

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez**

Civil Action No. 20-cv-3698-RMR-JPO

CARLOS PINTO-RIOS,

Plaintiff,

v.

TYLER S. BROWN, *et al.*,

Defendants.

ORDER

This matter comes before the Court on the Recommendation issued by then Magistrate Judge S. Kato Crews on December 6, 2023, ECF 278, addressing the Motion to Dismiss filed by Defendants Kerry Pruett, Katy Keller, Susan Greenwald, Stacie Hengy, Micah Rhoad, Patricia Trujillo, Jeffrey Peterson (“Individual Defendants”), and Wellpath, LLC (collectively, the “Wellpath Defendants”), ECF 247.¹ Judge Crews recommends that the motion be granted in part and denied in part.

Plaintiff timely filed an objection to the Recommendation at ECF 284-1, and the Wellpath Defendants filed a response at ECF 290. The Court has received and considered the Recommendation, along with the record and the pleadings. For the

¹ On January 26, 2024, this action was reassigned to Magistrate Judge James P. O’Hara. ECF 287.

reasons set forth below, the Court accepts in part and rejects in part the Recommendation.

I. LEGAL STANDARD

The Court is required to make a de novo determination of those portions of a magistrate judge's recommendation to which a specific, timely objection has been made, and it may accept, reject, or modify any or all of the magistrate judge's findings or recommendations. 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); Fed. R. Civ. P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.").

"[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Property*, 73 F.3d 1057, 1060 (10th Cir. 1996). In the absence of a proper objection, the district court may review a magistrate judge's recommendation under any standard it deems appropriate. See *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) ("In the absence of timely objection, the district court may review a magistrate's report under any standard it deems appropriate."); see also *Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."). When no proper objection is filed, "the court need only satisfy itself that there

is no clear error on the face of the record in order to accept the recommendation.”² Fed. R. Civ. P. 72(b) advisory committee’s note to 1993 amendment.

II. ANALYSIS

The parties do not object to the factual or procedural background discussed in the Recommendation. Accordingly, the Court adopts and incorporates the factual and procedural background included within the Recommendation as if set forth herein.³

Plaintiff first objects to the Magistrate Judge’s recommendation that the Court dismiss Plaintiff’s state-law claims for failure to timely file a certificate of review in accordance with Colo. Rev. Stat. § 13-20-602(4). Plaintiff argues that the Magistrate Judge “did not appropriately evaluate Colorado law in interpreting the Certificate Statute,” faulting the Recommendation for “only cit[ing] federal law in determining what constitutes ‘service’ and when the 60-day time period to file the certificate runs.” ECF 284-1 at 2–3. Specifically, Plaintiff argues that what constitutes “service” for purposes of the statute is an open question under Colorado law and that the Magistrate Judge erred by failing to evaluate “how this provision should be interpreted under state law.” *Id.* at 4.

² This standard of review is something less than a “clearly erroneous or contrary to law” standard of review, Fed. R. Civ. P. 72(a), which in turn is less than a de novo review, Fed. R. Civ. P. 72(b). See, e.g., *Nat’l Jewish Health v. WebMD Health Servs. Grp., Inc.*, 305 F.R.D. 247, 249 n.1 (D. Colo. 2014) (Daniel, J.).

³ Additionally, no party has objected to the Recommendation’s conclusion that Plaintiff has stated a plausible claim for relief for deliberate indifference against Dr. Peterson (Claim 3). The Court agrees with the Magistrate Judge’s analysis on this issue and concludes that there is no clear error on the face of the record with regard to this or any other portion of the Recommendation to which neither party objected. See Fed. R. Civ. P. 72(b) advisory committee’s note (“When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.”).

The Court perceives no error on this issue. Tellingly, Plaintiff does not point to a single case discussing—much less adopting—his proffered interpretation of the certificate of review requirement, and the Court is aware of none. Plaintiff’s objection thus neither identifies any error in the Recommendation nor offers any justification for Plaintiff’s failure to timely file a certificate of review in this case. As the Magistrate Judge noted, “Plaintiff has yet to offer one reason why he failed to timely file a certificate of review or what good cause there might be to extend the filing period.” ECF 278 at 18. This remains the case.⁴ Reviewing the issue de novo, the Court agrees with the Recommendation’s finding that Plaintiff’s malpractice claims against the Individual Defendants should be dismissed for failure to comply with Colo. Rev. Stat. § 13-20-602(4). Plaintiff’s objection on this issue is therefore overruled.⁵

Plaintiff next objects to the Magistrate Judge’s recommendation that Plaintiff’s direct negligence claims against Wellpath be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). In analyzing Plaintiff’s claims, Judge Crews concluded that the second amended complaint (“SAC”) “fails to allege sufficient facts to plausibly infer Wellpath knew (or should have known) any one of the individual medical defendants

⁴ It also remains the case that “Plaintiff *still* has not filed a certificate of review pertaining to Defendants Trujillo and Peterson after serving them with the SAC.” *Id.* at 19.

