IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LUIS DIAZ-GUILLEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 3: 15-CV-1101-MAB**
	)	
JAY SWANSON, M.D.,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

BEATTY, Magistrate Judge:

Pending before the Court is Defendant Jay Swanson's ("Defendant") motion for summary judgment (Doc. 117). Plaintiff Luis Diaz-Guillen ("Plaintiff") filed a response in opposition to the motion (Doc. 126), a response to Defendant's statement of uncontested material facts (Doc. 127), and a statement of additional uncontested facts (Doc. 128). Defendant filed a response to Plaintiff's statement of additional uncontested facts (Doc. 129) and a reply to Plaintiff's response to Defendant's motion (Doc. 130).

On October 11, 2019, the Court directed the parties to provide additional briefing on whether Defendant acted under the color of state law when he provided the relevant medical services to Plaintiff (Doc. 135). Both parties filed timely supplements (Docs. 136 and 140). On November 6, 2019, the Court granted the parties' joint motion to unseal all previously sealed documents and exhibits (Doc. 146). For the reasons stated below, Defendant's motion for summary judgment (Doc. 117) is **GRANTED**.

I. BACKGROUND

Plaintiff brings this civil rights action pursuant to 42 U.S.C. §1983 alleging Defendant violated his Constitutional rights. Specifically, Plaintiff alleges Defendant violated the Eighth Amendment, as incorporated against the states by the Fourteenth Amendment, by being deliberately indifferent to Plaintiff's medical condition in that he failed to document, diagnose, and treat squamous cell carcinoma located in Plaintiff's paranasal sinus.

Construed in the light most favorable to the nonmoving party, the evidence and the reasonable inferences that can be drawn from it establish the following relevant facts for purposes of the instant motion for summary judgment.

II. FACTUAL BACKGROUND

After authorities arrested and charged Plaintiff with a crime on February 4, 2011, jail personnel housed Plaintiff at the Fayette County Jail in Vandalia, Illinois (Doc. 118-3, 24:4-13) where he remained until he was transferred on August 27, 2017 to the Illinois Department of Corrections ("IDOC") (*Id.* at 24:14-21; Doc. 118-4, p. 1).

In May of 2012, Dr. Lowry, a non-defendant general dentist referred Plaintiff to see Defendant for an evaluation. Dr. Shah, a non-defendant doctor employed by Wexford Health Sources, Inc. ("Wexford"), approved the request on May 17, 2012 (Doc. 118-5, 81:1-9; Doc. 118-4, p. 2; Doc. 118-3, 45:15-20). Wexford is a private company that contracts with the State of Illinois to provide medical services for inmates within the IDOC. Defendant is licensed in the state of Illinois to practice oral and maxillofacial surgery as a dental specialist and board certified in oral and maxillofacial surgery (Doc. 118-5, 7:15-22).

Defendant has diagnosed patients with invasive squamous cell carcinoma and conducted presentations and authored publications on facial and oral cancers (*Id.* at 47:6-8).

On May 23, 2012, Plaintiff presented for an appointment at Defendant's medical office and completed a new patient intake form (Doc. 118-7, p. 8). Rhonda Anderson, one of Defendant's certified surgical technicians, reviewed Plaintiff's intake form and wrote under a subheading entitled "CHIEF COMPLAINT(S):": "oral lesion, upper left cheek muscosa." (*Id.* at 2). Defendant physically examined Plaintiff then noted that "patient with lesion, left maxilla, plan CT scan with or without infusion of his left upper, consistent with hemangioma."[1] (Doc. 118-3, 47:8-9, 50:3-7, 110:20-24; Doc. 118-7, pp. 3, 9). The findings of Plaintiff's CT scans of the soft tissues of the neck, brain, and paranasal sinuses on May 24, 2012 were negative for cancer (Doc. 118-5, 59:15-18, 153:21-24, 189:21-24, 190:1-10; Doc. 118-9; Doc. 118-6). The May 24 CT scan confirmed Defendant's diagnosis of Plaintiff as having a hemangioma (Doc. 118-5, 95:23-24, 96:1-6, 101:22-24; Doc. 118-9).

