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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

STEVEN BRODER,

Plaintiff,

vs.

File No. 03-75106

Hon. Gerald E. Rosen

Mag. Judge Paul J. Komives

CORRECTIONAL MEDICAL SERVICES, INC.,
and its physician employees, namely:
AUBERTRO ANTONINI, JOHN AXELSON,
MALCOLM TRIMBLE, _____ BEY,
BENZI MATHAI, and RAY H. CLARK;
and employees and medical staff of the Michigan
Department of Corrections, namely:
PATRICIA L. CARUSO, director,
GEORGE PRAMSTALLER, medical director,
HENRY GRAYSON, warden,
and JAN EPPS, regional medical director;
in their individual and official capacities,

Defendants.

FILED
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U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
DETROIT

**PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT CMS'S MOTION TO DISMISS**

MICHIGAN CLINICAL LAW PROGRAM

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42 U.S.C. § 1983
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28 U.S.C. § 1367(a)

ISSUES PRESENTED

1. Did the plaintiff exhaust his administrative remedies under 42 U.S.C. § 1997c(a) and MCL 600.5503(1)?

The plaintiff says yes.

The defendant says no.

2. Should the Court retain supplemental jurisdiction over the plaintiff's pendant state law claims pursuant to 28 U.S.C. § 1367(a).

The plaintiff says yes.

The defendant says no.

STANDARD OF REVIEW and CONTROLLING AUTHORITY

In deciding a 12(b)(6) motion to dismiss, a court must accept all of the plaintiff's allegations as true and construe them in the light most favorable to the plaintiff. *Zinerman v. Burch*, 494 U.S. 113, 117 (1990). A 12(b)(6) motion should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A. Exhaustion of Administrative Remedies

Prisoners must exhaust all administrative remedies "as are available" before filing a civil rights action concerning conditions of confinement. *See* 42 U.S.C. § 1997c(a). When exhaustion is required, "a prisoner must ... show that [administrative remedies] have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint." *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2002). The exhaustion requirement is intended to give defendants the opportunity to respond to the prisoner's allegations and to take corrective action. *See Porter v. Nussle*, 534 U.S. 516, 524-525 (2002), *Freeman v. Francels*, 196 F.3d 641, 644 (6th Cir. 1999), and *Burton v. Jones*, 321 F.3d 569, 575 (2003). Here the plaintiff filed four separate

grievances and pursued all of them to the final (Step III) stage. The grievances laid out the plaintiff's complaints about his medical care in detail, and they were properly attached to his complaint. Therefore the motion should be denied.

B. Supplemental Jurisdiction

A federal court should exercise supplemental jurisdiction over state law claims when the state law claims arise from the same case or controversy as the claim with original federal jurisdiction. See 28 U.S.C. § 1367(a) ("The district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.") Claims form part of the same case or controversy when they "derive from a common nucleus of operate facts." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966); *Ahearn v. Charter Township of Bloomfield*, 100 F.3d 451, 454-455 (6th Cir. 1996); *Obeid v. Meridian Automotive Systems*, 296 F. Supp. 2d 751, 753 (E.D. Mich. 2003). In the present case the facts that form the basis for the plaintiff's federal claims are identical to the facts that form the basis for his state law claims. Supplemental jurisdiction is therefore proper. This part of the motion should be denied as well.

Introduction

Steven Broder is a prisoner in the custody of the Michigan Department of Corrections (MDOC). His complaint alleges that the defendants failed to timely diagnose and treat his throat cancer. His federal claims, brought under 42 U.S.C. § 1983, are for violations of his Eighth Amendment rights, for the defendants' deliberate indifference to his reasonable medical needs. His overlapping state law claims are for medical malpractice/negligence, and gross negligence and willful wanton misconduct (what Michigan sometimes calls reckless indifference), arising out of the same delays in diagnosis, treatment, and aftercare. Mr. Broder seeks damages and injunctive relief.

The defendant Correctional Medical Services (CMS) is the MDOC's managed care provider. CMS moves to dismiss on the grounds that Mr. Broder failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e (a). CMS also asks the Court to deny supplemental jurisdiction and to dismiss Mr. Broder's state law claims, so that they may be heard in state court instead of here. For the reasons set forth below, Mr. Broder opposes the motion to dismiss on both grounds, and asks that it be denied.

STATEMENT OF FACTS

A. Facts Regarding Administrative Exhaustion

Mr. Broder filed four separate MDOC grievances challenging the delays in his care and the quality of his care. He appealed all four grievances through to the final (Step III) level. The four grievances are described below.¹

1. The First Grievance

On November 3, 2001, Mr. Broder filed his first grievance for inadequate treatment. The

¹ All of the grievances were attached to the complaint and were reproduced as attachments to CMS's brief. To avoid adding a third copy to the Court file, we will refer by number to the CMS exhibits.

grievance described his difficulty in swallowing, his weight loss, and his persistent sore throat. (CMS Brief, Exh. 2-4.) In the Step I grievance, Mr. Broder asked why the evaluations with an ear, nose and throat (ENT) specialist and a gastroenterologist, which he was told would be scheduled, had not yet occurred. *Id.* He concluded the Step 1 grievance form by stating that because of the delays, "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." *Id.*

MDOC received this grievance on November 8, 2001, but did not respond until December 8, 2001, by which time Mr. Broder had already filed a Step II grievance appeal. *Id.* In the Step I response, SMT Health Care wrote that it was "at present time awaiting the appointment dates for these procedures that were requested," and directed Mr. Broder to "discuss appointment with [his] medical service provider at next visit." *Id.* Mr. Broder received confirmation of MDOC's receipt of his Step II appeal on December 4, 2001, and was assured he would receive a response by December 25, 2001. *Id.* Mr. Broder, however, did not receive a response to his Step II appeal until February 5, 2002, which again said, "we are currently awaiting for the appointment dates for the requested procedures." *Id.* Meanwhile, on December 25, after not receiving an answer to his Step II appeal, Mr. Broder filed a Step III appeal, citing as his basis for the appeal "continual pain, breathing and swallowing difficult, in addition to losing almost 30 pounds since March." He again requested the promised procedures. *Id.*

After waiting for a response for over a month, on January 27, 2002, Mr. Broder mailed a letter to the Director's Office at MDOC in Lansing telling the Director that "on or about December 25, 2001" he had mailed his Step III grievance to the Director's Office for review, and never received a response. Mr. Broder attached another copy of his Step III grievance appeal and re-

quested a response. *Id.* Despite his efforts, Mr. Broder has never received a response to this letter or to his original Step III grievance appeal.

