion from a colorectal specialist before proceeding further, and appellees refused to

obtain that opinion for six months. Even then, Gil had to suffer through five more painful months before his surgery was performed.

i. The six-month delay to see a colorectal specialist. Playing loose with the facts, appellees claim (at 51-52) that "the delay, whether four, five or six months," was "less" the result of arranging an appointment with a specialist, "as it was the result of Gil's hesitancy to agree to a procedure because [of concerns about side effects of the operation]." They argue that this delay in seeing a *colorectal specialist* was acceptable, because Gil was able to see Dr. McDonald – a Board Certified *general* surgeon beforehand. Appellees' Br. 52.

Appellees fail to address the substance of Gil's claim: Gil did not want to undergo a risky operation by someone who had previously operated unsuccessfully without seeing whether there were other options. Dr. Heise specifically recommended that Gil see a colorectal specialist, but appellees refused to arrange that consultation for six months. Appellees do not dispute that the district court erred in analyzing this claim: the district court mistakenly believed that Dr. Mc Donald was a colorectal specialist. Gil Br. 43-45 & nn.17-19. Instead, they seek to elide the problem by presenting the facts in a misleading manner. *See supra* p. 1.

Furthermore, the additional two-month delay certainly does matter: It is more time during which Gil suffered from severe pain and had to push his rectum back into his body after bowel movements. This additional pain must be included in the negligence calculus and weighed against the trivial cost of arranging an appointment. Despite appellees' suggestion to the contrary (at 51, 54), this is the type of

administrative claim for which no expert testimony is required under Wisconsin law. Gil Br. 45.

ii. The additional five-month delay to get surgery. Though appellees attempt to blame Gil for the delay (at 51-52), they do not dispute that Gil sought information regarding his "upcoming surgery" on January 10, 2000 – four days after he met with Dr. Kim. Gil Br. 8; SA121 (¶86); SA233. During the next months, Gil repeatedly requested his surgery, but received no explanation for the delay. Gil Br. 8. Thus, even if Gil could be held responsible for the delay until January 2000 because he did not endorse the unnecessarily risky procedure without additional consultation, there is no way Gil cannot be faulted for the additional five-month delay afterwards.

In addition, appellees are wrong in stating (at 53) that Dr. Kim testified that 'he did not think plaintiff's condition was medically urgent.'" Dr. Kim never said that. Rather, Dr. Kim said only that he is not very concerned if a patient "do[esn't] come back next week or next month," because the condition generally does not get worse during that time. SA452 (32:9-22). Dr. Kim added, however, that waiting "five months" may be problematic, because "it will probably get uncomfortable" "[i]f [the rectum] pops out." SA452-SA453 (32:24-33:10). This is precisely what happened to Gil.

Appellees also try to undercut Gil's statement that he was in pain from June 1999 to May 2000 (SA439 (¶11)) by asserting (at 53-54) that "Gil did not report to any health care provider that he was having pain associated with the prolapse at any of the eleven medical appointments Gil had during the summer of 1999 through the spring of 2000." But their evidence – brief physicians' notes – is not as clear-cut as appellees suggest:

- At the June 7, 1999, Gil complained to Dr. Aslam about recurrence of the prolapse and said that it was "irritated." SA199.
- Physicians witnessed the prolapse in August 1999 and January 2000. SA200; SA231.
- The reason Gil did not discuss his pain at the September 10, 1999, meeting with Dr. Reed, was that Dr. Reed spent the whole appointment admonishing Gil for suing him; they never discussed Gil's condition. SA219.
- On several other occasions, no medical evaluation was performed. *See* SA208; SA222; SA226.

Moreover, these notes are far from perfect transcriptions of what was said at the meetings, and, as such, are undoubtedly incomplete. While they might *create* a disputed issue of material fact on some points, they certainly do not *eliminate* the need for trial. Indeed, just looking at photographs taken in February 2000 (SA121 (¶88); SA236-SA238; Dkt. 52, Exh. 62B-62D (better copies)) shows that Gil's condition was severe. It is up to the jury to determine how much pain Gil was in and whether it was negligent for appellees to make him wait five months for surgery for no apparent reason.

3. Gil's final claims pertain to inadequate treatment following his second rectal prolapse surgery. The flaws in appellees' attempt to defend Dr. Reed's changes to the prescription are discussed above. Appellees' remaining arguments also fail.

i. The hour wait while Gil bled. Both sides simply disagree on the underlying facts. Appellees claim (at 55) that Gil did not show up for the appointment. Gil said that he did, waited for an hour in severe pain while bleeding from the rectum, and then told medical staff that he could wait no longer. Gil Br. 10. Appellees complain (at 55 n.8) that Gil did not include these facts in his proposed findings of fact. But Gil did include them

in his response to plaintiffs' proposed findings of fact. Dkt. 79, at 8 (#28). This evidence thus was properly before the district court. It is the jury's role to resolve this factual dispute.

ii. The delay to get an enema. Appellees do not contest that Gil was unable to get an enema until May 10, though his last bowel movement was May 1. Gil Br. 9-10, 32. Appellees criticize Gil for "pars[ing] Dr. Kim's testimony to support his claim" because Dr. Kim said only that an enema should be administered in "four, five days" from when the patient "*complain[s] of constipation*" and "Gil 'first 'complained of constipation' on Friday afternoon, May 5, 2000." Appellees' Br. 57. That is wrong: Gil first complained of constipation on May 2. *See supra* p. 1.

Besides, it is not clear why the date Gil first complained is dispositive. While physicians are not expected to read minds, appellees acknowledge (at 56) that constipation "is a normal side effect" of "anal rectal surgery." The concern was all the more serious because of Dr. Reed's decision to cancel two of the prescribed laxatives and to switch Gil's pain prescription to Tylenol III, which is more constipating than Vicodin. Appellees provide no explanation why an enema was not given on May 5.

Admittedly, Dr. Kim's testimony on the subject was sparse and did not address many of these issues. *See* SA453 (33:11-22). But this omission illustrates precisely why this Court has strongly cautioned against conducting a "paper trial on the merits" instead of a real trial. *See supra* p. 4. While a paper trial may be permissible where the evidence is so compellingly clear that it permits only one resolution, that certainly is not true with respect to this claim – or, for that matter, any of Gil's claims.

CONCLUSION

Reversal is required.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7) for a brief produced with a proportionally spaced font. This brief was prepared using Microsoft Word 2002 in Book Antiqua 12 point font (except for the footnotes, which are in 11 point font). The length of this brief is 6,961 words.

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Nickolai G. Levin

Dated: December 8, 2006

CERTIFICATE OF COMPLIANCE WITH SEVENTH CIRCUIT RULE 31(e)

I certify that I have enclosed a virus-free compact disc including a searchable PDF of the reply brief.

____
Nickolai G. Levin

Dated: December 8, 2006

CERTIFICATE OF SERVICE

I certify that on the 8th day of December, 2006, I filed an original and fifteen copies of the foregoing REPLY BRIEF FOR PLAINTIFF-APPELLANT by UPS OVERNIGHT DELIVERY to:

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I further certify that on the 8th day of December, 2006, I served two copies of the foregoing REPLY BRIEF FOR PLAINTIFF-APPELLANT by UPS OVERNIGHT DELIVERY, addressed to counsel as follows:

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