UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVEN BRODER, (#226094)

Plaintiff

v.

CORRECTIONAL MEDICAL SERVICES, INC., PATRICIA L. CARUSO, GEORGE PRAMSTALLER, HENRY GRAYSON, JAN EPP, in their individual and official capacities,

Defendants.

No. 03-cv-75106

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DEFENDANTS' (PATRICIA CARUSO, GEORGE PRAMSTALLER, AND JAN EPP)[1] MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

Defendants, Patricia Caruso, George Pramstaller, and Jan Epp, through Counsel and pursuant to FRCP 12 (b) (1) and (6) and FRCP 12 (h) (3) bring this motion to dismiss all federal claims for lack of jurisdiction under the Eleventh Amendment, failure to exhaust administrative remedies under 42 USC 1997e (a), and for failure to state a claim upon which relief may be

[1]Defendant, Henry Grayson, who is represented by this Defense Counsel, submitted a stipulation and order to dismiss, with prejudice, signed by all parties' counsel. (USDC Dkt. Entry 76, filed September 27, 2006). Upon information and belief, no order has yet been entered dismissing Henry Grayson, but it is reasonable to anticipate he will be dismissed. Thus, this motion does not address arguments that would be applicable to a dismissal of Henry Grayson. If the Court does not intend to sign and enter an order dismissing Henry Grayson with prejudice and without costs or attorneys fees pursuant to the stipulation of the parties, please advise and Henry Grayson will file his own dispositive motion/s.

granted.[2] Alternatively, these Defendants bring a motion for summary judgment pursuant to FRCP 56 (b) because there is no genuine issue of material fact on essential elements of Plaintiff's case and the moving party is entitled to a judgment as a matter of law.

1. Co-Defendants, Bency Mathai, and Craig Hutchinson, filed a dispositive motion and brief on November 30, 2006, which these Defendants join and adopt by reference pursuant to FRCP 10 (c), as if fully set forth herein.

2. These Defendants, however, have additional legal defenses available to them that were not covered by Co-Defendants' dispositive motion and brief, to include the following:

a) These Defendants enjoy Eleventh Amendment immunity from suit in federal court for monetary damages in their "official capacity/ies";

b) In their individual capacity/ies, these Defendants were not personally involved in any alleged wrongdoing, which is a prerequisite for liability under 42 USC 1983. Since these Defendants were not personally involved, Plaintiff cannot meet an essential element of a 42 USC 1983 action and the federal claims must be dismissed. These Defendants were not medical treaters. In fact, Plaintiff admitted at his deposition that none of these Defendants were personally involved in any medical treatment of Plaintiff and that he had not even met or talked to any of these Defendants about anything at issue in this case;

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[2] If this Court dismisses the federal claims, it may then decline to exercise supplemental jurisdiction over the state law claims and dismiss those state law claims without prejudice. Where a district court has exercised jurisdiction over state law claims solely by virtue of supplemental jurisdiction and all federal claims are dismissed prior to trial, the state law claims should be dismissed without reaching the merits. *Landefeld v Marion General Hospital*, 994 F2d 1178, 1182 (CA 6 1993); *Faughender v City of North Olmstead*, 927 F2d 909, 917 (CA 6 1991); *Coleman v Huff*, No. 97-1916; 1998 WL 476226 at 1 (CA 6 1998). However, if the Court decides to exercise supplemental jurisdiction over the state law claims, then dismissal of those claims is also appropriate under FRCP 12 (b) (6) for failure to state a claim upon which relief may be granted and for failure to exhaust administrative remedies pursuant to MCL 600.5503 (1).

c) Plaintiff never filed any prisoner grievance against Defendant Patricia Caruso and the sole grievance he filed naming George Pramstaller and Jan Epp was untimely, which requires a dismissal of these three Defendants because Plaintiff has failed to exhaust administrative remedies under 42 USC 1997e (a);

d) Plaintiff's federal claim is barred by qualified immunity since Defendant's conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[3]

e.) Defendant Patricia Caruso is not a health care professional and has never held herself out to be one. As a result, a state law medical malpractice action may not be brought against a person who is not a health care professional per MCL 600.2912 (1) and/or a "practitioner of medicine" under MCL 600.2912a. As a result, she cannot be sued in her individual capacity for monetary damages in a medical malpractice action and any attempt to sue her in an "official capacity" in this regard in federal court is precluded by Eleventh Amendment immunity.

f.) Defendant Jan Epp is not a "practitioner of medicine" and cannot be sued for medical malpractice under MCL 600.2912a.[4] Plaintiff admits that Jan Epp is only a nurse (First Amended Complaint, paragraph 9) and is not a medical doctor or physician;

g.) George Pramstaller, in his "official capacity" is immune from any tort liability in federal court, including any alleged medical malpractice under MCL 600.2912, *et seq*, because of Eleventh Amendment immunity. In his individual capacity, he cannot be sued for medical malpractice, since he was not a treating physician;

[3] *Harlow v Fitzgerald*, 457 US 800; 102 5 Ct 2727; 73 L Ed 2d 396 (1982).
[4] *Cox v Flint Board of Hospital Managers*, 467 Mich 1, 18-22 (2002).

g.) Patricia Caruso, as Director of the MDOC, and George Pramstaller, as MDOC Medical Director, are high appointed officials of state government and are immune from state tort liability under MCL 691.1407 (5).

h.) Plaintiff's pendent state tort claim against Defendant public employees is barred by public employee immunity. MCL 691.1407 (2).

i.) Plaintiff does not have a single medical expert who will testify that any of these three Defendants were deliberately indifferent to any serious medical need of the Plaintiff or that they intended any harm to come to the Plaintiff and, therefore, Plaintiff cannot meet his burden under the Eighth Amendment. Although Plaintiff alleges that MDOC policies and practices were not adequate, none of Plaintiff's experts have even reviewed the MDOC's policies and practices and Plaintiff's experts admitted at deposition that they do not know the particulars of the MDOC contract with CMS and they are not familiar with the provision of medical services to prisoners within the MDOC. Thus, they could give no valid expert opinions in any of these areas.

Wherefore, these Defendants request that Plaintiff's First Amended Complaint and this entire case be dismissed without prejudice for failure to exhaust administrative remedies. Alternatively, that this case be dismissed with prejudice on all other grounds and that these Defendants be awarded their costs and attorneys fees, as allowed by law.

Respectfully submitted,

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Dated: December 20, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVEN BRODER, (#226094)

Plaintiff

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DEFENDANTS' (PATRICIA CARUSO, GEORGE PRAMSTALLER, AND JAN EPP)[5] BRIEF IN SUPPORT OF MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

I. FACTS

Co-defense counsel for Dr. Bency Mathai and Dr. Craig Hutchinson filed a motion and supporting brief to dismiss and/or for summary judgment (USDC Dkt. Entry 79), which these Defendants incorporate by reference pursuant to FRCP 10 (c), as if fully set forth herein. These

[5]Defendant, Henry Grayson, who is represented by this defense counsel, submitted a stipulation and order to dismiss, with prejudice, signed by all parties' counsel. (USDC Dkt. Entry 76, filed September 27, 2006). Upon information and belief, no order has yet been entered dismissing Henry Grayson, but it is reasonable to anticipate he will be dismissed. Thus, this brief in support of the dispositive motion/s does not address arguments that would be applicable to a dismissal of Henry Grayson. If the Court does not intend to sign and enter an order dismissing Henry Grayson with prejudice and without costs or attorneys fees pursuant to the stipulation of the parties, please advise and Henry Grayson will file his own dispositive motion/s and brief in support.

Defendants join in the motion filed by co-defense counsel and state that all of the arguments for dismissal in co-defense counsel's motion and brief apply equally as well to these Defendants, since Plaintiff cannot establish any Eighth Amendment violation against these Defendants for any alleged failure to adopt appropriate policies and procedures, without first establishing that the treating physicians were in violation. Hence, since the co-defendant treating physicians did not violate the Eighth Amendment, Plaintiff cannot establish that Patricia Caruso, George Pramstaller or Jan Epp did so either.