2. The Second Grievance

Mr. Broder filed a second grievance on July 12, 2002. (CMS Brief, Exh. 2-3.) In this grievance, Mr. Broder, who had spent much of April, May, and June 2002 in the hospital, wrote that the diagnosis and treatment of his cancer had been in violation of MDOC Policy Directive 03.04.100. He also said that his grievance was intended to run against “any and all individuals or organizations involved in the diagnosis, treatment, referral of my condition.” *Id.* Mr. Broder attached to the grievance a list of the people/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* Exhibit A, attached.²

Mr. Broder’s Step I grievance was received by MDOC on July 15, 2002. He was assured that a response would be given by August 5, 2002. Again the Step I response was late; it did not reach Mr. Broder until August 14, 2002. In the Step I response, an MDOC Health Unit Manager wrote that “[d]ue to the C.M.S. approval process the inmate was scheduled procedures performed [sic], diagnosed with Laryngeal cancer and Radiation/Chemo therapy initiated within a 5 month span, ...it is unavoidable that there will be a lapse of time between referral and appointment dates,” and that “healthcare staff responded to kited requests for healthcare assistance within the appropriate time frames.” *Id.*

By the time the Step I response reached Mr. Broder, though, he had filed a Step II appeal (sent on August 7, 2002) because the time specified by the Step I grievance receipt form had

² This list was inadvertently left off the second grievance when the four grievances were filed with the plaintiff’s complaint. *See* Complaint, Exhibits. But the list was attached to the actual grievance when it was filed with MDOC on July 12, 2002; indeed, it was specifically referenced in the text of the grievance.

passed and he had still not received a response. On August 9, 2002, Mr. Broder received confirmation from MDOC of the receipt of his Step II grievance appeal and he was told he would receive a response no later than August 30, 2002. *Id.* He did not receive a response until December 5, 2002. In that Step II response, Regional Health Administrator Jan Epp wrote to Mr. Broder, "You were interviewed and a response was provided to you in a timely manner." *Id.* (In fact, the Step I response was nine days late and the Step II response was more than 95 days late.)

Because the Step II response (December 5, 2002) was so late, Mr. Broder had already filed a Step III appeal stating he had not yet received a Step II response, and that "Grievant's medical treatment and diagnosis [were] neither 'timely' [nor] provided in a 'humane' way." *Id.* As with the first grievance, Mr. Broder received no response to his Step III appeal.

3. The Third Grievance

Mr. Broder's filed his third Step I grievance on March 1, 2003. (CMS Brief, Exh. 2-2.) This grievance requested a response as to why his ENT specialist's (Dr. Kornak's) instruction that Mr. Broder receive another throat scope (vocal cord stripping and biopsy to be done within a few weeks of October 2002) had not yet been followed. Mr. Broder cited PD 03.04.100, which requires healthcare staff to schedule specialty services within five business days from the order of a medical services provider. *Id.* On March 10, 2003, Mr. Broder received a letter from Jan Epp saying MDOC had received his Step I grievance form and that Mr. Broder would have a response no later than March 31, 2003. *Id.* On March 13, 2003, Mr. Broder met with RN Supervisor Peggy Lee who then wrote a memorandum to the grievance coordinator affirming Mr. Broder's claim that his requested procedures had been approved but he was still awaiting scheduling. *Id.* Lee wrote that because she had *notified* the schedulers, the grievance had been taken care of. *Id.*

On March 27, 2003, however, Mr. Broder filed a Step II grievance appeal arguing that the Step I response had failed to address his question as to why a two-week promise for follow-up treatment had taken six months to schedule. *Id.* On May 5, 2003, Mr. Broder received a Step II response written by Jan Epp 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....” *Id.* Because the 30-day response time had passed since Mr. Broder filed his Step II appeal and he had not received a Step II response, Mr. Broder again filed a timely Step III appeal on April 28, 2003, requesting an explanation for why medical services were not accessible and timely as required in Policy Directive 03.04.100. *Id.*

This time, more than six months passed before Mr. Broder received a Step III response. On November 7, 2003, Mr. Broder received this Step III response from Jim Armstrong which stated that the “grievance was processed ... according to the provisions of Policy Directive 03.02.130.” Armstrong said that “Grievant’s medical treatment is in accordance with PJD-03.04.101” and that “staff properly responded to this grievance.” *Id.* Armstrong denied the appeal.

4. The Fourth Grievance

Mr. Broder’s fourth and final grievance (*see* CMS Brief, Exh. 2-1) was filed on April 22, 2003, while the third grievance was awaiting a Step II response. The fourth grievance focused on the inadequate post-chemotherapy treatment Mr. Broder had received. In the Step I grievance form, Mr. Broder wrote that he was not informed that a side effect of the chemotherapy (loss of the ability to salivate) could lead to tooth decay. *Id.* Mr. Broder requested an answer as to why it took eleven months for a doctor to prescribe the drug Salagen to help with his salivation problems. *Id.* Also, Mr. Broder wrote that he was still awaiting follow-up visits (for radiation

oncology, biopsy, and vocal cord stripping) that were the subject of his third grievance. *Id.* Mr. Broder noted that he had suffered months of pain before his diagnosis, months more of pain and anxiousness awaiting approval of his cancer treatment, and then months more waiting for the aftercare that his ENT specialist told him he should receive. *Id.*

Mr. Broder's Step I grievance form was received on April 24, 2003, at which time Mr. Broder was informed that he could expect a Step I response no later than May 15, 2003. *Id.* The Step I response, however, did not arrive until July 21, 2003. In that response, Peggy Lee wrote that because the operation and chemotherapy had been done outside the hospital, he would have received follow-up care and been made to sign an understanding of the procedure before the operation. Also, she recommended that Mr. Broder bring up his issues with his ENT specialist at the next scheduled meeting. *Id.*

Due to the three-month delay in receiving a Step I response, Mr. Broder filed a Step II appeal on May 20, 2003, citing as reasons for the appeal the failure to get the Step I response, and, on the merits, not having seen his radiation oncologist as instructed. *Id.* On June 10, 2003, Mr. Broder received a Step II response that merely stated that because of the severity of his dental problems, Mr. Broder would meet with the Region III Dental Director to determine a treatment plan. *Id.* Because there was no attached explanation regarding the delay in prescribing Salagen for Mr. Broder's salivation problems or regarding the delay in the follow-up appointment with his radiation oncologist, Mr. Broder filed a Step III appeal requesting these explanations. *Id.*

Five months later, on November 18, 2003, Mr. Broder received a Step III response from Jim Armstrong saying "Grievant's dental treatment is in accordance with PD 04.06.150, paragraph I, and relief is not warranted at this level," and that the "record supports that staff properly

responded to this grievance” and that “[t]his grievance appeal is denied.” *Id.*

B. Facts Regarding Supplemental Jurisdiction

The defendants in this action are an amalgam of state actors and private actors (acting under color of state law). This is so because in May 2000 the State of Michigan privatized medical services for prisoners. As a result, doctors and physicians’ assistants and nurse practitioners who formerly were state employees are now employees or agents of CMS. CMS’s contract with the state gives CMS the primary authority to approve specialty care like the treatment of cancer. CMS develops and implements the protocols for granting or denying specialty care approval, and for making sure that specialty care is timely provided. CMS and its employees and agents are therefore necessary party-defendants under the privatization contract.

At the same time, MDOC continues to claim responsibility for prison medical policies and procedures, which it says are developed and implemented by state officials. MDOC also has kept its own supervisory physicians, as state and regional medical directors or officers. Accordingly, Mr. Broder alleges that the delays in his diagnosis, treatment, and aftercare are attributable to *both* sets of actors, state and private (acting under color of state law).

