UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVEN BRODER,

Plaintiff,

vs. **File No. 03-CV-75106**

CORRECTIONAL MEDICAL SERVICES, INC., *et al.,* **Hon. Marianne O. Battani**
Mag. Judge Paul J. Komives

Defendants.

PLAINTIFF'S MOTION AND BRIEF TO REVISIT THE DISMISSAL OF THE CORPORATE DEFENDANT CMS IN LIGHT OF NEW CASE LAW

The plaintiff Steven Broder, by counsel, moves the Court to re-instate dismissed defendant Correctional Medical Services, Inc., (CMS) due to a new U.S. Supreme Court case that changes the controlling law.

Pursuant to Fed. R. Civ. P. 6(b)(1) and Local Rule 7.1, the plaintiff's counsel sent a draft of the proposed motion to CMS's counsel, who refused to stipulate to the motion. The motion is supported by the short brief below.

Respectfully submitted,

MICHIGAN CLINICAL LAW PROGRAM

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Dated: September 21, 2007

PLAINTIFFS' BRIEF IN SUPPORT

Issues Presented:

1. Should the Court reinstate the dismissed corporate defendant Correctional Medical Services, Inc., (CMS) because of intervening U.S. Supreme Court case law?

2. Should the Court reinstate CMS because no case law supports the earlier finding that CMS is entitled to Eleventh Amendment immunity?

Primary Authority:

1. *Jones v. Bock,* ___ U.S. ___, 127 S.Ct. 910 (2007)
2. *Kovats v. Rutgers State University*, 822 F.2d 1303 (3d Cir. 1987)
   Calhoun v. Ramsey, 408 F.3d 375 (7th Cir. 2005)
   Hartman v. CMS, Inc., 960 F. Supp. 1577 (M.D. Fl. 1996)

Facts and Proceedings to Date Regarding CMS

Plaintiff Steven Broder brought suit under 42 U.S.C. § 1983, alleging that various defendants failed to timely diagnose and treat his throat cancer in violation of his Eighth Amendment right to be free from cruel and unusual punishment and in violation of state medical malpractice law. Mr. Broder originally named CMS, Inc., as the lead defendant in his lawsuit. CMS moved to dismiss, arguing a failure to exhaust – specifically that Mr. Broder had failed to name it as a separate entity in any of his four grievances. *See* CMS Motion, R. 8 (2/24/04). The Magistrate Judge agreed with CMS as to grievances #1, #3, and #4, but said that Mr. Broder had made sufficient reference to CMS in grievance #2. *See* R&R on CMS Motion to Dismiss, R. 21, at 8-9 and 16-17 (8/9/04). Following objections to the R&R, Judge Gerald Rosen disagreed with the Magistrate Judge, holding that

Mr. Broder had failed to name CMS with sufficient specificity even as to grievance #2. Judge Rosen also held – *sua sponte*, without briefing by either side – that CMS was not amenable to suit under § 1983 because it had Eleventh Amendment immunity. *See* Opinion and Order (adopting in part and modifying in part the R&R and dismissing the corporate defendant CMS) (Rosen, J.), R. 35, at 4-7 (9/9/04). Mr. Broder now asks the Court to revisit the dismissal of CMS in light of changes in the law.

1. Facts Regarding Exhaustion: The Grievances

Mr. Broder filed four separate MDOC grievances challenging the delays in his diagnosis and treatment and the quality of his care and aftercare.

Grievance #1: Mr. Broder filed his first grievance for inadequate treatment on November 3, 2001. The grievance described his difficulty in swallowing, his weight loss, his persistent sore throat, and his fears for his health on account of the delays in getting tested. Mr. Broder asked why evaluations by ENT and GI specialists, which he was told would be scheduled, had not yet occurred. He concluded the Step 1 grievance by stating:

> I have lost an additional 10 pounds (approximate) and have continual excruciating pain. I simply write this grievance to document the situation and attempt to eliminate any further delays in my medical treatment.