The key dates and treatment of Plaintiff are as stated in co-defendants' brief and there is no reason to be redundant and re-state them here. These Defendants simply want to reiterate that Plaintiff had laryngeal cancer that was properly diagnosed, properly treated, and that he has now been cancer free for over four and one-half years![6]

There are, however, some facts that are applicable to legal defenses specific to Patricia Caruso, George Pramstaller, and Jan Epp, that need to be brought to the Court's attention.

A. <u>Patricia Caruso</u>

It is undisputed that Plaintiff was cancer free as of July 22, 2002 per Dr's Tsien, Dr. Kornak, and Dr. Mathai and that Plaintiff's throat was pain free by September 2002 (See USDC Dkt. Entry 79, Co-Defendants' brief, pages 10-11 and attached exhibits thereto). It is also undisputed that Patricia Caruso did not even become the Director of the Michigan Department of

[6] Regarding his current health, Plaintiff testified at his June 2, 2005 deposition, as follows:
"Q All right. Now, you don't have cancer today, do you?
A Not that I'm aware of.
Q So whatever treatment you had for throat cancer, it has resolved the issue or the problem? It got rid of the cancer, in other words?
A Yeah. It got rid of the cancer as far as I know." (See Exhibit 1 attached hereto, Plaintiff's Deposition, page 60, lines 17-22).
Q All right. And the radiation therapy and the chemo therapy cured your cancer, along with the surgeries you had; is that correct?
A Yeah. (Plaintiff's Deposition, page 69, lines 2-5)

Corrections (MDOC) until some time in the year 2003.[7] Plaintiff testified at his deposition, with regards to Patricia Caruso, as follows:

"Q All right. Have you ever met Patricia Caruso?

A I've seen her. I've never personally met her, no. (Plaintiff's Deposition, page 35, lines 5-6)[8]

Q You've never been introduced to Patricia Caruso; is that correct.

A No.

Q You've never had any personal conversations either on the telephone or face-to-face with Patricia Caruso; is that correct?

A Correct. (Plaintiff's Deposition, page 35, lines 13-19)

Q When did Patricia Caruso become the director, to your knowledge?

A I'm going to guess at 2003.

...,

Q And what was her job – Patricia Caruso's job before she became director of the Department of Corrections?

A If I'm not mistaken, she was original – a regional prison administrator or regional warden.

Q For what region?

A I believe it was region one, which I believe is up north.

Q Does that include the Parnall Correctional Facility?

A No.

Q So she would have been a regional prison administrator in a region that did not include the prison where you were housed, at Parnall?

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[7] See MDOC Michigan Annual Reports for 2001-2002 listing the directors in 2001-2002, including William Overton as Director in 2002 at website http://www.michigan.gov/corrections under "Publications and Information". Patricia Caruso was not the MDOC Director in 2001 or 2002. She did not become the MDOC Director until July 1, 2003. Plaintiff was already cured of cancer as of July 2002 (approximately one year before Patricia Caruso became the MDOC Director). The latest date complained of by Plaintiff in his First Amended Complaint is April 17, 2003 when a follow-up biopsy was performed indicating Plaintiff remained cancer free following his 2002 treatment. (USDC Dkt. Entry 49, First Amended Complaint, paragraph 80). Obviously, given these dates, Patricia Caruso could not have any personal involvement sufficient for liability under 42 USC 1983 in her "individual capacity" or her "official capacity". She also enjoys Eleventh Amendment immunity in her "official capacity".

[8] Plaintiff's deposition is attached hereto as Exhibit 1.

A Yes.

Q Did you have any correspondence with Patricia Caruso while she was a regional prison administrator?

A No. I never knew she existed.

Q So until she became director, you didn't know who she was?

A Correct. (Plaintiff's Deposition, page 36, lines 1-22)

Q Have you ever written to Patricia Caruso in a letter format or a kite where – for any issue involved in this lawsuit that we're here on today?

A Not that I'm aware of." (Plaintiff's Deposition, page 38, lines 16-19)

Thus, it is very clear in this case, that Patricia Caruso had no personal involvement within the meaning of 42 USC 1983. She was not the MDOC Director during 2001-2002 and she had no personal involvement with Plaintiff regarding his laryngeal cancer. As a former Warden at the Kinross Correctional Facility in the Upper Peninsula and as a Regional Administrator in a region where Plaintiff was not housed, she was not the supervisor of either George Pramstaller or Jan Epp. Plaintiff has failed to establish any facts demonstrating that Patricia Caruso had any personal involvement in anything at issue in this case.

Further, Patricia Caruso is not a health care professional, physician, or practitioner of medicine. As a result, she cannot be sued for "medical malpractice" under any state law theory. Further, just as co-defense counsel pointed out, Plaintiff failed to file an affidavit of merit with the First Amended Complaint as required by MCL 600.2912d and there was no notice of intent served on Patricia Caruso as required by MCL 600.2912b (1)-(6), which is a mandatory prerequisite for any medical malpractice action.

Lastly, the MDOC Director is appointed by the Governor of Michigan[9] and is a high appointed official entitled to absolute immunity from state tort liability per MCL 691.1407 (5). Thus, Plaintiff may not pursue state tort negligence law claims of any kind against Patricia Caruso.

B. George Pramstaller

Defendant, Dr. George Pramstaller, was not a treating physician in this case. He had no personal involvement in treating Plaintiff within the meaning of 42 USC 1983. Since he was not a treating physician he cannot be sued under the state law medical malpractice statutes in his individual capacity. In his "official capacity" he cannot be sued in federal court because of Eleventh Amendment immunity. In order to establish George Pramstaller's lack of personal involvement, it is helpful to review Plaintiff's own deposition testimony. Plaintiff testified, as follows:

"Q Have you ever met George Pramstaller?

A No.

Q So you've never talked to him personally face-to-face or on the telephone?

A No.

...,

[9] The Defendants request that this Court take judicial notice under FRE 201 that the MDOC is a department of state government for the State of Michigan. These facts are not subject to reasonable dispute because they are generally known within the territorial jurisdiction of this trial court and are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Thus, this request meets the requirements of FRE 201 (b). See MCL 791.201, *et seq*, creating the MDOC as a department of state government within the State of Michigan with a Director appointed by the Governor.

MCL 791.231a (1) establishes a ten member Parole Board within the Michigan Department of Corrections (MDOC). MCL 791.231a (2) - (4) provide for the appointment and/or removal of the ten Parole Board members by the MDOC Director with salaries to be paid from state funds and established by the state legislature. Thus, the MDOC director is the head of the Department.

Q Has George Pramstaller ever been a treating physician for any health problem that you've had?

A I'm not sure how – I'm not sure how "treating" is going to be defined.

Q Have you ever been – has he ever seen you as a patient?

A No." (Plaintiff's deposition, pages 38, lines 24-25 and page 39, lines 1-11)

"Q All right. Do you have any other correspondence that you addressed to George Pramstaller at all besides what's in [Deposition] Exhibit 5?[10]

A Just regarding – not regarding the cancer, no.

Q Well, what other correspondence do you have, if any?

A Regarding orthopedic shoes.

Q Okay. And that's the subject of a separate lawsuit?

A Correct.

Q And has nothing to do with the lawsuit we're here on; correct?

A Right." (Plaintiff's Deposition, page 41, lines 15-25)

"Q All right. Now, have you ever filed a prisoner grievance against George Pramstaller?

A I made a reference in some of the grievances, but never – I don't think I ever wrote one against him personally." (Plaintiff's Deposition, page 42, lines 8-11)

"Q Have you ever sent a medical kite to health care staff for which you were refused treatment?

A No.

Q So any time you sent a medical kite you were seen?

A Yes. Or responded to." (Plaintiff's Deposition, page 50, lines 8-12)

"Q So – just so I'm straight, you've never made a request to any custody staff or prison official to be seen by health care staff that was denied?