Likewise, both his federal and state claims arise out of exactly the same conduct by the defendants. That is, their failure to provide timely diagnosis, treatment, and aftercare give rise to both the federal and state claims pled in his complaint.

ARGUMENT

I. THE PLAINTIFF HAS EXHAUSTED HIS ADMINISTRATIVE REMEDIES

CMS argues that Mr. Broder failed to meet the exhaustion requirement of the federal and state Prison Litigation Reform Acts. *See* 42 U.S.C. § 1997e(a) and MCL 600.5503(1).³ The

³ 42 U.S.C. § 1997e(a) states: “No action shall be brought with respect to prison conditions under § 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facil-

exhaustion requirement is intended to give defendants the opportunity to respond to prisoners' allegations and to take corrective action. *See Porter v. Nussle*, 534 U.S. 516, 524-525 (2002). "The importance of using the prison grievance process [is] to alert prison officials to problems." *Freeman v. Francks*, 196 F.3d 641, 644 (6th Cir. 1999). Consequently, the Sixth Circuit has adopted a fair notice standard for determining whether prisoner-plaintiffs have exhausted their administrative remedies: "It is sufficient for a court to find that a [prisoner] gave prison officials fair notice of the alleged mistreatment or misconduct that forms the basis of the constitutional or statutory claim made." *Burton v. Jones*, 321 F.3d 569, 575 (6th Cir. 2003).

A. Mr. Broder Appealed All of His Grievances to the Final Stage

CMS first argues that Mr. Broder failed to exhaust because he never got Step III responses (to two of his grievances) from MDOC. This argument is absurd. As noted above in the statement of facts, Mr. Broder could not have been more diligent about putting his complaints in writing. He filed a total of four separate grievances, each of which he appealed with military precision. He had and has no control over MDOC's responses. The fact that MDOC saw fit to respond months late to nearly every grievance and every appeal, and the fact that MDOC failed to respond at all to two of his Step III appeals, can hardly be laid at his door. A prisoner plaintiff must grieve, but he cannot compel the Department of Corrections to respond.⁴

Moreover, MDOC Policy Directive 03.02.130 (Def.'s Brief Exh. 3) provides that the Step III appeal is the prisoner's last available administrative remedy. By attaching his Step III appeals, Mr. Broder has shown that he has gone through all the steps allowed by the MDOC

ity until such administrative remedies as are available are exhausted." Similarly, MCLA 600.5503(1) states: "A prisoner shall not file an action concerning prison conditions until the prisoner has exhausted all available administrative remedies."

⁴ Mr. Broder recently discovered that at least one of the missing Step III grievances – containing confidential medical information – had been sent to the wrong inmate. *See* Affidavit of Sandra Girard, Executive Director of Prison Legal Services of Michigan, attached as Exhibit B.

grievance process, thus establishing that he has exhausted all administrative remedies “as are available.” 42 U.S.C. § 1997e(a). *See also* Policy Directive 03.02.130 (CMS Brief, Exh. 3).

B. Mr. Broder Attached Proof of Exhaustion to His Complaint

CMS next argues that Mr. Broder failed to attach proper proof of exhaustion to his complaint. (CMS Brief at 4.) But CMS misinterprets or ignores the plain language of the law. The Sixth Circuit has held that “in order to effectuate [the language of 42 U.S.C. § 1997e(a)], a prisoner must ... show that [his administrative remedies] have been exhausted by attaching a copy of the applicable administrative *dispositions* to the complaint.” *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000) (*emphasis added*); *see also Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) (“A prisoner should attach to his . . . complaint the *administrative decision*, if it is available, showing the administrative *disposition* of his complaint”) (*emphasis added*); *Hill v. Howe*, No. 00-71151, 2000 WL 973672, *2 (E.D. Mich., June 27, 2000) (*same*) (*see* Exhibit E). Nowhere in these cases does the Sixth Circuit or the Eastern District require that the prisoner plaintiff attach copies of each stage of every grievance filed. Only the *disposition* is required.

Nevertheless, Mr. Broder went the extra mile and attached all four Step I, Step II, and Step III grievances, as well as every response (except the two Step III appeals that MDOC never answered). The complaint is not deficient for failing to attach proof of exhaustion, and CMS had “fair notice” of Mr. Broder’s complaints against it. *See Burton v. Jones*, 321 F.3d 569, 575 (6th Cir. 2003).⁵

C. CMS Was Properly Named and/or Identified in the Grievances

CMS next argues that Mr. Broder failed to “mention defendant CMS at all” in his grievances. (CMS Brief at 4). This argument borders on a tautology because most prisoners do

⁵ As noted above in the statement of facts, the list of medical providers he attached to his second grievance was inadvertently omitted by counsel in preparing the complaint. It is attached to this response brief as Exhibit A.

not know who or what CMS is, or what relationship it bears to MDOC or to the doctors and nurses and physicians' assistants who actually treat prisoners. Therefore one would hardly find it surprising if a prisoner never mentioned CMS by name in any formal MDOC grievance. CMS is a corporation, and a corporation can only acts through its employees and agents. Thus, when a prisoner complains in detail about an ongoing failure of his medical care, CMS (the corporation), like MDOC itself, has sufficient notice of the problem to meet the "fair notice" requirement of exhaustion.

But the meticulous Mr. Broder addressed this issue as well. As noted in the statement of facts and in footnote 5, *supra*, Mr. Broder attached to his second grievance an extra sheet identifying by name every single person who to his knowledge had treated him up to that point, and he added to the list "any and all relevant CMS personnel." In the grievance itself he listed "any other treating personnel, supervising personnel, and any and all other individuals *or organizations* involved in the diagnosis, treatment, or referral of my condition." See Exhibit A and Def.'s Exh. 2-3 (*emphasts added*). Mr. Broder thus could not have made it clearer that his complaints of medical mismanagement were intended to run against anyone and everyone who had any connection to his diagnosis, treatment, and aftercare, including MDOC's contract medical provider, CMS.

Even without that attachment, the Court should find that Mr. Broder's grievances gave ample notice to MDOC of his complaints against CMS. Because CMS is the sole provider of medical care to MDOC patients, both MDOC and CMS must have been aware that Mr. Broder was complaining of CMS and its medical staff in his grievances. Moreover, MDOC staff who answered the grievances must have reviewed his medical records (which would have included

the names of the CMS employees or agents who were providing the care) in order to respond to the grievances. CMS had more than “fair notice” of Mr. Broder’s complaints.

D. The Sixth Circuit Has Rejected the Total Exhaustion Rule

CMS next argues that even if Mr. Broder exhausted his administrative remedies for some defendants and some claims, the entire complaint should be dismissed pursuant to the “total exhaustion” rule.

Even if some of Mr. Broder’s claims were unexhausted or only partially exhausted – which he denies – CMS’s assertion that such a “mixed” case should be dismissed is erroneous. A prisoner with multiple claims against multiple defendants is not required to achieve “total exhaustion” of his administrative remedies. *Hartsfield v. Vidor*, 199 F.3d 305 (6th Cir. 1999).