On June 14, 2012, Plaintiff presented for a follow-up exam with Defendant and relevant medical notes indicate, in part, the following, "maxillary lesion – flares up and recedes doesn't go away review CT Scan." (Doc. 118-7, p. 6). On July 11, 2012, Plaintiff presented for an appointment at Defendant's medical office where a registered nurse ("RN") first screened Plaintiff before Defendant examined him (Doc. 118-10, p. 1-2). After the screening, the RN made the following note in Plaintiff's medical chart:

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[1]A hemangioma is a benign malformation (lesion or tumor) produced by a proliferation of vessels. Marx, and Stern, Diane, Oral and Maxillofacial Pathology: A Rationale for Diagnosis and Treatment, Vol. 1, Second Ed., pp. 445-46.

> Pt standing in consult room and states in broken English "Is someone going to explain what they're going to do to me?" This RN began asking pt what he thinks he's here for? Pt appears to NOT understand this RN or his officer. This RN asks How well do you know English and he states, "Not follow to well". Officer says he may not understand well. Pt will not make eye contact @ RN. RN trying to rephrase to assess his comprehension. Asked, "What language are you fluent in?" He immediately states "Spanish." Unsure of his comprehension. Dr. Swanson made aware of situation.

(Doc. 118-10, p. 1-2).

Defendant testified that while Plaintiff "had some difficulty with English, he was able to understand, as far as I was concerned, what I was trying to tell him." (Doc. 118-5, 181:7-15). Defendant further testified that, "it's part of the DOC's recommendation to have a translator too if they felt his English skills were lacking." (*Id.* at 181:19-21)

On July 11, 2012, Defendant recommended Plaintiff have surgery to remove the hemangioma, but Plaintiff refused the surgery because he was apparently confused about whether the procedure would go against his religious beliefs as a Jehovah's Witness (*i.e.* blood transfusions) (Doc. 118-5, 112:2-24, 113:1-15, 117:1-10, Doc. 118-9, p. 1-3; Doc. 118-6, 107:1-19). On September 4, 2012, Dr. Raymond Barnes, a non-defendant general dentist, treated Plaintiff then referred him for a follow up with Defendant for evaluation and biopsy of a possible rhabdomyosarcoma (Doc. 118-5, 19:1-17; 121:5-6; Doc. 118-4, p. 4). On September 24, 2012, Plaintiff again met with Defendant (Doc. 118-7, p. 8). An intake form completed indicates Plaintiff's issues with the "left side of face" was the reason for his visit (*Id.*). The form also indicates "Jaw Pain" is selected underneath the heading "Check (X) if you have or ever have had problem with any of the following." (*Id.*). Defendant

testified that he does not recall having a conversation with Plaintiff about his complaints of jaw pain (Doc. 118-5, p. 35).

On October 3, 2012, Defendant performed an excision surgery on Plaintiff by removing the lesion, he then sent samples of the lesion to a board-certified pathologist (Doc. 118-3, 60:3-9, 62:20-21, 111:9-15; Doc. 118-5, 136:1-13, 140:1-6). The related operative report indicates Defendant excised a large hemangioma, four centimeters (Doc. 118-5, p. 35). Defendant testified that he did not know if the lesion had grown in size since May 24, 2012 (*Id.*). On October 4, 2012, pathologist Dr. Benjamin Coleman from St. Mary's Hospital in Decatur, IL indicated the maxillary lesion Defendant removed from Plaintiff was a hemangioma (Doc. 118-11). On October 12, 2012, Dr. Francis Kayira, a non-defendant IDOC physician, referred Plaintiff to Defendant for a post-surgical follow up (Doc. 118-4, p. 6). The post-operative follow up took place on October 15, 2012 which was the last time Defendant treated Plaintiff (Doc. 118-5, 174:18-20).