A No." (Plaintiff's Deposition, page 60, lines 12-15)

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[10] See Exhibit 2 attached hereto, which is a copy of George Pramstaller's answers to Plaintiff's Second Set of Interrogatories. Interrogatory 12 and the response thereto discuss the same correspondence that was Plaintiff's Deposition exhibit 5. George Pramstaller never received or responded to Plaintiff's correspondence. He was not personally involved.

Given that Plaintiff was properly diagnosed, properly treated, and cured of laryngeal cancer in this case, Plaintiff's September 23, 2001 correspondence and the response thereto have no real bearing on this case. See Plaintiff's deposition testimony quoted in footnote 2 above and Co-Defense Counsel's recitation of facts in his brief in support of his dispositive motion (USDC Dkt. Entry 79).

Besides Plaintiff's own deposition testimony that he never met or talked to George Pramstaller, that George Pramstaller was not his treating physician, that Plaintiff never exhausted his administrative grievances against George Pramstaller, and that Plaintiff has never been denied health care services, the Court will also note that there are no medical records of any kind indicating that George Pramstaller was ever a treating physician of Plaintiff's.

C. Jan Epp

Like the other two named Defendants, Jan Epp was not personally involved in anything at issue in this case within the meaning of 42 USC 1983 and Plaintiff never exhausted his administrative grievances against her as required by 42 USC 1997e (a). In this regard, Plaintiff testified at his deposition, as follows:

"Q So you would agree she has never personally treated you or seen you for any health care concern?

A Not that I'm aware of, no. Unless she saw me here for some reason, like I'm thinking she may have.

Q If she saw you, you would know that because you would have been present when she saw you; right?

A Well, it was the kite – this part I'm primarily thinking about the orthopedic shoes. She may have been over that matter, back around '99.

Q Okay. So you think she may have seen you for a reason that's unrelated to any issue in this lawsuit?

A Correct.

Q But you're not sure she did see you?

A No, I'm not sure.

Q Do you know what Jan Epp's looks like? Could you describe her for us?

A No.

Q Have you ever talked to Jan Epps on the telephone?

A No.

Q Have you ever written any correspondence to her?

A I believe so.

Q When?

A That I couldn't tell you.

Q Did it have anything to do with this lawsuit?

A I couldn't tell you that, either." (Plaintiff's Deposition, pages 44, lines 13-25 and page 45, lines 1-12).

D. <u>Plaintiff's Experts do not support any legal claim against these Defendants</u>

Besides Plaintiff's own deposition testimony, Plaintiff's experts in this case fail to mention any of the Defendants, Patricia Caruso, George Pramstaller, and Jan Epp, by name or indicate that any of these three breached any standard of care in the medical profession. Nor do the expert reports state that any of these three Defendants were deliberately indifferent to any serious medical need of Plaintiff's or formed any subjective intent to harm plaintiff under the Eighth Amendment.

Plaintiff's expert, Dr. Brent Cutler, testified that neither Jan Epp nor George Pramstaller violated any Eighth Amendment standard, stating as follows[11]:

"Q Doctor, have you ever met Jan Epps?

A No.

Q Have you ever corresponded with her or Dr. Pramstaller?

A No.

Q Have you ever met Dr. Pramstaller?

A No.

Q Have you ever talked to either Jan Epps or Dr. Pramstaller on the telephone?

A No.

...,

Q Do you know what Jan Epp's job title or job duties were?

A No.

Q I don't see anything in your report specifically relating to Jan Epps. Do you have an opinion as – regarding Jan Epps and whether or not she did anything wrong in this case?

[11] Relevant portions of Dr. Brent Cutler's deposition are attached hereto as Exhibit 3.

A What is her position? The answer is no.

Q Okay. Yeah, she is not even mentioned in your report, so – Did you review any Michigan Department of Corrections policies or procedures in preparing your report?

A No.

Q Are you aware that Jan Epps never personally provided any medical care to the Plaintiff Steven Broder and never treated him?

A I never saw any reference to that in the records.

Q Okay.

A I guess I'm aware of it.

Q So you don't have an opinion as to whether Jan Epps intentionally denied plaintiff Steven Broder any medical treatment for any serious medical condition in this case?

A No, I do not.

Q And you don't have an opinion as to whether or not she was deliberately indifferent to any serious medical need of the plaintiff Steven Broder?

A No, I do not. (Brent Cutler Deposition, pages 85, line 1, to page 87, line19)

Q What is Dr. Pramstaller's job title, if you know?

A Medical director for Michigan Department of Corrections.

Q Do you know what his job duties are?

A Not specifically. Generally running the medical system for the Michigan Department of Corrections.

Q Do you have an opinion whether Dr. George Pramstaller formed[12] a subjective intent to harm the plaintiff Steven Broder by preventing or delaying any prescribed medical treatment for any serious medical need?

A No, I don't think he did. (Brent Cutler Deposition, pages 88, lines 5-15)

Plaintiff's own expert also testified that he doesn't even know whether any of the alleged delays had any effect, whatsoever, on Plaintiff's ultimate outcome in this case. (See Exhibit 3 attached hereto, Brent Cutler Deposition, pages 90, lines 13-22). Thus, all of the alleged delays that Plaintiff complains about in his First Amended Complaint amounted to nothing because Plaintiff was diagnosed, treated, and cured and Plaintiff's own expert doesn't even know if there

was any adverse effect on Plaintiff. All this case amounts to is a disagreement by Plaintiff with his doctors about what treatment he needed and when. Such disagreements do not amount to Eight Amendment violations. The bottom line is Plaintiff was cured and he has been cancer free for over four and one-half years.

E. Facts Regarding Exhaustion of Administrative Grievances

Plaintiff admits that he never filed any prisoner grievance against any of these three Defendants (Patricia Caruso, George Pramstaller, and Jan Epp).[13] Obviously, since Patricia Caruso did not become the MDOC Director until July 2003 and Plaintiff was completely cured of cancer before then, it is readily apparent why there would logically be no grievance against her.[14] Although Plaintiff attached some prisoner grievances to his initial complaint filed in this lawsuit, none of those prisoner grievances name any of these three defendants, and none of the grievances are against any of these three defendants. Neither Patricia Caruso nor George Pramstaller ever responded to any of Plaintiff's prisoner grievances. They were not involved in the grievance process.

The only Defendant who responded to one of Plaintiff's grievances was Jan Epp, which she did at the Step 2 appeal stage of the process. However, being assigned to respond to a prisoner grievance is not the same as being grieved. Thus, Plaintiff has failed to exhaust his administrative remedies against any of these three Defendants under 42 USC 1997e (a).

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[12] The deposition transcript contains the word "performed", which should be "formed" instead.
[13] Plaintiff's Deposition, pages 42, line 8, to page 46, line 16.
[14] It is obvious that Plaintiff simply named Patricia Caruso as a Defendant because at the time he initiated this lawsuit by filing the Complaint on December 19, 2003 (See USDC Dkt. Entry 1) she was the MDOC Director. However, Plaintiff forgot to take into consideration that Patricia Caruso was not the MDOC Director at any time relevant to this lawsuit.

II. LEGAL ARGUMENTS

A. In their "official capacity", each Defendant enjoys Eleventh Amendment immunity from suit in federal court for monetary damages and/or injunctive and declaratory relief, regardless of whether the legal claims arise under federal or state law or both. The only exception to Eleventh Amendment immunity is for "prospective" injunctive and/or declaratory relief. Such relief is not appropriate in a case where Plaintiff can prove no violation of the Eighth Amendment or federal law. Additionally, Plaintiff is cured of cancer. Thus, any claimed need for prospective injunctive or declaratory relief is moot in this case. Plaintiff cannot establish any likelihood of success on the merits for purposes of injunctive relief when he cannot demonstrate that the cancer will re-occur in the future or that any alleged delays in the past had any adverse effect on him.