CMS relies on *Smeltzer v. Hook*, 235 F. Supp. 2d 736, 744-746 (W.D. Mich. 2002) for the “total exhaustion” rule. In *Smeltzer*, 235 F.Supp.2d at 742, the court conceded that the Sixth Circuit has repeatedly rejected the total exhaustion rule. *See, e.g., McElhaney v. Elo*, 230 F.3d 1358, 2000 WL 1477498 (6th Cir.2000) (unpublished) (attached as Exhibit B); *Riley v. Richards*, 210 F.3d 372 (6th Cir.2000) (unpublished) (attached as Exhibit C). The *Smeltzer* district court nevertheless went ahead and applied the total exhaustion rule based on the argument that the contrary decisions were unpublished opinions, and that they all relied on the reasoning of *Hartsfield*, which the district court said never reached the question of total exhaustion. *Smeltzer*, 235 F. Supp. 2d at 742.

Subsequently, in *Burton v. Jones*, 321 F.3d 569 (6th Cir. 2003), however, the Sixth Circuit corrected the *Smeltzer* court’s reading of *Hartsfield*, stating that “the *Hartsfield* holding illustrates that a prisoner’s lawsuit, which alleges multiple claims against multiple defendants, is not vulnerable to dismissal under § 1997e(a) simply because the prisoner has failed to exhaust a

particular claim as to a specific defendant.” *Burton*, 321 F.3d at 575, n.2. Thus, defendant CMS’s “total exhaustion” argument is contrary to controlling law.

E. The Plaintiff’s Inadvertent Failure to Comply with MCL 600.5507(2) Should Be Excused Where He Has Filed No Previous Cases

Finally, CMS argues that Mr. Broder’s complaint should be dismissed pursuant to MCL 600.5507(2) because he inadvertently failed to disclose the number of civil actions he had previously filed. Often that information is part of the cover sheet that accompanies a new filing in a prisoner’s case, and therefore Mr. Broder’s counsel did not include a separate allegation within the body of the complaint itself.⁶

In any event, upon information and belief, Mr. Broder has never filed a lawsuit before against MDOC, CMS, or any of the named defendants. Upon further information and belief, this is the first lawsuit that Mr. Broder has ever filed as a prisoner in the custody of MDOC.⁷

Because Mr. Broder has exhausted all of his administrative remedies in conformity with the requirements of 42 U.S.C. §1997a(e) and MCL 600.5507, and has clearly put defendant CMS on notice of his claims, CMS’s motion to dismiss for failure to exhaust should be denied.

II. THE COURT SHOULD KEEP MR. BRODER’S PENDANT STATE-LAW CLAIMS

The defendant CMS asserts that the Court should decline to exercise supplemental jurisdiction, under 28 U.S.C. § 1367(a), over Mr. Broder’s state law claims of gross negligence, willful and wanton misconduct, and medical malpractice/negligence. (CMS Brief at 6-8.)

According to the defendant, litigating Mr. Broder’s federal § 1983 claim along with his state law claims, “may not serve judicial economy or trial convenience.” *Id.* CMS mischaracterizes 28

⁶ If the Court wants this allegation to be made a part of the complaint, then Mr. Broder can amend his complaint to add it. *See* Fed. R. Civ. P. 15(a).

⁷ The reason for the requirement appears to be so that the Court can keep track of frivolous lawsuits that were dismissed and that would count as “strikes” for purposes of the “three strikes” rule under the PLRA. Here, Mr. Broder has *no* strikes, so the pleading requirement serves no purpose.

U.S.C. § 1367(a).

Under 28 U.S.C. § 1367(a), federal courts should exercise supplemental jurisdiction over state law claims that form part of the same case or controversy as the claim with original federal jurisdiction. *See* 28 U.S.C. § 1367(a) (“The district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.”) The U.S. Supreme Court has stated that supplemental jurisdiction is proper “whenever there is a claim ‘arising under (the) Constitution’ . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional ‘case.’” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) (superseded by statute). Claims form part of the same case or controversy when they “derive from a common nucleus of operative facts.” *Gibbs*, 383 U.S. at 725; *Ahearn v. Charter Township of Bloomfield*, 100 F.3d 451, 454-455 (6th Cir. 1996); *Obeid v. Meridian Auto. Sys.*, 296 F. Supp. 2d 751, 753 (E.D. Mich. 2003). Stated differently, “if there is some basis for original jurisdiction, the default assumption is that the court will exercise supplemental jurisdiction over all related claims.” *Blakely v. United States*, 276 F.3d 853, 861 (6th Cir. 2002).

In the present case, both the federal and state claims derive from exactly the same operative facts – the defendants’ alleged failure to timely diagnose and treat Mr. Broder’s laryngeal cancer. (Compl. ¶ 2-3.) Therefore, Mr. Broder’s state law claims meet the statutory standard as applied by the U.S. Supreme Court, by the Sixth Circuit, and by the Eastern District of Michigan.

While pendant jurisdiction is “a doctrine of flexibility, designed to allow courts to deal with cases involving pendant claims in the matter that most sensibly accommodates a range of concerns and values,” *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 173 (1997)

(citing *Carnegie Melon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)), the statute itself enumerates the circumstances in which district courts should refuse the exercise of supplemental jurisdiction:

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if --

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

Mr. Broder's case does not fit any of the four reasons to decline supplemental jurisdiction under 28 U.S.C. § 1367(c). The state law claims Mr. Broder asserts do not raise any novel or complex issues of state law. (Compl. ¶ 101-113.) These are garden-variety torts.

Nor do Mr. Broder's state law claims predominate over the claims for which the district court has original jurisdiction. Mr. Broder's federal claims allege that CMS doctors or staff demonstrated deliberate indifference to Mr. Broder's serious medical needs, subjecting him to cruel and unusual punishment in violation of the Eighth Amendment. To prove deliberate indifference against CMS, Mr. Broder must show that its customs, policies, or practices resulted in the CMS doctors' failure to diagnose and treat his throat cancer within a reasonable time. To make out the state law claims for gross negligence, willful and wanton misconduct, and medical malpractice/negligence, Mr. Broder will have to rely on the same facts. The facts needed to prove Mr. Broder's federal claims will thus be identical to the facts needed to prove Mr. Broder's state law claims. Therefore, Mr. Broder's state law claims in no way "predominate" over the § 1983 claim of which the Court has original jurisdiction.

The third reason – dismissal of the underlying federal claim – does not apply unless or until the Court dismisses Mr. Broder’s § 1983 claim under Rule 12 or Rule 56. *See* 28 U.S.C. § 1367(c)(3). If that were to occur, so that no federal claim remained against any defendant, then the state law claims *should* be dismissed as well, and the plaintiff would not oppose the dismissal. But on this ground CMS’s motion is premature.