⁵ Plaintiff also asserts for the first time in his Objection that “it might behoove the Court” to decline to exercise supplemental jurisdiction over his state-law claims. ECF 284-1 at 7. Plaintiff does *not* contend, however, that the Magistrate Judge erred in continuing to exercise supplemental jurisdiction in this case. Accordingly, Plaintiff’s position regarding supplemental jurisdiction is not a proper objection, and the Court need not address it further. *See also Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) (“Issues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.”).

posed a risk of harm to Plaintiff, or that any harms which did occur were a foreseeable manifestation of that alleged risk.” ECF 278 at 24. Judge Crews additionally found that “while the SAC contains numerous allegations regarding Wellpath’s lack of training of its employees, it inconsistently pleads ‘[t]he individual Medical Defendants have received professional education and training for the performance of their respective professions to patients in the community.’” *Id.* (citing ECF 212, ¶ 373). The Court preliminarily agrees with Plaintiff that the fact that the Individual Defendants received undefined “education and training” is not necessarily inconsistent with Plaintiff’s claim for negligent supervision and training. The Court thus declines to adopt this portion of the Recommendation’s reasoning. However, even accepting Plaintiff’s contention that the allegations regarding Defendants’ general “professional education and training” do not foreclose a direct negligence claim against Wellpath, the Court nonetheless agrees with the Recommendation’s ultimate determination that the SAC fails to adequately allege such a claim here. Reviewing Plaintiff’s arguments and considering the motion to dismiss *de novo*, the Court finds that the SAC does not sufficiently plead that Wellpath knew (or should have known) that any of the Individual Defendants posed a risk to Plaintiff. The Court therefore declines to find that Judge Crews erred in concluding that Plaintiff has failed to plead a plausible direct negligence claim under these circumstances. Plaintiff’s objection on this issue is overruled.

Finally, Plaintiff objects to the recommended dismissal of his Eighth Amendment deliberate indifference claims, arguing that the Magistrate Judge improperly conflated Rule 8 and Rule 12 in finding that the SAC alleges insufficient facts to plausibly establish

the subjective component of such claims as to the Individual Defendants. The Court agrees with Plaintiff that the Magistrate Judge erred in recommending dismissal of Plaintiff's deliberate indifference claims. Upon de novo review, the Court finds that the SAC adequately describes the conduct for which each of the Wellpath Defendants is being considered liable and enables them to prepare a responsive pleading. Should discovery reveal that the actions of one or more of the Wellpath Defendants are insufficient for liability to attach, they may present such evidence on summary judgment or at trial. *See Ferguson v. Bd. of Cnty. Commissioners of Sierra Cnty.*, No. CV 11-1001 WPL/CG, 2013 WL 12334214, at *4 (D.N.M. Apr. 2, 2013). At this juncture, however, the Court is satisfied that the Wellpath Defendants are on notice of the claims against them and able to discern their respective roles in the alleged misconduct such that the case against them can move forward on the SAC.

Taking the current allegations as true and viewing them in the light most favorable to Plaintiff, the Court finds that Plaintiff has alleged sufficient facts to survive a motion to dismiss on his deliberate indifference claims. At this stage in the proceedings, Plaintiff need not prove the allegations in his complaint. *See Chilcoat v. San Juan Cnty.*, 41 F.4th 1196, 1207 (10th Cir. 2022) ("At the motion to dismiss stage, [the Court is] tasked with assessing plausibility, not proof."). He must only allege facts that state a non-speculative claim for relief and provide the Defendants with notice of the actual grounds of the claim(s) against them. Well-pleaded claims may proceed even if "actual proof of [the alleged] facts is improbable." *Dias v. City and Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (quotation omitted). Having assessed the plausibility of Plaintiff's deliberate indifference

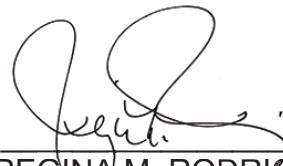
claims and drawing all inferences in the light most favorable to Plaintiff, the Court finds that they survive the Wellpath Defendants' dismissal motion. The Magistrate Judge erred in concluding otherwise. Accordingly, Plaintiff's objection on this issue is sustained.

III. CONCLUSION

Consistent with the above analysis, Plaintiff's Objection, ECF 284-1, is SUSTAINED in part and OVERRULED in part. The Magistrate Judge's Recommendation, ECF 278, is AFFIRMED and ADOPTED in part and REJECTED in part. Accordingly, the Wellpath Defendants' Motion to Dismiss, ECF 247, is DENIED as to Claims 1–3 against Defendants Pruett, Keller, Greenwald, Hengy, Rhoad, Trujillo, and Peterson and GRANTED as to Claim 6.

DATED: March 25, 2024

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Regina M. Rodriguez', is written over a horizontal line.

REGINA M. RODRIGUEZ
United States District Judge