The Eleventh Amendment of the United States Constitution bars suits in federal court against the State, its agencies, and officials sued in their official capacity unless this immunity from suit is expressly waived by either the State or Congress, regardless of the nature of the relief sought.[15] Plaintiff's complaint is brought under 42 USC § 1983, and he specifically sued these three Defendants in their official capacity/ies for damages as well as injunctive and declaratory relief. The statute, 42 USC 1983, is not a waiver of the State's Eleventh Amendment

[15] *Pennhurst State School and Hospital v Halderman*, 465 US 89, 100, 104 S Ct 900, 79 L Ed 2d 67 (1984); *Seminole Tribe of Florida v Florida*, 517 US 44, 116 S Ct 1114, 134 L Ed 2d 252 (1996). The Eleventh Amendment provides jurisdictional immunity to state officials when the state is the real, substantial party in interest. *Pennhurst State School and Hospital v Halderman*, 465 US 89, 101 (1984). As when the state itself is named as the defendant, a suit against state officials that is, in fact, a suit against a state is barred regardless of whether it seeks damages or injunctive relief. *Id*., at 101-102. Thus, a suit against a state official, which is a disguised suit against the state itself, is prohibited by the Eleventh Amendment. In this case, Plaintiff attempts to seek both monetary damages and injunctive relief against state officials for alleged actions taken in their official capacity regarding MDOC policies and procedures. As this Court already noted in its Order dated September 22, 2004 (USDC Dkt. Entry 35, page 6, fn 3) "policy or custom" complaints under 42 USC 1983 may only be brought against local governments and municipalities, which do not enjoy Eleventh Amendment immunity. *Monell v Dept of Social Services*, 436 US 658, 689 at fn 54 (1978). Plaintiffs may not sue these three Defendants in their "individual capacity" for an alleged policy and custom violation, because only state officials acting in an official capacity and as an arm of the state make policy and custom and such a suit is against the state itself. Plaintiff may not avoid Eleventh Amendment immunity by couching the suit as an individual capacity claim. Individuals acting in their individual capacity do not make policy and customs for the state. Any claim seeking to change MDOC policy and custom, whether by injunction or a damage award, is, in effect, a suit against the state and precluded.

jurisdictional immunity.[16] Therefore, Plaintiff's complaint is barred by the Eleventh Amendment, and must be dismissed.

The Eleventh Amendment to the United States Constitution bars suits against states and their departments or agencies in federal court.[17] The nature of the relief sought here does not permit a different result. In *Missouri v Fiske*,[18] the Supreme Court stated that the jurisdictional bar applies regardless of the nature of the relief sought:

> "Expressly applying to suits in equity as well as at law, the [Eleventh] Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State."

This was further explained in *Dugan v Rank*,[19]:

> "The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." (quoting *Larson v Domestic & Foreign Commerce Corp*., 337 US 682, 704 (1949)).

In *Cory v White*,[20] the Court again declared that the Eleventh Amendment bars requests for injunctive relief:

> "It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." Thus, the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself. Edelman did not embrace, much less imply, any such proposition."[21]

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[16] *Will v Dept. of State Police*, 491 US 58, 109 S Ct 2304, 105 L E 2d 45 (1989); *Quern v Jordan*, 440 US 332, 341 (1979).
[17] *Alabama v Pugh*, 438 US 781 (1978); *Quern v Jordan*, 440 US 332 (1979).
[18] *Missouri v Fiske*, 290 US 18, 27 (1933).
[19] *Dugan v Rank*, 372 US 609,620 (1963).
[20] *Cory v White*, 457 US 85, 72 L Ed 2d 694 (1982).
[21] *Id* at 90-91.

Although the Supreme Court has recognized an exception for prospective injunctive relief to the Eleventh Amendment's bar, that exception only applies in limited circumstances. Embodied in *Edelman v Jordan*,[22] the exception allows a court to abrogate a state's sovereign immunity for the sole purpose of ending continuing violations of federal law by governing future conduct. However, the Supreme Court has unequivocally stated that the theory underlying this abridgment of the state's immunity is a "fiction," the justification for which is not present in all cases requesting injunctive relief.[23] The Sixth Circuit concurred in *Banas v Dempsey*,[24] and *Green v Mansour*,[25] stating: "As the fiction creates the exception to the Eleventh Amendment bar, it also limits the remedies that can be awarded."

In particular, two requirements must be met before this Court can indulge the fiction and entertain a claim for injunctive relief in an official capacity suit:

1. An federal right must be at stake; and
2. The injunctive relief requested must be designed to end a continuing violation of federal law.

In *Green*,[26] the Court specifically noted that while prospective injunctive relief "designed to end a continuing violation of federal law" is necessary to vindicate the federal interest, "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."

[22] *Edelman v Jordan*, 415 US 651 (1974).
[23] *Pennhurst State Sch. & Hosp. v Halderman*, 465 US 89, 105, 79 L Ed 2d 67 (1984)
[24] *Banas v Dempsey*, 742 F 2d 277, 287 (CA 6 1984), *aff'd sub nom.*
[25] *Green v Mansour*, 474 US 64, 88 L Ed 2d 371 (1985).
[26] *Green*, 474 US at 68.

This case does not present a scenario of continuing violations of federal rights which would justify invoking the fiction of *Ex parte Young* and *Edelman* to abrogate the State's sovereign immunity and to award prospective injunctive relief to govern future action.[27] The

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[27] Likewise, retrospective declaratory relief is also barred by the Eleventh Amendment. The Federal Declaratory Judgment Act, 28 USC § 2201, is procedural in nature and neither supplies nor extends an independent ground for a federal court's jurisdiction, where none otherwise exists. *See, e.g., Green v Mansour*, 474 US 64 (1985); *Hughes-Bechtol, Inc v West Virginia Bd. of Regents*, 527 F Supp 1366 (SD Ohio, 1981), *aff'd*, 737 F2d 54 (CA 6 1984), *cert den*, 469 US 1018 (1984); and, *Michigan Savings & Loan League v Francis*, 683 F2d 957 (CA 6 1982). Furthermore, as aptly analyzed in *Kozol v Lumbermens Mutual Casualty Co.*, 201 F Supp 718, 720 (D Mass, 1962):

> "In enacting Section 2201, Congress had in mind providing a remedy to supply equitable relief where needed. I do not believe that it intended the Section to be available solely for the meaningless vindication of a claimed right, the establishment of which confers no economic benefit on the claimant and saddles the defendant with unnecessary expense, and likewise saddles innocent third parties with a great deal of totally unnecessary inconvenience."

In *Green*, the Supreme Court was confronted with a situation in which certain policies and regulations, implemented by the Michigan Department of Social Services, were alleged to be in violation of 42 USC § 1983. The Supreme Court "granted certiorari to resolve a conflict in the Circuits over whether federal courts may . . ., issue a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." *Green*, 474 U.S. at 67. Regarding the propriety of declaratory relief, the Sixth Circuit determined, as follows:

> "Any declaratory judgment in these cases would concern only the past conduct of the state official, a finding, in retrospect, that certain activities of the state official had previously violated plaintiffs' rights under federal law. In our view, such a declaration would not be prospective in nature, and therefore an order based solely on a declaration regarding the past conduct of the state official would not be an order falling within the "prospective-compliance" exception necessary to bring it "on the *Ex parte Young* [209 US 123 (1908)] side of the Eleventh Amendment." *Banas v Dempsey*, 742 F2d 277, 288 (CA 6, 1984) (quoting *Quern v Jordan*, 44 US 332, 347 (1979).