The fourth reason for declining supplemental jurisdiction is “exceptional circumstances” for “compelling reasons” under 28 U.S.C. § 1367(c)(4). In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), the U.S. Supreme Court set a high standard for meeting this factor. The Court said that federal courts should decline to exercise their jurisdiction only “in otherwise ‘exceptional circumstances’ where denying a federal forum would clearly serve an important countervailing interest.” *Id.* The defendant says that judicial economy, fairness, and comity require this Court to deny supplemental jurisdiction over Mr. Broder’s state law claims. (CMS Brief at 7.) In fact, judicial economy, fairness, and state-federal comity counsel the opposite. It makes no sense for all the witnesses to have to be dragged into two courts for two sets of discovery, two sets of pre-trial motions, and for two separate jury trials, when the proofs on all issues as to all defendants (not just CMS) and all claims are virtually the same. Cases such as this – where the same conduct gives rise to federal and state law claims – are the reason why the supplemental jurisdiction statute was passed in the first place: to keep the claims in one forum where they can be resolved with the greatest efficiency.

Mr. Broder’s state law claims arise out of the same factual nexus as his federal claims, and his state law claims do not implicate any of the circumstances for which a federal district court can or should refuse to exercise supplemental jurisdiction. CMS’s motion should therefore be denied on this ground as well.

CONCLUSION

For the above reasons, the plaintiff Steven Broder asks the Court to deny defendant CMS's motion to dismiss.

Respectfully submitted,

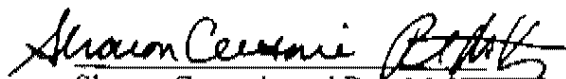
MICHIGAN CLINICAL LAW PROGRAM



By, Paul D. Reingold (P-27594)
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363 Legal Research Building
801 Monroe Street
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Beth Blackwood and Matt Pryor
Student Attorneys



Sharon Ceresnie and Rob McHenry
Student Attorneys

Dated: March 16, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVEN BRODER,

Plaintiff,

vs.

File No. 03-75106

Hon. Gerald E. Rosen

Mag. Judge Paul J. Komives

CORRECTIONAL MEDICAL SERVICES, INC.,

and its physician employees, namely:

AUBERTRO ANTONINI, JOHN AXELSON,

MALCOLM TRIMBLE, _____ BEY,

BENZI MATHAI, and RAY H. CLARK;

and employees and medical staff of the Michigan

Department of Corrections, namely:

PATRICIA L. CARUSO, director,

GEORGE PRAMSTALLER, medical director,

HENRY GRAYSON, warden,

and JAN EPPS, regional medical director;

in their individual and official capacities,

Defendants.

FILED
2004 MAR 17 P 2:36
U.S. DIST. COURT
EAST DIST. MICHIGAN
DETROIT

PROOF OF SERVICE

On the 16th day of March 2004, a copy of Plaintiff's Brief in Opposition to Defendant CMS's Motion to Dismiss was first classed mailed to:

Brian Richtarcik

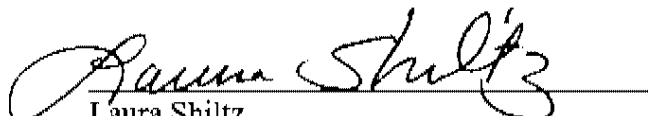
Chapman and Associates, P.C.

40950 N. Woodward Ave., Suite 350

Bloomfield Hills, MI 48304

I declare that the statements above are true to the best of my information, knowledge and belief.

Date: 3/16/04


Laura Shiltz
Legal Assistant

Index of Exhibits

- Exhibit A** List of 37 medical and/or supervisory staff, attached to grievance
- Exhibit B** Affidavit of Sandra L. Girard regarding missing grievance responses
- Exhibit C** *McElhaney v. Elo*, 230 F.3d 1358, 2000 WL 1477498 (6th Cir.2000)
- Exhibit D** *Riley v. Richards*, 210 F.3d 372 (6th Cir. 2000)
- Exhibit E** *Hill v. Howe*, 2000 WL 973672 (E.D. Mich., Jun. 27, 2000)

03-75106

EXS. A-F

20 pages

A

LIST OF MEDICAL AND/OR SUPERVISORY STAFF

Audberto Antonini, MD	Debbie Killewald, RN, BSN
John Axelson, MD	Ronald Kornac, MD
Pat Barrett, RN	Mohan Kulkarni, MD
Sally Bengal, RN	Peggy Lee, RN
Jerry Booth, MD	Benzi Mathai, MD
Orson Cardon, MD	P.C. Patel, MD
Jim Chamberlain, RN	George J. Pramstaller, D.O.
Ray H. Clark, MD	Celeste Praser, RN
Laura Coffey, RN, MSN	S. T. Reddy, MD
Kenneth O. Devaney, MD	Debra Richardson, RN
J. Epps, RN	Donna Rohr, RN
Robyn Finch, RN	Sharma, MD
Lisa Garner, RN	Don Smith, RN
Henry N. Grayson, Warden	Molly Sullivan, MD
J. Hamilton, MD	Malcolm Trimble, MD
James Hayman, MD	Christina Tsien, MD
James Heisel, MD	Annette Werner, RN, BSN
JoAnn Hirth, MD	
Hoyner, MD	Any and all relevant CMS personnel
Connie Ives, RN	Any and all relevant MDOC personnel

B

PRISON LEGAL SERVICES OF MICHIGAN, INC.

Sandra L. Girard
Executive Director

P.O. Box 828
Jackson, MI 49204
(517) 780-8639
Voice Mail: (517) 780-8470
FAX (confidential): (517) 780-8667
FAX (confidential): (517) 787-0014
E-Mail: plsmho@ameritech.net

October 27, 2003

Mr. Steven Broder, 228094
1790 E. Parnell St.
Jackson, MI 49201

Re: Affidavit and MDOC grievances

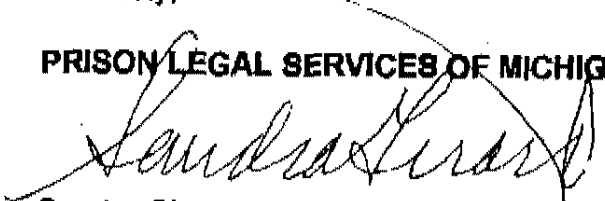
Dear Mr. Broder:

Enclosed, please find an affidavit from me concerning the grievances that were delivered to Mr. Londry in November 2002 and your original documents.

I apologize for the delay in returning your documents and providing the affidavit.

Sincerely,

PRISON LEGAL SERVICES OF MICHIGAN



Sandra Girard
Executive Director

Encls.