Vandalia Jail personnel subsequently transferred Plaintiff to Western Illinois Correctional Center ("Western") in Mount Sterling, Illinois, eight days after his last appointment with Defendant (Doc. 118-3, 64:14-20). Dr. Antoine, a non-defendant physician, evaluated Plaintiff approximately two weeks after his excision surgery, discovered the surgical site was infected, then prescribed antibiotics and mouth wash (*Id.* at 67:15-23, 68:17-24). After Plaintiff took the antibiotics and mouth wash as prescribed, the surgical site fully healed (*Id.* at 69:4-10). Neither Plaintiff nor IDOC personnel communicated any complaints, issues, or postoperative complications to Defendant after Plaintiff's last appointment with him on October 15, 2012 (Doc. 118-5, 174:18-24, 175:1-13,

185:9-11).

On June 13, 2013, approximately seven and a half months since Plaintiff's last visit with Defendant, Dr. A.J. Huff, a non-defendant dentist at Graham referred Plaintiff to Dr. Daniel Riggs, a non-defendant physician for an evaluation (Doc. 118-4, p. 7). On August 20, 2013, Dr. Riggs examined Plaintiff (Doc. 118-3, 76:14-17). On September 19, 2013, Dr. Dailey, a non-defendant ENT in Jacksonville, Illinois, examined Plaintiff's mouth then scheduled a CT scan; on November 8, 2013, Dr. Daily performed a biopsy on a mass on the left side of Plaintiff's face (Doc. 118-3, 80:15-24; 81:18-20; 82:18-21; 83:15-18).

On November 18, 2013, Dr. Dailey informed Plaintiff he had squamous cell carcinoma [2] and recommended a left maxillectomy removal (*Id.* at 85:11-21). On December 12, 2013, Dr. Sobol, an ENT, evaluated Plaintiff then recommended a left radical maxillectomy with orbital preservation based on his diagnosis of invasive squamous cell carcinoma; Plaintiff consented to the surgery. (Doc. 118-3, 90:6-8). On January 15, 2014, Plaintiff underwent a total maxillectomy surgery, performed by Dr. Sobol (Id. at 90:14-17). On January 22, 2014, a surgical pathology report confirmed Plaintiff's diagnosis of squamous cell carcinoma (Doc. 118-11).

III. LEGAL STANDARDS

A. Summary Judgment Standard

The standard applied to summary judgment motions under Federal Rule of Civil

[2] Both parties agree squamous cell carcinoma is an aggressive malignancy that can grow rapidly within several weeks to months, especially in the oral cavity and it is frequently diagnosed late in the progress of the disease (*See* Doc. 127, p. 12).

Procedure 56 is well-settled and has been succinctly stated as follows:

> Summary judgment is appropriate where the admissible evidence shows that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. A "material fact" is one identified by the substantive law as affecting the outcome of the suit. A "genuine issue" exists with respect to any such material fact . . . when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." On the other hand, where the factual record taken as a whole could *not* lead a rational trier of fact to find for the non-moving party, there is nothing for a jury to do. In determining whether a genuine issue of material fact exists, we view the record in the light most favorable to the nonmoving party.

Bunn v. Khoury Enterprises, Inc., 753 F.3d 676, 681 (7th Cir. 2014) (citations omitted).

B. State Actor Requirement

"Section 1983 creates a federal remedy against anyone who, under color of state law, deprives 'any citizen of the United States . . . of any rights, privileges, or immunities secured by the Constitution and laws.'" *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Dept. Health,* 699 F.3d 962, 972 (7th Cir. 2012) (quoting 42 U.S.C. § 1983). Determining whether a private party acted under the color of state law "is an important statutory element because it sets the line of demarcation between those matters that are properly federal and those matters that must be left to the remedies of state tort law." *Rodriquez v. Plymouth Ambulance Service*, 577 F.3d 816, 822 (7th Cir. 2009).

C. Deliberate Indifference Standard

The Supreme Court has recognized that deliberate indifference to the serious medical needs of prisoners may constitute cruel and unusual punishment under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). To prevail on a claim for deliberate indifference to a serious medical need, there are "two high hurdles, which

every inmate-plaintiff must clear." *Dunigan ex rel. Nyman v. Winnebago Cnty.*, 165 F.3d 587, 590 (7th Cir. 1999). First, the plaintiff must demonstrate he suffered from an objectively serious medical condition. *Id.* at 591-92.