In upholding the Sixth Circuit's determination, the *Green* Court stated: "We have refused to extend the reasoning of *Young*, however, to claims for retrospective relief." *Green*, 474 US at 68. Furthermore, the *Green* Court noted that the reasoning in *Quern* was also inapplicable to abrogate the Michigan Department of Social Service's Eleventh Amendment immunity, concerning the request for declaratory relief:

> "Justice Brennan's dissent contends that because the injunction and declaratory judgment in *Quern* implied past violations of federal law, declaratory judgments expressly adjudicating the question of past violations are routinely available. We think he is mistaken.
>
> Thus, a declaratory judgment that respondent violated federal law in the past would have to stand on its own feet as an appropriate exercise of federal

three Defendants (Patricia Caruso, George Pramstaller, and Jan Epp[28]) are entitled to a dismissal based on their Eleventh Amendment immunity. Plaintiff has failed to meet the requirements for the prospective injunctive relief exception because he has not established the violation of any federal right and therefore there can be no "continuing violation of federal law" present in this case. The only federal law claim raised by Plaintiff is an Eighth Amendment "cruel and unusual punishment" claim for alleged deliberate indifference to serious medical needs. The legal standard for an Eighth Amendment claim is as stated in co-defense counsel's brief (USDC Dkt. Entry 79, pages 17-20). Plaintiff cannot establish that any Defendant had the requisite subjective intent or state of mind to violate the Eighth Amendment. Plaintiff's claims of negligence and medical malpractice do not amount to an Eighth Amendment violation.[29]

In effect, Plaintiff merely has a disagreement with his treating physicians about the exercise of their medical judgment, which does not constitute an Eighth Amendment claim.[30] Even Plaintiff's own expert, Dr. Brent Williams, testified that he does not know what effect, if any, the alleged delays Plaintiff complains about had on Plaintiff.

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jurisdiction in this case. This it cannot do for the reasons we have previously stated." *Green*, 474 US at 74.

[28] Jan Epp retired from the MDOC and is no longer an MDOC employee. See Jan Epp's answers to Plaintiff's Second Set of Interrogatories attached hereto as Exhibit 4. These answers are under oath as required by FRCP 33 and notarized. The answers, being under oath and notarized, have the same legal affect as a notarized affidavit. In interrogatory answers 7 and 12, Jan Epp states she is now retired from the MDOC. Thus, any claimed injunctive relief as to her would also be moot due to her retirement and because she has no ability to implement injunctive relief. Any requested injunctive relief would have no effect on Jan Epp.

[29] *Estelle v Gamble,* 429 US 97, 105-106 (1976). *Ribble v Lucky*, 817 F Supp 653, 655 (ED Mich, 1993) (Even claims of "gross negligence" fail to state an Eighth Amendment claim).

[30] *West Lake v Lucas*, 537 F2d 857, 860 at fn 5 (CA 6, 1976). *Hicks v Frey*, 992 F2d 1450, 1455 (CA 6, 1993). *Youngberg v Romeo*, 457 US 307, 321 (1982) (Courts typically do not intervene in questions of medical judgment).

B. Neither the State, the MDOC, nor these Defendants in their "official capacity" are "persons" under 42 USC 1983.

Plaintiff has specifically indicated in the caption of the First Amended Complaint that he is suing these defendants in their official capacity. By suing defendants in their official capacity, plaintiff has, in effect, sued defendants' office, which is no different from a suit against the state itself.[31] For purposes of 42 USC 1983, state officials sued in their "official capacity" are not persons within the statutory meaning of that term. They cannot be sued under 42 USC 1983 in their "official capacities". *Will v Michigan Dep't of State Police,* 491 US 58 (1989).

C. Where Defendants have not violated a clearly established federal statutory or constitutional right, they are entitled to dismissal based on qualified immunity.

The First Amended Complaint, paragraph 132, ask for various types of monetary relief, apparently against all named defendants, because the pleading fails to differentiate what relief is requested against what defendants. And the caption of the complaint indicates that all defendants are sued in both their individual and official capacities. In the event that Plaintiff seeks damages against them in their individual capacities, these three Defendants are entitled to summary judgment based on qualified immunity.

In 1982 the United State Supreme Court held that governmental officials or employees who are sued in their individual capacities “are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”[32] The Sixth Circuit thereafter said that "[t]he failure to so plead, precludes a plaintiff from proceeding further, even from engaging in discovery.”[33]

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[31] *Will v Michigan Dep't of State Police,* 491 US 58 (1989).
[32] *Harlow v Fitzgerald*, 457 US 800, 818 (1982).
[33] *Dominique v Telb,* 831 F2d 673, 676 (CA 6, 1987), citing *Mitchell v Forsyth,* 472 US 511 (1985), *Gomez v Toledo*, 446 US 635 (1980), and *Harlow*, 457 US at 818.

In 1991, the Supreme Court held in *Siegert v Gilley* that prior to determining whether a right is clearly established and prior to entertaining summary judgment where qualified immunity has been asserted, a court must first determine "whether the plaintiff has asserted a violation of a constitutional right at all."[34]

This holding was expanded and clarified in the Court's 2001 decision in *Saucier v Katz.* The Court enunciated a two-prong test, and also held that a district court must view the issue of qualified immunity in the specific context of the case. First, a court must consider whether the facts of the case, viewed in the light most favorable to the plaintiff, "show the officer's conduct violated a constitutional right."[35] If so, the court must then decide "whether the right was clearly established."[36] "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation that he confronted."[37]

The Court also reiterated that a ruling on qualified immunity "should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive."[38] Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation" and is "an immunity from suit rather than a mere defense to liability."[39]

A court's first inquiry, taking the complaint in the light most favorable to the plaintiff, is whether the facts alleged show the defendant's conduct violated a constitutional right.[40] If a violation could be made out on a favorable view of the parties' submissions, the next, sequential step "is to ask whether the right was clearly established" and "this inquiry, it is vital to note, must

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[34]*Siegert v Gilley*, 500 US 226, 232 (1991).
[35]*Saucier v Katz*, 533 US 194, 201 (2001).
[36]*Saucier v Katz*, 533 US at 201.
[37] *Saucier v Katz*, 533 US at 201.
[38] *Saucier v Katz*, 533 US at 200.
[39] *Saucier v Katz*, 533 US at 201.
[40]*Saucier v Katz*, 533 US at 201.

be undertaken in light of the specific context of the case, not as a broad general proposition."[41] In this case, plaintiff has not alleged facts sufficient to satisfy the first prong of the *Saucier* test. As set forth throughout this brief, Plaintiff cannot establish any facts showing that the Defendants' conduct violated a constitutional right.[42] Therefore, the Court should grant Defendants qualified immunity with respect to any putative claim for damages.

Further, as argued above, the law on this issue at the time of the events at issue here was in favor of Defendants' position that a disagreement with the medical doctors about the exercise of their medical judgment regarding acceptable time frames for treatment does not constitute a constitutional violation. Nor is mere negligence or even gross negligence a constitutional violation. Therefore, no clearly established law would have informed Defendants that, if they did not treat Plaintiff sooner, that they would be committing an 8th Amendment violation, especially when the diagnosis and treatment that occurred cured Plaintiff of cancer. Thus, Plaintiff fails to meet either provision of the two-part test for determining qualified immunity. Defendants are therefore entitled to a dismissal of any potential claim for damages, based on qualified immunity.

D. In their individual capacity, these Defendants had no personal involvement in any alleged wrongdoing and cannot be held liable under 42 USC 1983. The only claim that falls under 42 USC 1983 in this case is the 8th Amendment claim and there was no 8th Amendment violation.

In order to demonstrate liability under 42 USC § 1983, a plaintiff must first establish that each named defendant acted under color of state law and that their actions offended rights secured by the Constitutional and/or laws of the United States.[43] Second, a plaintiff must make a

[41] *Saucier v Katz*, 533 US at 201.
[42] *Saucier v Katz*, 533 US at 201.
[43] *Baker v McCollan*, 443 US 137 (1989).

clear showing that each named Defendant was personally involved in the activity that forms the basis of the complaint.[44]

Allegations premised on *respondeat superior* liability are foreclosed in § 1983 actions.[45] In *Bellamy*, the Sixth Circuit stated that in order to impose liability on supervisory personnel, a Plaintiff must show more than having brought offending conduct to the attention of supervisory officials:

> There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved and knowingly acquiesced in the unconstitutional conduct of the offending subordinate.