The MDOC answered the grievance late, by which time Mr. Broder had already filed his Step II appeal. The Step II response was also late. It said, "We are currently waiting for the appointment dates for the requested procedures." By then Mr. Broder had already filed his appeal to Step III, citing continual pain, difficulty breathing and swallowing, and further weight loss. After waiting more than a month, on January 27, 2002,

Mr. Broder mailed a letter to the MDOC director's office in Lansing inquiring about his Step III appeal and attaching a second copy of it. Mr. Broder never got a response ether to his appeal or to his follow-up letter.

Grievance #2: Mr. Broder filed his second grievance on July 12, 2002, after having spent parts of April, May, and June 2002 in the hospital for chemotherapy and radiation. He complained that the late diagnosis and treatment of his cancer were in violation of MDOC policy. He said that his grievance was intended to run against "any and all individuals or organizations involved in the diagnosis, treatment, [or] referral of my condition." Mr. Broder attached to the grievance a list of the people and/or agencies who, to the best of his knowledge, had in any way figured in his diagnosis, treatment, or aftercare to that point. The list included 37 named individuals plus "any and all relevant CMS personnel" and "any and all relevant MDOC personnel." *See* Grievance #2.

Once again the MDOC response was late and Mr. Broder filed a Step II appeal on August 7, 2002. The appeal receipt said that he would receive a response no later than August 30, 2002, but he did not get a Step II response until December 5, 2002. The Step II response said, "You were interviewed and a response was provided to you in a timely manner." In fact, the Step I response was nine days late and the Step II response was 95 days late. Because the Step II response was so late, Mr. Broder had already filed a Step III appeal, stating that his "medical treatment and diagnosis [were] neither 'timely' [nor] provided in a 'humane' way." As with the first grievance, Mr. Broder never received a response to his Step III appeal.

Grievance #3: Mr. Broder filed his third grievance on March 1, 2003. This grievance asked why his ENT specialist's instructions of October 2002 (that Mr. Broder have a follow-up test to ensure that his cancer was in remission) had not yet been followed. On March 13, 2003, Mr. Broder met with an RN supervisor who then wrote a memorandum to the grievance coordinator confirming that Mr. Broder's requested procedures had been approved but that no appointment had yet been scheduled (despite the five-month delay).

Mr. Broder filed a Step II appeal because he still did not have a scheduled appointment and the Step I response failed to address why a doctor's request for follow-up tests had taken five months to schedule. On May 5, 2003, Mr. Broder received a late response stating that "the specialist may have told you it would only be 2 weeks, however, the process that is required is for this request to go to CMS first for denial or approval." By then Mr. Broder had already filed a timely Step III appeal. Six months later, on November 7, 2003, Mr. Broder got a Step III response denying his grievance.

Grievance#4: Mr. Broder's filed his fourth grievance on April 22, 2003 (while the third grievance was awaiting a Step II response). The fourth grievance focused on post-treatment issues, specifically that a side effect of the chemotherapy (loss of the ability to salivate) could lead to serious tooth decay. Mr. Broder wanted to know why it took 11 months for him to get the drug Salagen to help with his salivation problems. Also, Mr. Broder wrote that he was still awaiting the follow-up visits with specialists that were the subject of his third grievance.

Mr. Broder's Step I grievance was received on April 24, 2003. He was told he

would get a Step I response no later than May 15, 2003. The Step I response, however, did not arrive until July 21, 2003. The response said that Mr. Broder should bring up his issues with his ENT specialist at his next scheduled appointment. Due to the three-month delay in receiving a Step I response, Mr. Broder filed a Step II appeal on May 20, 2003. The Step II response acknowledged the severity of his dental problems and set up a visit with the dental director to determine a treatment plan. The response did not address why Mr. Broder had not been prescribed Salagen throughout his treatment or why his follow-up radiation oncology visit had not been scheduled. Mr. Broder duly filed his Step III appeal on November 18, 2003. It was denied five months later.