AFFIDAVIT OF SANDRA L. GIRARD

I, Sandra L. Girard, make the following statements:

1. I am an attorney licensed to practice in the State of Michigan (P33274);
2. I am the Executive Director of Prison Legal Services of Michigan, Inc. (PLSM);
3. PLSM represents, since its appointment in August 1996, all male prisoners in the State of Michigan Department of Corrections in a state-wide class action, Cain v Michigan Department of Corrections, in the Michigan Court of Claims;
4. From December 15, 1997 until April 16, 2003, including the time of the initial contact relevant to this matter, PLSM was located inside the Charles Egeler Correctional Facility at 3855 Cooper Street, Jackson, Michigan;
5. At that time PLSM employed ten prisoners as paralegals and two as clerks and also employed an office assistant, office administrator, and a law school graduate who was not yet admitted to the Bar;
6. On December 5, 2002, I accepted a collect call from prisoner Steven Broder, #226094, housed at the Parnall Correctional Facility, 1790 East Parnall Road, Jackson, Michigan;
7. Mr. Broder called to complain that Prisoner Affairs in the Central Office of the Michigan Department of Corrections had mailed Mr. Broder's Step III Grievance and attachments to prisoner Douglas Londry, #245998. Prisoner Affairs had also mailed to Mr. Londry the Step III Grievance and attachments from Mr. Nathaniel Kinney, #217637, as well as Mr. Londry's own Step III Grievance;
8. Mr. Broder told me that all the grievances were stapled together with one big staple and enclosed in an envelope that addressed to Mr. Londry at Parnall Correctional Facility, 1790 East Parnall Road, Jackson, Michigan;
9. Mr. Broder also informed me that Mr. Londry had told him about the situation and had showed him the package but had not altered the way the grievances had been received, i.e., he had not unstapled and separated them yet;
10. Mr. Broder told me that he and Mr. Londry both were confined at Parnall Correctional Facility but Mr. Kinney was not even at that prison, he was confined at Cooper Street Correctional Facility;
11. Mr. Broder was especially concerned because all the grievances pertained to highly confidential medical grievances and it was a very negligent breach of confidentiality to send them to a different prisoner;

12. Mr. Broder said he wanted to be able to document this breach of confidentiality;

13. I advised Mr. Broder to have Mr. Londry send the package of grievances to me, exactly the same way he had received them from the Prisoner Affairs Office in Lansing;

14. I told him that I would examine the package of grievances and if it supported his claims, I would prepare an affidavit that the three men could use to pursue this violation of their confidentiality;

15. On December 17, 2002, I received a certified package processed through the Charles Egeler mail room from Mr. Douglas Londry;

16. Inside this package was a letter to me from Mr. Londry in which he stated that he had received the enclosed stack of grievances, in the same condition as they were sent to me, from Michael A. Powell, Prisoner Affairs Coordinator, in the Central Office of the MDOC in Lansing;

17. I closely examined the package of grievances and found that underneath a letter from Mike Powell to Mr. Londry asking for more information, there were seven grievances stapled together with one large staple. They included five grievances (Steps I through III) filed by Mr. Londry, one grievance (Steps I through III) filed by Mr. Broder, and one grievance (Steps I through III) filed by Mr. Kinney (A copy of the letter from Mr. Powell, is attached.);

18. Stapled into the package of grievances, with Mr. Broder's and Mr. Kinney's grievances, were letters from Mr. Powell to each of them requesting more information about their Step III Grievances. Those two letters were dated October 1, 2002, and it appeared that had both responded to the letters (Copies of those letters are attached.);

19. All of the grievances dealt with medical problems that I would classify as highly personal and confidential;

20. On January 9, 2003, at my request and under my direction, a paralegal reviewed the file and drafted an affidavit. I reviewed it, made some changes and received another draft on January 13, 2003;

21. During this time PLSM was involved in litigation in the Court of Claims, Court of Appeals and Supreme Court challenging the MDOC's efforts to force PLSM to vacate its office inside the Charles Egeler Facility and move its twelve prisoner employees to other prisons;

22. Despite the pendency of a timely motion for rehearing of the Court of Appeals' December 27, 2002 opinion, on January 17, 2003, the MDOC moved eight of PLSM's prisoner paralegals and clerks to different prisons, including the paralegal who was assisting me with this matter. The MDOC gave PLSM one week to vacate its office;

23. Following extensive briefing and a hearing, the trial court found the MDOC in contempt of court and ordered it to return the eight prisoner employees by 4:00 p.m. on January 31, 2003;

24. On February 25, 2003, the Court of Appeals denied our motion for rehearing and gave its December 27, 2002 opinion immediate effect. The following morning the MDOC moved all twelve prisoner employees and ordered PLSM to vacate its office;

25. On March 19, 2003, the Michigan Supreme Court gave PLSM 28 days to vacate its offices at Egeler Correctional Facility and ordered the trial court to enter a final judgment in this massive class action by November 1, 2003;

26. On March 31, 2003, the trial court ordered that eleven of the twelve prisoner employees be returned to Egeler to help PLSM civilian staff organize outstanding work, organize files, pack, and prepare to move;

27. On April 1, 2003, the eleven prisoners were returned, but on April 4, 2003, the Court of Appeals reversed the trial court order and by 3:00 pm on April 4, 2003, all eleven prisoners were transferred again, without the opportunity to organize, finish outstanding work, such as this affidavit, and pack in a systematic matter;

28. PLSM's four civilian employees were left to locate and rent office space and move its entire office, including twenty desks, extensive computer equipment including 25 desktop computers, three scanners, two photocopiers, a LAN, a fax machine, various office furnishings, almost 100 file cabinets, a complete law library, approximately 100 boxes of discovery materials from the Cain case, and a six line telephone system by April 16, 2003.

29. The MDOC provided several minimum security prisoners to load boxes on to trucks and unload them at the new location. However, as a result of moving under such extreme time pressures and the prisoner helpers' lack of knowledge about how to organize the materials at the new location, PLSM's office was left in chaos. Most of its employees were gone, its files were in disarray, and instead of an adjournment, it had been ordered to complete discovery and trial in the largest prison class action in Michigan's history (over 2,000 lay witnesses and a dozen experts) within seven months;

30. After the move, I was unable to readily locate many files, including the file connected with this matter, and I had to choose between my duties to the class and to individual members of that class;

31. We lost the services of the prisoner paralegals who had an average of eight years experience, who worked for less than \$10 per day. Some of these men worked exclusively on trial preparation; the others worked primarily on prisoner correspondence. One man spent almost full-time simply filing documents. We could not afford to hire an equal number of experienced civilian paralegals or clerical personnel. I had to recruit volunteers and hire numerous inexperienced college and law students to try and complete discovery

and prepare for trial, as well as handling over 50 piece of incoming prisoner correspondence each day;

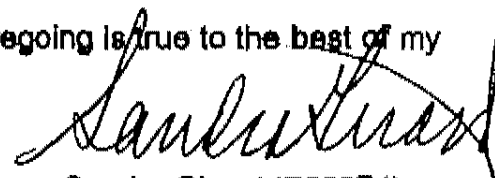
32. On top of the chaos resulting from the move, PLSM's systematic method of opening, logging, screening, coding, assigning, answering, and filing incoming correspondence was completely disrupted. We lost the people responsible for most of these tasks.

33. In September 2003, I asked my staff to search everywhere for this file and a staff member eventually found it in a stack of discovery documents and other files;

34. Today, October 27, 2003, I am mailing an original copy of this affidavit to Mr. Broder, Mr. Londry, and Mr. Kinney along with his individual grievances and attachments;

35. The delay in obtaining my affidavit and the return of their documents is not the fault of Mr. Broder, Mr. Londry, or Mr. Kinney. They attempted to promptly pursue this matter and have me witness the violation of their rights to confidentiality that occurred when all the grievances were sent to Mr. Londry.