In the second prong, to show that prison officials acted with deliberate indifference, a plaintiff must put forth evidence that prison officials not only knew that the prisoner's medical condition posed a serious health risk, but they consciously disregarded that risk. *Holloway v. Delaware Cnty. Sheriff*, 700 F.3d 1063, 1073 (7th Cir. 2012). "This subjective standard requires more than negligence and it approaches intentional wrongdoing." *Id.*; *accord Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010) ("Deliberate indifference is intentional or reckless conduct, not mere negligence."); *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010) ("[N]egligence, even gross negligence does not violate the Constitution.").

IV. ANALYSIS

A. Color of State Law

There is a genuine issue of material fact whether Defendant acted under color of state law during relevant times. In *Rodriquez*, the court sets out the following factors to determine whether a private doctor providing health care to state inmates was a state actor: (1) the degree of state control over the health care provider's decisions; (2) the voluntariness of the health care provider's relationship with the state; and, (3) the relationship of the private medical provider to the prisoner. 577 F.3d at 822-24 ("They are, however, the factors that *West* indicates that we must apply in our assessment of the individual case") (quoting *West v. Atkins,* 487 U.S. 42 (1988)). The Court will address each

factor in turn.

i. State Control

Plaintiff argues state control is evident because a Graham doctor referred Plaintiff to Defendant for medical care; the IDOC arranged Defendant's treatment of Plaintiff; IDOC scheduled Plaintiff's appointments with Defendant and were based on IDOC's security and scheduling needs; and, IDOC guards accompanied Plaintiff to his outside appointments. While the above facts are true, they do not necessarily evidence state control because these are steps that take place for most, if not all, outside appointments for state prisoners.

Defendant argues state control is lacking because Defendant rendered medical care to Plaintiff in his private medical office which limited the state to control or influence his medical decisions. While the private setting of Plaintiff's care (Defendant's private office) seemingly favors a finding that Defendant's decisions were not controlled or influenced by the state, the Seventh Circuit has cautioned that the setting *alone* is not dispositive. *Rodriquez*, 577 F.3d at 826. Ultimately, this factor is a toss up between Plaintiff and Defendant, with Plaintiff getting the slight edge on this one simply because we are at the summary judgment stage (and all reasonable inferences should be drawn for the non-moving party).

ii. Voluntariness

The voluntariness factor considers whether the Defendant physician voluntarily assumed the state's responsibility in providing healthcare to state inmates. The Supreme Court's decision in *West* teaches that "[i]t is the physician's function within the state

system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State." *West*, 487 U.S. at 55–56. "Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner." *Id.* at 56.

In *Shields v. Illinois Dep't of Corr.*, the court held that two private doctors each had only an incidental and transitory relationship with the penal system. 746 F.3d 782, 798 (7th Cir. 2014) ("[T]here is no evidence that Drs. Olysav and Froelich had a contract with Wexford or the prison, that their practices focused on treating inmates, or even that they regularly treated inmates as part of their practices."). In contrast to the doctors in *Shields*, Defendant testified *that he voluntarily entered into a contract* with Wexford. It is reasonable to infer Defendant knew Wexford contracted with the State to provide medical services to state inmates. Defendant further testified that treating inmates accounts for five to ten percent of his practice. Therefore, the record tends to favor Plaintiff on the voluntariness prong and cut against summary judgment.

iii. Direct Relationship

The final factor the Court must consider in the state action inquiry is whether the private provider had a direct, not attenuated, relationship with the prisoner-patient. As just outlined, Defendant and Plaintiff's relationship began because Defendant contracts with Wexford to provide medical care to state inmates. Defendant also testified that he is one of the only oral surgeons in southern Illinois willing to treat prisoner-patients. Additionally, Defendant personally examined Plaintiff multiple times over several months, provided him with a diagnosis, and performed a surgery on Plaintiff. Therefore,

there is sufficient evidence to infer Defendant had a direct relationship with Plaintiff.

In sum, the undisputed facts are sufficient to raise a genuine issue of material fact whether Defendant's treatment of Plaintiff constituted state action. In other words, the Court cannot conclusively find, at the summary judgment stage, that Defendant was *not* acting under color of state law. But, as the ensuing analysis will show, this is not enough for Plaintiff to stave off summary judgment in favor of the Defendant because no reasonable jury could conclude that Defendant acted with deliberate indifference in his treatment of Plaintiff.