ARGUMENT

I. *Jones v. Bock* Changed the Legal Standard for Exhaustion

When Judge Rosen considered CMS's motion to dismiss in 2004, the Sixth Circuit had a Draconian set of rules about what prisoner-plaintiffs must do in order to meet the exhaustion requirements of the PLRA. *See e.g., Knuckles-El v. Toombs,* 215 F.3d 640 (6th Cir. 2000) (requiring the plaintiff to prove exhaustion with specificity); *Brown v. Toombs,* 139 F.3d 1102 (6th Cir. 1998) (same); *Burton v. Jones,* 321 F. 3d 569 (6th Cir. 2003) (requiring the plaintiff to name in his initial grievance every individual whom he later sued); *Curry v. Scott,* 249 F.3d 493 (6th Cir. 2001) (same); *Jones-Bey v. Johnson,* 407 F.3d 801 (6th Cir. 2005) (requiring that the plaintiff must show "total exhaustion," *i.e.,* that no part of the case could go forward if any claim was unexhausted).[1]

[1] Although *Jones-Bey* was a 2005 case and thus came down after Judge Rosen decided CMS's motion to dismiss, the case re-affirmed what panels of the Sixth Circuit had already been doing in unpublished

In *Jones v. Bock*, __ U.S. __, 127 S.Ct. 910 (2007), the U.S. Supreme Court abrogated all of these cases. In a rare unanimous opinion, the Court held (1) that failure to exhaust is an affirmative defense, so that prisoners have no "heightened" pleading requirement to prove exhaustion; (2) that the PLRA does not require a prisoner to name every defendant in the initial grievance[2] (noting that Michigan's grievance process had no such requirement either); and (3) that the PLRA also does not require "total exhaustion" of all claims in order for unexhausted claims to go forward.

In this case there was no dispute that Mr. Broder had appealed all his grievances to Step III so that *procedurally* exhaustion was complete. *See* R&R, R. 21, at 8-10 (8/9/04). The only exhaustion issue left open was whether or not the Eighth Amendment claim could run against the corporate defendant CMS where Mr. Broder either had not named CMS at all (grievances #1, #3, and #4) or had not named CMS *specifically as a corporate entity* (grievance #2). Judge Rosen found that naming CMS as a separate corporate entity was required as to each and every grievance, and therefore he dismissed CMS.

Jones v. Bock completely changes this analysis. Under *Jones*, Mr. Broder need not have named CMS *at all*. As long as reasonable prison officials or medical staffers reading the grievances would have understood the general nature of Mr. Broder's complaints, that is all that is required. *Id.*

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cases on the issue of total exhaustion.

[2] The Court cited *Johnson v. Johnson,* 385 F.3d 503, 522 (5th Cir. 2004), saying: "We are mindful that the primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued; the grievance is not a summons and complaint that initiates adversarial litigation."

Mr. Broder's first grievance was as clear as it could be, saying, in effect: "My doctor has told me that I may have cancer and that I need to be tested, but that was weeks ago and I have heard nothing since: what is the hold-up?" He could not possibly have known (1) who was responsible for getting the appointments scheduled; (2) what MDOC/CMS policies might have contributed to the delays; (3) what legal causes of action might eventually accrue if the delays caused him harm; or (4) which MDOC/CMS employees/agents would have to be named as defendants in order for any legal causes of action to proceed. His other grievances were equally specific, complaining about the failure of his medical providers to ensure timely testing, diagnosis, treatment, and aftercare.