Bringing a complaint to the attention of supervisory officials is insufficient.[46]

And a supervisory official's awareness after the fact of alleged illegal conduct does not provide a basis for imposition of damages under 42 USC § 1983. See *Weaver v Toombs*, 756 F Supp 335, 337 (WD Mich, 1989). Merely being aware of a prisoner's complaint and failing to take corrective action is insufficient to impose liability on supervisory personnel under § 1983. *Poe v Haydon*, 853 F2d 418, 429 (CA 6, 1988), *cert den*, 488 US 1007 (1989). The supervisor must have directly participated in the alleged wrongful conduct.

> "[A] supervisory official's failure to, control, or train the offending individual is not actionable, unless the supervisor 'either encouraged the specific incident of misconduct or in some other way directly participated in it.'" *Id.*

Plaintiff has made no allegation or showing that Director Patricia Caruso participated in, authorized, acquiesced in, or encouraged any unconstitutional conduct by any other Defendant. In fact, Plaintiff must admit that Patricia Caruso did not even become the MDOC Director until July 1, 2003, which fact is incontrovertible. Since Plaintiff cannot demonstrate that Patricia

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[44] See *Rizzo v Goode*, 423 US 362 (1976); *Bellamy v Bradley*, 729 F2d 416 (CA 6 1984) *cert den*, 469 US 845 (1984).
[45] *Monell v Dep't of Social Servs*, 436 US 658 (1978); *Bellamy*, 729 F2d at 421.
[46] *Id.*

Caruso was ever the Director at any time relevant to this lawsuit, he cannot establish any personal involvement on her part and any individual capacity suit against her must be dismissed.

Furthermore, Plaintiff has not shown that any of these three Defendants had "actual knowledge of a breakdown in the proper working of the department" and failed to perform his own specific duties in the face of such actual knowledge.[47] As Plaintiff's deposition testimony makes clear, none of these three Defendants had any personal interaction with Plaintiff in 2001-2002 over anything at issue in this case.

The only Defendants that ever reviewed and responded to any of Plaintiff's prisoner grievances during the time at issue was Jan Epp, when she responded at Step 2 of the grievance process. The mere denial of administrative grievances does not amount to active unconstitutional behavior.[48] Liability under § 1983 must be based on active unconstitutional behavior and cannot be based upon "a mere failure to act."[49] A prisoner's allegation that a defendant improperly denied a grievance is not a claim of constitutional dimension because there is "no inherent constitutional right to an effective prison grievance procedure."[50]

Additionally, since Plaintiff cannot establish that any Eighth Amendment violation occurred at all with regards to any treating physician in this case, he cannot successfully argue that any of these three Defendants acquiesced in any unconstitutional behavior. Plaintiff must first demonstrate unconstitutional behavior by a subordinate before he can argue supervisory liability and he cannot prove either in this case.

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[47] See *Hill v Marshall*, 962 F2d 1209, 1213 (CA 6 1992).

[48] *See Shehee v Luttrell*, 199 F3d 295, 300 (CA 6, 1999), *cert den*, 120 S Ct 2724 (2000); *see also, Manney v Monroe*, 151 F Supp 2d 976 (ND Ill, 2001) (Where the only evidence of a prison officials involvement in an alleged constitutional violation is a signature on the grievance report, it is not sufficient to show personal involvement.).

[49] *Shehee v Lutrell*, 199 F 3d 295, 300 (CA 6 1999) (citing *Salehpour v University of Tennessee*, 159 F 3d 199, 206(CA 6 1998), *cert den*, 119 S Ct 1763, 143 L Ed 2d 793 (1999).

[50] *See Overholt v Unibase Data Entry, Inc.*, No. 98-3302, 2000 US App. LEXIS 14087 at *9, 2000 WL 799760, at *3 (CA 6 June 14, 2000) (copy attached); *Lyle v Stahl*, No. 97-2007, 1998 US App. LEXIS 18241 at*3, 1998 WL 476189, at *1 (CA 6 Aug. 3, 1998) (copy attached).

Because Plaintiff has failed to show personal involvement sufficient to impose liability under § 1983, Defendants Patricia Caruso, George Pramstaller, and Jan Epp are all entitled to dismissal.

E. Plaintiff failed to exhaust administrative remedies under 42 USC 1997e (a) against any of these Defendants and this case should be dismissed.

Inmate Eighth Amendment claims must be grieved through the MDOC administrative grievance procedure. 42 USC 1997e (a) states in this regard, as follows:

> "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

The exhaustion of administrative remedies requirement applies to cases filed on or after April 26, 1996.[51, 52]

The Supreme Court, in *Porter v Nussle*, 534 US 516, 524-525 (2002) discussed Congress' intent in enacting §1997e (a), as follows:

> Beyond doubt, Congress enacted §1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officers' time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation. In other instances, the internal review might "filter out some frivolous claims." And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy. (Emphasis added)

The Supreme Court also emphasized that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular

[51] *White v McGinnis*, 131 F3d 593, 594 (CA 6 1997).

[52] A limited exception applies to cases filed after April 26, 1996 when the events occurred before that date. *See generally*, *Wolf v Moore*, 199 F3d 324 (CA 6 1999); and *Wyatt v Leonard*, 193 F3d 876 (CA 6 1999). However, this exception does not apply in the case-at-bar because the events at issue in this lawsuit occurred in 2001-2002, which was well after the April 26, 1996 effective date of the Prison Litigation Reform Act and the amendments to 42 USC 1997e (a) making exhaustion of administrative remedies mandatory.

episodes, and whether they allege excessive force or some other wrong"[53] The Supreme Court explained that a prior decision in *Booth v Churner*, 532 US 731 (2001), held that Congress has enacted a statute that is an exception to the general rule that statutes be construed to favor non-exhaustion in 42 USC §1983 cases:

> In reaching its decision the [lower court] referred to its "obligation to construe statutory exceptions narrowly, in order to give full effect to the general rule of non-exhaustion in §1983. The [lower court] did not then have available to it our subsequently rendered decision in [*Booth*]. *Booth* held that §1997e(a) mandates initial recourse to the prison grievance process even when a prisoner seeks only money damages, a remedy not available in that process. In so ruling, we observed that "Congress… may well have thought that we were shortsighted" in failing adequately to recognize the utility of the administrative process to satisfy, reduce, or clarify prisoner grievances. While the canon on which the [lower court] relied may be dependable in other contexts, the PLRA establishes a different regime. For litigation with §1997e(a)'s compass, Congress has replaced the "general rule of non-exhaustion" with a general rule of exhaustion.[54]

The Sixth Circuit specifically addresses the exhaustion requirement under 42 USC §1997e for prisoner civil rights cases in *Brown v Toombs*,[55] stating:

> "In light of the plain mandatory language of the statute regarding exhaustion of remedies, the legislative purpose underlying the plain language, and the sound policy on which it is based, this court will henceforth require that prisoners filing §1983 cases involving prison conditions must allege and show that they have exhausted all available state administrative remedies. A prisoner should attach to

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[53] *Id*. at 992. In *Booth v Churner*, 532 US 731 (2001) the Court held that the PLRA's exhaustion requirement applies to Eighth Amendment claims even if the administrative process does not allow for monetary damages to be awarded. In *Porter v Nussle, supra*, the Court held that the PLRA exhaustion requirement applies to all Eighth Amendment claims including claims of excessive force and failure to protect claims. *Porter v Nussle, supra*, involved a claim by a prisoner that prison staff singled him out for a beating, i.e. an excessive force claim. The Supreme Court agreed with the Sixth Circuit, that even excessive force claims under the Eighth Amendment are subject to the PLRA's exhaustion requirement. *See, Freeman v Francis*, 196 F3d 641 (CA 6 1999), which was cited by the Supreme Court in *Porter v Nussle, supra*. In *Porter v Nussle*, the Supreme Court discussed the different proofs necessary to make a case for excessive use of force under *Hudson v McMillan*, 503 US 1 (1992) and for failure to protect claims under *Farmer v Brennan*, 511 US 825 (1994) and found that the PLRA exhaustion requirements apply to both types of cases, as both types of cases involve "prison conditions" under 42 USC 1997e(a).