B. Deliberate Indifference

The undisputed facts indicate that no reasonable jury could find Defendant was deliberately indifferent to Plaintiff's serious medical condition. Defendant does not contest whether Plaintiff suffered from an objectively serious medical condition. Rather, Defendant focuses his argument on the subjective prong by contending he never disregarded Plaintiff's serious medical condition. Plaintiff counters by arguing Defendant acted with deliberate indifference because he failed to appreciate Plaintiff's difficulty with English which prevented Plaintiff from effectively communicating his symptoms to Defendant. According to Plaintiff, this language barrier then caused Defendant to misdiagnose and/or fail to diagnose Plaintiff's serious medical condition. Plaintiff further argues that Defendant's conduct amounted to such a departure from the standard of care that deliberate indifference should be inferred.

More specifically, Plaintiff argues Defendant acted with deliberate indifference to his serious medical condition because he "wholly ignored" Plaintiff's "second, and much

more significant, medical condition." (Doc. 126, p. 2). Setting aside Defendant's diagnosis and treatment of Plaintiff's hemangioma, Plaintiff argues Defendant failed to recognize "any language barrier problems with [Plaintiff]" which then contributed to Defendant failing to diagnose and treat squamous cell carcinoma located in Plaintiff's paranasal sinus (*Id.*). This alleged failure by Defendant then caused Plaintiff's "symptoms [to remain] undiagnosed and persist[] for seven and a half months before [Plaintiff] would be seen by another specialist." (*Id.*) The subsequent specialist diagnosed Plaintiff with Stage 4 squamous cell carcinoma, which required surgery to "remove several teeth and half of the roof of his mouth." (*Id.*).

Here, no reasonable jury could find Defendant ignored Plaintiff's symptoms in such a manner that it demonstrated a departure from accepted medical professional standards sufficient to meet the subjective element. As Plaintiff accurately cites in his response in opposition, "[a] medical professional's deliberate indifference may be inferred when 'the medical professional's decision is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible did not base the decision on such judgment.'" *King v. Kramer*, 680 F.3d 1013, 1019 (7th Cir. 2012) (quoting *Estate of Cole by Pardue v. Fromm,* 94 F.3d 254, 261–62 (7th Cir. 1996)).

In *King*, the court found the doctor's actions were "so far afield from an appropriate medical response to [the plaintiff's] seizures that they fell outside the bounds of her professional judgment." *Id.* The court reasoned, in part, the doctor's decisions were such a substantial departure because the doctor already decided the plaintiff was faking

seizures even before she examined him; she was "aware that he was withdrawing from alprazolam, and that seizures can result from withdrawal;" she did not get a reliable oximeter and blood pressure readings because the plaintiff's convulsions were too severe; and, the plaintiff's response to the smelling salts test was consistent with a seizure. *Id.* This case is simply not analogous to *King* because, unlike the doctor in *King*, Defendant took affirmative steps, based on his professional judgment, to treat Plaintiff's serious medical condition in such a manner to foreclose a finding that his actions and/or inaction were a substantial departure from the standard of care. Even when viewing the facts in the light most favorable to Plaintiff, there is insufficient evidence to support a finding that there is a question of material fact whether Defendant was subjectively aware that Plaintiff faced serious risks associated with squamous cell carcinoma. While Plaintiff emphasizes the actions Defendant did not take, it is important to also consider the appropriate actions Defendant did take when deciding whether his decisions concerning Plaintiff's medical care amounted to a substantial departure from the standard of care where deliberate indifference may be inferred. *See King*, 680 F.3d at 1019 ("[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner") (quoting *Estelle,* 429 U.S. at 106); ("[i]n evaluating the evidence, we must remain sensitive to the line between malpractice and treatment that is so far out of bounds that it was blatantly inappropriate or not even based on medical judgment").