Jones makes clear that prisoners do not need law degrees (or clairvoyance) when they file a Step I grievance in order to later sue the appropriate defendants.[3] Mr. Broder did everything we would expect a responsible prisoner to do. He filed a series of four grievances, each one laying out with specificity the precise lack of care of which he complained. With the second grievance he included a list of every person whose name had appeared on his medical records to that point, and he made clear that he intended his complaint to run against all of them, plus "any other treating personnel, supervisory personnel, and any and all other individuals or organizations involved in the diagnosis,

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[3] In *Brown v. Sikes*, 212 F.3d 1205 (11th Cir. 2000), the court listed no fewer than seven purposes behind the exhaustion requirement of § 1997e, and held that it would not serve *any* of those purposes to require a prisoner to include in his grievance information that he did not know, or could not reasonably be expected to know, when he filed the grievance. *See also Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002) (holding that when state grievance rules do not prescribe the contents of a grievance or the necessary degree of factual particularity, a grievant need only "object intelligently to some asserted shortcoming" and need not "lay out facts, articulate legal theories, or demand particular relief"). Even the pre-*Jones* Sixth Circuit agreed that "an inmate need not identify each officer by name when the identities of the particular officers are unknown." *See Burton v. Jones,* 321 F.3d at 575.

treatment, or referral of my condition." Under *Jones v. Bock*, that is more than a prisoner needs to do.

Because Judge Rosen dismissed the case pursuant to cases that are no longer good law, the Court should now correct that error and reinstate the corporate defendant CMS.

II. CMS Does Not Have Eleventh Amendment Immunity

Judge Rosen also ruled *sua sponte* that CMS must be dismissed because it has Eleventh Amendment immunity.[4] Order of 9/24/04, *supra*, at 4-7. In doing so, Judge Rosen cited no other case from any jurisdiction in which an entity providing contract services to a state had been granted Eleventh Amendment immunity. As far as the plaintiff's counsel is aware, Judge Rosen cited no other case because there was none to cite. *Id.*[5]

At bottom Judge Rosen confused black-letter civil rights law by concluding that any entity which is sufficiently aligned with the state so as to be suable under § 1983 is necessarily also sufficiently aligned with the state to have Eleventh Amendment immunity. To the contrary, a host of cases hold that the two issues are judged by different legal standards, for very good reason.

To be suable under § 1983, all that is required is that an entity (or person) be suffi-

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[4] The plaintiff did not seek reconsideration at the time because the Court's alternate ground for dismissal – failure to name CMS in a grievance – was a valid interpretation of then-existing Sixth Circuit law and was an independent ground for dismissal.

[5] The only case Judge Rosen cited on this issue was *Boyd v. Corrections Corp. of America*, 380 F.3d 989 (2004). But *Boyd* held only that prisoners serving time in private "contract" prisons must still abide by the administrative exhaustion provisions of the PLRA, because those provisions apply to "any" prison or jail. Implicit in the decision was that a private contract prison is serving a state function (and thus is acting under color of state law and is suable under § 1983), but *Boyd* neither said nor implied anything about the Eleventh Amendment.

ciently aligned with the state that its action can be viewed as "arising under color of state law." Thus, a private store that carries out state-mandated racial segregation, newspaper people who ride along with law enforcement officers, a school athletic association, and doctors working under contract to the state can all be sued under § 1983 for violating the civil rights of others while acting "under color of state law." *See e.g., Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970) (private store); *Wilson v. Layne*, 526 U.S. 603 (1999) (reporters); *Brentwood Academic v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001) (school athletic association) ; *and West v. Atkins*, 487 U.S. 42 (1988) (prison doctors).

Eleventh Amendment immunity, on the other hand, is a much narrower concept. It attaches to the state itself; it has been held to extend to state officials sued in their official capacities, as well as to agencies that are *directly* linked to the state, like executive departments, state hospitals, and state universities. *See e.g., Thiakol Corp. v. Michigan Dept. of Treasury*, 987 F.2d 376 (6th Cir. 1993) (Eleventh Amendment bars suit against treasury); *Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89 (1984) (Eleventh Amendment bars suit against state hospital); *and Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000) (Eleventh Amendment bars suit against state university).