Thus, even Plaintiff's Eighth Amendment claims in the First Amended Complaint, Count I, paragraphs 87-96, are subject to the exhaustion requirements of 42 USC 1997e (a).

[54] *Id*. at 988 n. 4.

[55] *Brown v Toombs*, 139 F3d 1102, 1104 (CA 6 1998) (per curiam), *cert den* 525 US 833.

> his §1983 complaint the administrative decision, if it is available, showing the administrative disposition of his complaint. Exhaustion applies only to cases filed on or after April 26, 1996 the effective date of the Prison Litigation Reform Act.[56]
>
> District Courts should enforce the exhaustion requirement *sua sponte* if the issue is not raised by the defendant."

In *Knuckles-El v Toombs,*[57] this issue was revisited. This Court stated:

> "The complaint here does not meet the pleading requirements set forth in [*Brown*, 139 F.3d at 1104] and it was therefore properly dismissed. In *Brown*, we held that the statutory language in 42 U.S.C. §1997e(a) "no action shall be brought until all available administrative remedies are exhausted" - - "should be interpreted to mean precisely what is obviously intended - - that a federal court should not prematurely decide the merits of any such action." *Id.* We held that in order to effectuate this language, a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceedings and its outcome."

An inmate may not bypass exhaustion by declining to file an administrative grievance in a timely manner and thereafter claim the remedies are time-barred and thus not available.[58] Even if MDOC officials are late in responding to a grievance, the inmate must still pursue the process to its end, e.g. taking advantage of the MDOC process that allows the inmate to go to the next step where a response is tardy.[59] In *Freeman v Francis,*[60] this Court stated "the prisoner…may not exhaust administrative remedies during the pendency of a lawsuit."[61] (emphasis added).[62] This Court held that the purported defendant must have been named in a grievance that was fully exhausted.[63] In the case at bar, Plaintiff has not named the Defendant,

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[56] *See White v McGinnis,* 131 F3d 593, 595 (CA 6 1997).
[57] *Knuckles-El v Toombs,* 215 F3d 640, 642 (CA 6 2000), *cert den* 531 US 1040.
[58] *Wright v Morris,* 111 F3d, 414, 417 n.3 (CA 6 1997) *cert den* 522 US 906.
[59] *Hartsfield v Vidor,* 1999 F3d 305, 309 (CA 6 1999).
[60] *Freeman v Francis,* 196 F3d 641 (CA 6 1999).
[61] *Id.* at 645.
[62] This Court created a very limited exception to this rule. In *Curry v Scott,* 249 F3d 493 (CA 6 2001), this Court held that where an inmate files a complaint, then exhausts the administrative remedies, then files an amended complaint that no dismissal is necessary. *Id*. at 501. This Court indicated this exception was being created due to unique circumstances that it did not expect to be repeated. *Id*. at 502 n. 3.
[63] *Curry v Scott,* 249 F3d 493, 505 (CA 6 2001).

Patricia Caruso, in ANY prisoner grievance asserting a violation of his Eighth Amendment rights. Plaintiff has clearly not exhausted administrative remedies against Patricia Caruso on any Eighth Amendment claim.

Before filing a lawsuit in federal court, a prisoner must exhaust all his administrative remedies as to each claim he brings against each defendant he intends to sue, and demonstrate exhaustion by attaching copies of the administrative proceedings and decisions to his complaint, or if not available, describing the proceedings with specificity.[64] A prisoner must exhaust *all* his claims; a case cannot proceed where there is only partial exhaustion.[65]

As a result, the unexhausted Eighth Amendment claim must be dismissed even if this Court does not apply the "total exhaustion" rule that Defendants argue in Section II. G. of this brief is applicable.

F. Plaintiff's claims must all be dismissed because he failed to properly exhaust administrative remedies against each of these three Defendants (Caruso, Pramstaller, and Epp). The only prisoner grievance filed by Plaintiff that names either George Pramstaller and Jan Epp is Grievance No. SMT-02-07-0818-12D-2. This prisoner grievance was untimely. As a result, *Woodford v Ngo,* 548 US ___ (2006) requires dismissal of these claims.

This Court previously found that the only prisoner grievance filed by Plaintiff in this case that names Defendant George Pramstaller and Defendant Jan Epp is No. SMT-02-07-0818-12D-

[64] *Knuckles-El, et al., v Toombs, et al.,* 215 F3d 640, 642 (CA 6 2000); *Curry v Scott,* 249 F3d 493, 504-505 (CA 6 2001).
[65] *Smith v Federal Bureau of Prisons,* 300 F3d 721 (CA 6 2002); *Linder v Sundquist,* No. 02-5303, 2002 U.S. App. LEXIS 19662 (CA 6 Sept. 18, 2002) (unpublished); *Kemp v Jones,* No. 01-2744, 2002 U.S. App. LEXIS 16058 (CA 6 Aug. 6, 2002) (unpublished).

2.[66] Prisoner Grievance No. SMT-02-07-0818-12D-2 on its face, lists the following dates:

Date of Incident:	March 2001 to April 2002[67]
Date of attempt to informally resolve:	"Various dates"
Today's Date:	July 12, 2002[68]
Date received at Step I:	July15, 2002

Plaintiff's prisoner grievance was late and failed to comply with the MDOC prisoner grievance procedure because he filed it in July 2002, which is 16 months after the March 2001 date he is attempting to grieve and 2.5 months after the April 2002 date he attempts to grieve.

In *Woodford v Ngo,* 548 US ___ (June 22, 2006) the US Supreme Court held that a prisoner who fails to comply with the prison's procedures for filing administrative grievances by filing late and untimely grievances has also failed to comply with 42 USC 1997e (a) and his lawsuit should be dismissed. The Supreme Court stated in this regard, as follows:

> "[P]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.

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[66] Report and Recommendation (R & R) dated August 9, 2004, page 6. (USDC Dkt. Entry 21, page 6). The R & R states that the grievance referred to an attached list that included Pramstaller and Epp.

[67] Per MDOC PD 03.02.130 (R) Plaintiff was required to attempt a resolution of this alleged incident within two business days, which he failed to do. The date he lists as his attempt to informally resolve this grievance is "various dates". However, Plaintiff failed to attempt a resolution of the grievance within two days of either the beginning date of March 2001 or within two days of the ending date of April 2002 listed on this grievance. Plaintiff's grievance, which attempts to cover a time period of more than one year from March 2001 to April 2002 is clearly improper, as is his attempt to list "various dates" as the date he attempted a resolution of the grievance. Plaintiff's grievance was intentionally vague and ambiguous and failed to comply with MDOC grievance procedures.

[68] Per MDOC PD 03.02.130 (X) Plaintiff was required to file his Step 1 prisoner grievance within five days of his attempt to informally resolve the grievance. As we have seen, Plaintiff's attempt to informally resolve the grievance should have occurred no later than two days from April 2002, which means his Step 1 grievance was due no later than May 5, 2002 (this calculation generously allows five days from the end of April, since Plaintiff fails to give a day in April that he is grieving). Thus, Plaintiff's completion of a Step 1 grievance on July 12, 2002 was untimely and at least two months or eight weeks late.

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> [T]he benefits of exhaustion can be realized only if the prison grievance system is given fair opportunity to consider the grievance. The prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules. A prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction, and under respondent's interpretation of the PLRA noncompliance carries no significant sanction. For example, a prisoner wishing to bypass available administrative remedies could simply file a late grievance without providing any reason for failing to file on time. If the prison then rejects the grievance as untimely, the prisoner could proceed directly to federal court. ..., We are confident that the PLRA did not create such a toothless scheme."