First, on May 23, 2012, Defendant performed a physical examination on the left side of Plaintiff's mouth after Defendant's medical technician indicated on Plaintiff's new patient exam form that Plaintiff's chief complaint was an oral lesion on the upper side of

Plaintiff's left cheek; the form also indicated the lesion at issue had been present for one year. Defendant's physical examination of Plaintiff's mouth revealed a hemangioma which Defendant was familiar with because "it's a common abnormality" and he has "seen thousands of them." (Doc. 118-5, 35:13-17).[3] Next, based on the findings of his physical examination of Plaintiff's mouth, Defendant ordered a CT scan of the soft tissues of Plaintiff's neck, brain, and paranasal sinuses; the CT scan results were negative for cancer and supported Defendant's diagnosis of Plaintiff having a hemangioma. Defendant, unlike the doctor in *King*, did not assume Plaintiff was feigning a medical condition. Rather, after a physical examination revealed objective findings consistent with Plaintiff's chief complaint, Defendant took affirmative action to diagnose and then confirm his diagnosis. Importantly, based on Defendant's professional judgment, squamous cell carcinoma "does not look like a hemangioma in any way, shape, or form." (*Id.* at 54:22-23). In comparison, the doctor in *King* went outside her professional judgment because she was aware that seizures can result from withdrawing from alprazolam yet dismissed that concern when concluding the plaintiff had not suffered a seizure.

On June 14, 2012, Plaintiff presented for a follow-up exam with Defendant and relevant medical notes indicate, in part, the following, "maxillary lesion – flares up and recedes doesn't go away review CT Scan." (Doc. 118-7, p. 6). On July 11, 2012, Defendant recommended Plaintiff have surgery to remove the hemangioma, but Plaintiff refused the surgery because he was confused about whether the procedure would go against his

[3] Defendant ultimately excised the hemangioma and transmitted it to a board-certified pathologist who confirmed Defendant's diagnosis of Plaintiff's lesion as a hemangioma.

religious beliefs as a Jehovah's Witness (*i.e*. blood transfusions) (Doc. 118-5, 112:2-24, 113:1-15, 117:1-10, Doc. 118-9, p. 1-3; Doc. 118-6, 107:1-19). On September 4, 2012, Dr. Raymond Barnes, a non-defendant general dentist, treated Plaintiff then referred him for a follow up with Defendant for evaluation and biopsy of a possible rhabdomyosarcoma (Doc. 118-5, 19:1-17; 121:5-6; Doc. 118-4, p. 4). Defendant wholly disagreed with Dr. Barnes' concern because he had not seen a rhabdomyosarcoma in that specific location in 30 years of practice. Also, once Plaintiff's lesion was excised a pathologist confirmed it was a hemangioma which disaffirmed Dr. Barnes' diagnosis.[4]

On September 24, 2012, Plaintiff again met with Defendant. An intake form completed by Plaintiff indicates he wrote down "left side of face" as the reason for his visit which was consistent with Defendant's previous diagnosis. On October 3, 2012, Defendant performed an excision surgery on Plaintiff by removing the lesion, and the lesion was confirmed as a hemangioma by a pathologist. Unlike the doctor in *King*, Defendant did not deliberately ignore the results of tests he was able to administer. Rather, the tests and surgeries he employed confirmed his initial diagnosis. While this may be a case where reasonable medical minds may differ over the appropriate treatment for Plaintiff, it is not analogous "to the hypothetical nurse who knows that an inmate faces a serious risk of appendicitis, but nevertheless gives him nothing but an aspirin."

[4] In *King*, the doctor dismissed Plaintiff's response to a smelling salts test which was consistent with a seizure occurring. *King*, 680 F.3d at 1019. However, in this case Defendant *did not* dismiss relevant medical evidence to reach *a faulty conclusion*. Rather, Defendant dismissed Dr. Barnes' rhabdomyosarcoma diagnosis because of his professional judgment and, importantly, *his dismissal was later confirmed*.

Snipes v. DeTella, 95 F.3d 586, 591 (7th Cir.1996); *King*, 680 F.3d at 1019 (quoting *Sherrod v. Lingle*, 223 F.3d 605, 611–12 (7th Cir. 2000)).