I swear and declare under penalty of perjury that the foregoing is true to the best of my knowledge and recollection.


Sandra Girard (P33274)

Sworn and subscribed to before me this 27th day of October, 2003.



SHARON D. VOS
NOTARY PUBLIC JACKSON CO., MI
MY COMMISSION EXPIRES Aug 25, 2004

C

(Cite as: 230 F.3d 1358, 2000 WL 1477498 (6th Cir.(Mich.)))

C

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Randy A. MCELHANEY, Plaintiff-Appellant,
v.
Frank ELO, et al., Defendants-Appellees.

No. 98-2173.

Sept. 25, 2000.

Before BATCHELDER and COLE, Circuit Judges;
GRAHAM, District Judge. [FN*]

FN* The Honorable James L. Graham,
United States District Judge for the Southern
District of Ohio, sitting by designation.

**1 Randy A. McElhaney, a Michigan prisoner proceeding pro se, appeals a district court order dismissing his civil rights action filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

A complaint signed by plaintiffs McElhaney, Tucker, Rollins, Erwin, and Broskey--all prisoners at Gus Harrison Correctional Facility (HCF)--alleged that the warden of HCF (Elo), deputy warden (Haigh), assistant deputy wardens (Norwood and Vallie), recreation director (Wright), classification director (Markland), assistant resident unit supervisor (Ingram), resident unit officer (Kope), and the director of the Michigan Department of Corrections (MDOC) (McGinnis) violated their right of access to the courts by failing to provide McElhaney with the

minimum six hours per week of law library time established by MDOC policy. McElhaney had approved legal representation agreements with the other plaintiffs and claimed that the reduced law library time impeded his efforts to research and file pleadings for himself and those plaintiffs. In addition, the plaintiffs alleged that the rights of Tucker, Rollins, Erwin, and Broskey to legal assistance from McElhaney were violated by the defendants' actions. They sought monetary damages and injunctive relief.

In an amendment to the complaint, McElhaney added corrections officer Whisman and hearings officer Falkenstein as defendants and alleged that Whisman prevented McElhaney from entering the chow hall with a legal document in order to obtain a signature from Tucker. Whisman issued a major misconduct ticket when McElhaney refused a direct order to leave the papers, and Falkenstein subsequently found McElhaney guilty. McElhaney further alleged that librarian Heard hampered his efforts to prepare pleadings and copy exhibits in the law library. McElhaney subsequently filed a supplemental complaint, alleging that a John Doe defendant violated his right of access to the courts by refusing to let McElhaney's brother pick up trial transcripts for delivery to the Michigan Court of Appeals. In a responsive pleading, the plaintiffs alleged retaliation for their protected legal activities. Plaintiffs Erwin and Tucker filed separate motions for voluntary dismissal, which were subsequently granted.

In a report filed on August 10, 1998, the magistrate judge recommended that the motions to dismiss filed by defendants McGinnis, Elo, Whisman, and Falkenstein be granted; that summary judgment be granted in favor of defendants Haigh, Norwood, Wright, Markland, Kope, Ingram, and Vallie; and that the court *sua sponte* dismiss defendants John Doe and Heard. In addition, the magistrate judge recommended that the claims for injunctive relief be denied as moot because the three remaining plaintiffs had all been transferred from HCF to other institutions.

**2 Following a *de novo* review, the district court overruled McElhaney's objections, adopted the magistrate judge's report, and dismissed the action in an opinion and order filed on September 30 and entered on October 1, 1998. The notice of appeal was signed only by McElhaney.

(Cite as: 230 F.3d 1358, 2000 WL 1477498 (6th Cir.(Mich.)))

On appeal, McElhaney argues that: (1) disputed issues of material fact preclude the entry of summary judgment for the defendants; (2) the district court improperly granted summary judgment without affording the plaintiffs opportunity for discovery; (3) the defendants' actions resulted in actual prejudice to McElhaney's criminal appeal sufficient to state a claim for denial of the right of access to the courts; (4) the district court improperly decided disputed factual issues in granting Whisman's and Falkenstein's motions to dismiss; (5) the district court improperly decided disputed factual issues in granting McGinnis's and Elo's motions to dismiss; and (6) the district court applied the wrong standard and improperly decided disputed factual issues in dismissing the claims against Heard and "John Doe."

Upon review, we affirm the district court's order. This court reviews *de novo* a district court's dismissal of a complaint for failure to state a claim under Fed.R.Civ.P. 12(b)(6) after taking all well-pleaded factual allegations as true. See Jackson v. City of Columbus, 194 F.3d 737, 745 (6th Cir.1999); Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 405 (6th Cir.1998). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Jackson, 194 F.3d at 745; Lewis, 135 F.3d at 405. Despite this liberal standard, a plaintiff is obligated to satisfy federal notice pleading requirements and allege more than bare assertions of legal conclusions. See Lewis, 135 F.3d at 405.

This court also reviews *de novo* a district court's order granting summary judgment, using the same test as that used by the district court. See Avery v. King, 110 F.3d 12, 13 (6th Cir.1997). Thus, "[s]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* at 13-14 (quoting Fed.R.Civ.P. 56(c)).

The district court properly granted summary judgment to the defendants on McElhaney's First Amendment claim of denial of access to the courts. The focus of the First Amendment right is whether the defendants' actions actually denied the prisoner a "reasonably adequate opportunity" to present his claims in court. See Bounds v. Smith, 430 U.S. 817,

825 (1977). There is no constitutional right to any particular number of hours in the law library. See Walker v. Mintzes, 771 F.2d 920, 932 (6th Cir.1985). Rather, to state a claim for the denial of meaningful access to the courts, a plaintiff must plead and prove actual injury to existing or contemplated litigation of nonfrivolous claims which challenge the plaintiff's sentence or conditions of confinement. See Lewis v. Casey, 518 U.S. 343, 349, 354-55 (1996). McElhaney has failed to meet this requirement. Although he claims that his criminal appeal was dismissed as a result of his inadequate law library time, the record indicates otherwise. McElhaney's appeal was rejected because he did not *reduce* his oversized brief or move for an extension of time in which to do so as directed by the state court of appeals. Any failure by the defendants to provide six hours per week of law library time was not the cause of McElhaney's failure to follow the court's instruction.

**3 Nor does McElhaney have a constitutional right to assist other prisoners with their legal problems. See Gibbs v. Hopkins, 10 F.3d 373, 378 (6th Cir.1993). Where, as here, an inmate has an approved legal assistance agreement with another inmate, the prison may still reasonably limit the time, place, and manner in which inmates may consult, conduct their legal research, and prepare legal papers. See Walker, 771 F.2d at 932. Furthermore, a jailhouse lawyer's right to assist another prisoner is wholly derivative of the inmate/client's right of access to the courts. See Gibbs, 10 F.3d at 378. Because none of McElhaney's inmate/clients are parties to this appeal--in fact, two voluntarily withdrew from the complaint at the district court level--McElhaney cannot claim denial of access to the courts in relation to any of his inmate/clients' litigation.