As a result, the claims against all three Defendants should be dismissed because Plaintiff failed to properly exhaust administrative remedies as required by 42 USC 1997e (a) by filing untimely grievances. The US Supreme Court's ruling in *Woodford v Ngo* explicitly overrules the Sixth Circuit's decision in *Thomas v Woolum*, 337 F3d 720, 723 (CA 6, 2003), which held that a prisoner's case could not be dismissed because the underlying grievance was untimely. The Sixth Circuit's holding in *Thomas v Woolum* is contrary to and conflicts with the US Supreme Court's holding in *Woodford v Ngo*. *Thomas v Woolum* is no longer good law and has been overruled by a higher court.

Woodford v Ngo must be applied retroactively to all pending cases because "when the [US Supreme] Court applies a rule of federal law to the parties before it, the rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and to all events, regardless of whether such events predate or postdate our announcement of the rule."[69]

[69] *Harper v Virginia Dept of Taxation*, 509 US 86, 97 (1993). See too US District Judge Victoria Roberts' December 6, 2006 decision in *Michael Irving v T Kelly*, USDC-ED of Michigan, Docket No. 2:06-cv-11569-dt (Dkt. Entry 38 in said case) (Copy of Order attached hereto as Exhibit 5).

G. This entire Complaint should be dismissed based on the total exhaustion rule established in the Sixth Circuit US Court of Appeals. Thus, all claims, including unexhausted and exhausted claims[70] should be dismissed.

If this Court determines that any of the claims raised by Plaintiff in this Complaint have been properly exhausted pursuant to 42 USC 1997e (a) but that other claims have not been properly exhausted, then these Defendants request that this Court apply the "total exhaustion" rule and dismiss the entire lawsuit. The total exhaustion rule requires that any prisoner civil rights lawsuit that contains a mixture of exhausted and unexhausted claims must be dismissed pursuant to 42 USC 1997e (a).[71] These Defendants assert that the applicable rule in this Circuit is the total exhaustion rule of *Rinard v Luoma* and *Jones-Bey v Johnson.*

Defendants recognize that the US Supreme Court has granted a writ of certiorari to consider whether the total exhaustion rule or a partial exhaustion rule should be applied under 42 USC 1997e (a).[72] Nevertheless, the Defendants want to ensure they have preserved the issue for any later appeal and/or in the event that the Supreme Court upholds the total exhaustion rule the Defendants will request a dismissal based on the Supreme Court's ruling.

It is already a matter of record that this Court held that this case included at least some unexhausted claims when it was filed because this Court issued its Order of September 22, 2004 dismissing Defendant, CMS, for failure to exhaust under 42 USC 1997e (a).[73] Thus, this is a "mixed" complaint case. Likewise, if this Court agrees to dismiss all claims against Patricia

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[70] For purposes of this argument, the Defendants are assuming that the Court may find one or more claims have been exhausted. However, these Defendants are not conceding that any claims have been properly exhausted by arguing for the application of the total exhaustion rule. This argument is being included in this brief as an alternative argument, so that in the event this Court finds that a claim has been properly exhausted, a separate motion to dismiss will not have to be filed at a later date arguing for the application of the total exhaustion rule.

[71] *Rinard v Luoma*, 440 F3d 361 (CA 6 2006); *Jones-Bey v Johnson*, 407 F3d 801, 807 (CA 6 2005); *Chamberlain v Overton*, 326 F Supp 2d 811, 816 (ED Mich, 2004); and *Smeltzer v Hook*, 235 F Supp 2d 736, 739-740 (WD Mich, 2002).

[72] *Williams v Overton*, 126 S Ct 1463 (US March 6, 2006) (Dkt. No 05-7142) and *Jones v Bock*, 126 S Ct 1462 (US March 6, 2006) (Dkt. No. 05-7058).

[73] USDC Dkt. Entry 35.

Caruso because Plaintiff did not exhaust under 42 USC 1997e (a), then this case is a "mixed" complaint case involving both exhausted and unexhausted claims.

H. No viable medical malpractice claim exists against any of these three Defendants under MCL 600.2912a, et seq, and Count III of the First Amended Complaint, paragraphs 102-132 because none of them were "practicing medicine".

Defendant Patricia Caruso is not a health care professional and has never held herself out to be one. As a result, by express terms of the applicable statute, a state law medical malpractice action may not be brought against a person who is not a health care professional per MCL 600.2912 (1) and/or a "practitioner of medicine" under MCL 600.2912a.[74] As a result, she cannot be sued in her individual capacity for monetary damages in a medical malpractice action and any attempt to sue her in an "official capacity" in this regard in federal court is precluded by Eleventh Amendment immunity. As this Court has already seen, Patricia Caruso did not become the MDOC Director until July 1, 2003 and she had no personal involvement with Plaintiff, i.e. it is impossible to logically claim she was involved in any alleged medical malpractice.

Likewise, Defendant Jan Epp is not a "practitioner of medicine" and cannot be sued for medical malpractice under MCL 600.2912a. Plaintiff admits that Jan Epp is only a nurse (First Amended Complaint, paragraph 9) and is not a medical doctor or physician. In *Cox v Flint Board of Hospital Managers,* 467 Mich 1, 18-22 (2002) the Court held that nurses cannot be sued for medical malpractice under MCL 600.2912a. Thus, as a matter of law, this claim must be dismissed as it relates to Jan Epp. Further, Jan Epp never treated Plaintiff.

Lastly, George Pramstaller, although he is a licensed medical doctor, never treated Plaintiff. George Pramstaller cannot be liable for medical malpractice in his individual capacity when he was not engaged in the "practice of medicine" as it relates to Plaintiff. Plaintiff has

[74] There is no genuine issue of material fact regarding Patricia Caruso's status. All parties agree she is not a health care professional, a physician, or medical treater.

never met or talked to George Pramstaller and George Pramstaller never reviewed or responded to any prisoner grievance filed by Plaintiff.

If Plaintiff attempts to argue that he is suing any of these three Defendants for medical malpractice for not having policies or customs of any kind in place, then Plaintiff is attempting to sue them in their "official capacity" as policy makers, which is precluded in federal court by the Eleventh Amendment. Further, Patricia Caruso cannot be sued under such an argument when she was not the Director at the time in question.

I. As high appointed officials of state government, Patricia Caruso and George Pramstaller enjoy absolute immunity from state tort liability under MCL 691.1407 (5).

Patricia Caruso, as Director of the MDOC, and George Pramstaller, as MDOC Medical Director, are high appointed officials of state government and are immune from state tort liability under MCL 691.1407 (5).[75]

[75] *Markis v City of Grosse Pointe Park*, 180 Mich App 545 (1989). *Walkowski v Macomb County Sheriff*, 64 Mich App 460 (1975). *Harrison v Director of Dept of Corrections*, 194 Mich App 446 (1992), *app den* 441 Mich 887 (1992).

III. CONCLUSION AND RELIEF REQUESTED

Wherefore, Defendants request that this case be dismissed with prejudice as to the Eighth Amendment claim for all the reasons stated in this brief. Defendants assert that once the federal claim is dismissed that this court should decline jurisdiction over the state law claims.[76] However, if this Court decides the state law claims, those claims should also be dismissed with prejudice for all the reasons stated in this brief, which includes the reasons stated in co-defendants brief per FRCP 10 (c). Defendants also request that they be awarded all costs and attorneys fees allowed by law.

Respectfully submitted,

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Dated: December 20, 2006

KTCases/2004001847A/Brief SJ

CERTIFICATE OF SERVICE: I certify that on December 20, 2006, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will provide copies to counsel of record.

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[76] Where a district court has exercised jurisdiction over state law claims solely by virtue of supplemental jurisdiction and all federal claims are dismissed prior to trial, the state law claims should be dismissed without reaching the merits. *Landefeld v Marion General Hospital*, 994 F2d 1178, 1182 (CA6 1993); *Faughender v City of North Olmstead*, 927 F2d 909, 917 (CA 6 1991); *Coleman v Huff*, No. 97-1916; 1998 WL 476226 at 1 (CA 6 1998).