The record belies a finding that Defendant acted with deliberate indifference with regard to Plaintiff's serious medical condition. It is important to note that when a plaintiff alleges that "a healthcare provider knew enough to infer a substantial risk of harm, she must prove (1) that the provider was aware of facts supporting the inference and (2) that the provider *actually drew* the inference." *Davis v. Kayira*, 938 F.3d 910, 915 (7th Cir. 2019) (emphasis in original) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). Plaintiff argues Defendant should have inferred Plaintiff ***may have had*** squamous cell carcinoma in his paranasal based on his symptoms. [5]

In particular, Plaintiff claims his "symptoms of sinus pain, pressure, and drainage were present at the time of Plaintiff's treatment with Defendant and continued to persist thereafter until they were finally diagnosed as cancer." (Doc. 128, p. 1). This argument is unavailing because Plaintiff articulated the above symptoms in grievances submitted within the IDOC and there is no evidence showing *Defendant had knowledge* of these grievances. Additionally, Plaintiff's intake form with Defendant states the reason for his visit was the "the left side of [his] face" and that he was experiencing "jaw pain." (Doc. 118-7, p. 7). Based on Plaintiff's documented complaints, Defendant diagnosed it as a hemangioma, performed an excision surgery, and then a pathologist provided *a final*

[5] The Court emphasizes "may have had" because there is no evidence that Plaintiff did, in fact, have squamous cell carcinoma at the time Defendant treated him. Rather, the excision confirmed Plaintiff had a benign hemangioma. Plaintiff's argument is entirely predicated on speculation and conjecture.

diagnosis indicating the removed lesion was a hemangioma. Even with Plaintiff's complaints of jaw pain Defendant did not find it necessary to order a second CT scan. It should be noted again that even a vast departure from the standard of care does not amount to deliberate indifference. *Berry*, 604 F.3d at 440 ("Deliberate indifference is intentional or reckless conduct, not mere negligence."); *McGowan*, 612 F.3d at 640 (7th Cir. 2010) ("[N]egligence, even gross negligence does not violate the Constitution."). Simply put, there is nothing in the record to support a finding that Defendant inferred and drew on an inference that Plaintiff had squamous cell carcinoma in his paranasal and then consciously disregarded the associated risk.

Plaintiff's "language barrier" argument is also unavailing. Plaintiff contends Defendant consciously disregarded a serious risk to his health because he did not provide Plaintiff a translator which allegedly prevented the two from clearly communicating with each other. It is this alleged disconnect, according to Plaintiff, which then caused Defendant to misdiagnose his condition. Plaintiff supports this assertion by citing to a decision from this District. *See Diaz v. Baldwin*, 18-CV-1426-SMY, 2018 WL 6068326, at *4 (S.D. Ill. Nov. 20, 2018)[6] (noting the failure to provide an interpreter is relevant to an inmate's deliberate indifference claim); *Id.* (quoting *Morales v. Fischer*, 46 F. Supp. 3d 239, 253-54 (W.D.N.Y. 2014) (noting that a complete failure to provide an interpreter may result in a constitutional violation when "communication between an inmate and medical provider is 'essential to the efficacy of the treatment.'"). Here, while the Court

[6] The Plaintiff in this case is a different Mr. Diaz.

acknowledges the above relevant inquiry, it does not change the outcome. Plaintiff's chief initial complaint involved the left side of his face. Based on this, Defendant, examined, correctly diagnosed, and then excised a lesion from the left side of Plaintiff's face which a pathologist later confirmed as a hemangioma, which by definition (see footnote 1 *supra)*, is a *benign* malformation or lesion. It is unclear how a translator could have helped Plaintiff anymore because Defendant properly diagnosed Plaintiff's condition based on the physical findings. No reasonable jury could find Defendant's failure to provide Plaintiff an interpreter amounted to a constitutional violation.

V. CONCLUSION

For the foregoing reasons, the motion for summary judgment filed by Defendant Dr. Jay Swanson (Doc. 117) is **GRANTED**. All other pending motions are **DENIED as MOOT**. Judgment is entered in favor of Defendant and against Plaintiff.

IT IS SO ORDERED.

DATED: November 7, 2019

s/ Mark A. Beatty
MARK A. BEATTY
United States Magistrate Judge