Eleventh Amendment immunity does *not* attach to subdivisions of the state like county or city government, sheriffs' departments, or school boards.[6] *See e.g., Monell v.*

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[6] The same is true of qualified immunity: in *Richardson v. McKnight*, 521 U.S. 399 (1997), the Court held that although guards in a private prison (providing contract services to the state) are suable under § 1983 because they act under color of state law, they are not protected by the qualified immunity that state employees enjoy. The same is true in the present case. The MDOC defendants can claim qualified im-

Department of Social Services, 436 U.S. 658 (1978) (county); *Missouri v. Jenkins*, 495 U.S. 33 (1990) (school board); *Schelz v. Monroe County*, 954 F2d 1540 (11th Cir. 1992) (county sheriff's officers). The test for "sub-divisions" of the state is "whether the [body] is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or political subdivision to which the Eleventh Amendment does not extend." *Mt. Healthy City School Board of Education v. Doyle,* 429 U.S. 274, 280 (1977).

The standard for private entities which contract with the state is even higher. It looks at many factors, including whether the entity is separately incorporated, the degree of autonomy the entity has over its operations, whether it has the power to sue/be sued and to enter into contracts, whether its property is taxable, whether it has the funds or the power to satisfy a judgment, and whether any judgment will be paid by the state. *See e.g., Kovats v. Rutgers State University*, 822 F.2d 1303, 1307 (3d Cir. 1987).

On this standard, no one (but Judge Rosen) has ever suggested that CMS fits the definition of an arm of the state entitled to Eleventh Amendment immunity. Indeed, CMS itself has been sued in a host of federal courts all over the country, where its status as a contract health-care provider to state DOCs is similar if not identical to its status here in Michigan.[7] In none of these cases was CMS granted Eleventh Amendment immunity.

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munity as state employees, while the CMS employees or agents cannot.

[7] Most of the reported cases are brought by *pro se* prisoner plaintiffs and (predictably) result in Rule 12(b)(6) dismissals or Rule 56 summary judgments. But of the hundreds of cases reviewed, counsel for the plaintiff could find none in which CMS was let out on Eleventh Amendment grounds.

See e.g.,Calhoun v. Ramsey, 408 F.3d 375 (7th Cir. 2005) (policy-and-practice claim against both CMS and county went to the jury – defense verdict was upheld on appeal on the merits with no mention of the Eleventh Amendment); *Goode v. CMS, Inc.,* 168 F. Supp. 2d 289 (D. Del. 2001) (dismissing state defendants in their official capacities on Eleventh Amendment grounds, but dismissing CMS only for failure to state a claim because *respondeat superior* is not a basis for § 1983 liability); *Hartman v. CMS, Inc.,* 960 F. Supp. 1577 (M.D. Fl. 1996) (holding that fact issues precluded dismissal/summary judgment as to CMS, without mention of the Eleventh Amendment).

Judge Rosen's conclusion to the contrary may be indicative of what he wants the law to be, but it is not what the law is. To prevent clear error – and now that the independent ground for dismissing CMS (based on exhaustion) is no longer good law – the Court should revisit CMS's dismissal, and should reinstate CMS, Inc., as a named defendant.

CONCLUSION

For the above reasons, the plaintiff Steven Broder asks the Court:

1. to find that he complied with the administrative exhaustion requirements of the PLRA, so that his claims can go forward against CMS as to all grievances that he filed addressing the delays in his diagnosis, treatment, and aftercare;

2. to find that there was no basis in law for the Court to dismiss CMS *sua sponte* on Eleventh Amendment grounds;

3. to reinstate CMS, Inc., as a party defendant; and

4. to grant such further relief as the Court deems fair and just.

Respectfully submitted,

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Dated: September 21, 2007

Proof of Service

The plaintiff's motion and brief to revisit the dismissal of the corporate defendant CMS in light of new case law was served using the Court's ECF system, which will provide notice by e-mail to all counsel listed on the case caption.

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Dated: September 21, 2007