The district court properly dismissed defendants McGinnis and Elo because McElhaney's allegations concerning them are based upon their supervisory status, which is insufficient to impose liability under § 1983. See Shehee v. Luttrell, 199 F.3d 295, 300 (6th Cir.1999), cert. denied, 120 S.Ct. 2724 (2000); Salehpour v. University of Tennessee, 159 F.3d 199, 206-07 (6th Cir.1998), cert. denied, 119 S.Ct. 1763 (1999).

Because Tucker voluntarily withdrew from this action, the district court properly dismissed the claim against defendant Whisman, as the only allegation against him involved the alleged interference with McElhaney's attempt to get Tucker's signature on a

(Cite as: 230 F.3d 1358, 2000 WL 1477498 (6th Cir.(Mich.)))

document. The claim against defendant Falkenstein was properly dismissed because she is absolutely immune from an action for monetary damages relating to her adjudication of McElhaney's major misconduct. See Shelly v. Johnson, 849 F.2d 228, 230-31 (6th Cir.1988). Nor did the district court err in dismissing the claims against the John Doe defendant and librarian Heard.

This court recently set forth the elements of a First Amendment retaliation claim: (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there was a causal connection between elements one and two, i.e., the adverse action was motivated, at least in part, by the plaintiff's protected conduct. See Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir.1999) (en banc). The plaintiff has the burden of proof on all three elements. In this case, the district court found that McElhaney had failed to allege with specificity the adverse actions taken or demonstrate the required causal connection.

The district court should not have addressed the merits of McElhaney's retaliation claim. The Prison Litigation Reform Act requires prisoners bringing civil rights actions to exhaust all available administrative remedies prior to filing suit in federal court. See 42 U.S.C. § 1997e(a); Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir.), cert. denied, 525 U.S. 833 (1998). The prisoner bears the burden of establishing exhaustion of administrative remedies. See *id.* To establish exhaustion, the prisoner must allege that all available administrative remedies have been exhausted and he should attach documentation to the complaint indicating the administrative disposition of any grievances that he had filed. See *id.* Before the district court adjudicates any claim set forth in a prisoner's complaint, the court must determine whether the prisoner has complied with the exhaustion requirement. See *id.* When a prisoner has filed a civil rights claim in federal court without first exhausting his administrative remedies, dismissal of the complaint is appropriate. See Freeman v. Francis, 196 F.3d 641, 645 (6th Cir.1999); Brown, 139 F.3d at 1104. If a complaint contains exhausted and unexhausted claims, the district court may address the merits of the exhausted claims and dismiss only those that are unexhausted. See Hartsfield v. Vidor, 199 F.3d 305, 309 (6th Cir.1999).

**4 McElhaney did include, among his numerous exhibits, the disposition of his grievances relating to his access to the courts claim. However, he has neither alleged exhaustion of administrative remedies regarding his retaliation claim, nor submitted any documentation showing exhaustion. Therefore, McElhaney's retaliation claim should have been dismissed without prejudice for lack of exhaustion. However, we affirm the district court's judgment in its entirety because McElhaney's retaliation claim on its face satisfies 42 U.S.C. § 1997e(2), which permits dismissal on the merits without requiring exhaustion if the claim is frivolous, malicious, or fails to state a claim upon which relief may be granted. See Brown, 139 F.3d at 1104. McElhaney fails to state a retaliation claim because he does not allege retaliatory acts with specificity or demonstrate a causal connection between those acts and his protected conduct. See Thaddeus-X, 175 F.3d at 399-400 (simply alleging retaliation is insufficient to establish a causal connection). Moreover, there is no indication that McElhaney has been deterred from continuing his legal activities. Thus, the district court, although using a pre-Thaddeus-X standard, reached the proper conclusion.

The district court did not err in finding that McElhaney's claims for injunctive relief are moot due to his transfer to another institution. See Pegler v. Newkirk, 422 U.S. 395, 402-03 (1975); Kensu v. Haigh, 87 F.3d 172, 175 (6th Cir.1996).

Finally, we find that the specific issues presented by McElhaney in his brief on appeal are without merit. Accordingly, the district court's order, entered on October 1, 1998, is affirmed. Rule 34(j)(c)(2), Rules of the Sixth Circuit.

230 F.3d 1358 (Table), 2000 WL 1477498 (6th Cir.(Mich.)) Unpublished Disposition

END OF DOCUMENT

D

(Cite as: 210 F.3d 372, 2000 WL 332013 (6th Cir.(Mich.)))

P

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Jimmie Lee RILEY, Plaintiff-Appellant,
v.

Robert RICHARDS, et al., Defendants-Appellees.

No. 99-1327.

March 23, 2000.

Before MERRITT, NELSON, and DAUGHTREY,
Circuit Judges.

ORDER

**1 Jimmie Lee Riley, a pro se Michigan prisoner, appeals a district court judgment dismissing his civil rights action, as amended, filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

Seeking monetary, declaratory, and injunctive relief, Riley sued six corrections officers and employees of the G. Robert Cotton Correctional Facility. Riley sued the defendants in their individual and official capacities for allegedly violating his rights under the First, Eighth, and Fourteenth Amendments. The defendants filed a motion for summary judgment, supported by their affidavits, to which Riley responded.

In a report filed on January 27, 1999, a magistrate judge recommended that the defendants' motion for summary judgment be granted and that Riley's complaint be dismissed. After a thorough analysis, the magistrate judge concluded that Riley's claims

were either wholly conclusory or insufficient to establish a genuine issue of material fact so as to withstand summary judgment. Riley's motion for an additional 60 days in which to file objections to the magistrate judge's report was denied by the district court. The district court thereafter adopted the magistrate judge's report and recommendation, granted the defendants' motion for summary judgment, and dismissed Riley's action in a memorandum opinion and order filed on February 24 and entered on February 26, 1999. A separate judgment was entered the same day.

On appeal, Riley reasserts the issues presented to the district court and argues that: (1) his verified complaint was sufficient to establish genuine issues of material fact so as to preclude summary judgment; and (2) the district court erred by denying his motion for extension of time to file objections.

Upon review, we affirm the district court's judgment in part for reasons other than those relied upon by the district court. See Lawrence v. Chancery Ct. of Tennessee, 188 F.3d 687, 691 (6th Cir.1999). This court reviews *de novo* a district court's grant of summary judgment, using the same standard used by the district court. See Equitable Life Assurance Soc'y of the United States v. Poe, 143 F.3d 1013, 1015 (6th Cir.1998). Summary judgment is proper if there is no genuine issue of material fact and the defendants are entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Initially, the defendants urge this court to find that Riley has waived his right to appeal the denial of his claims because he failed to file timely objections to the magistrate judge's report and recommendation. See Thomas v. Arn, 474 U.S. 140, 155 (1985); United States v. Walters, 638 F.2d 947, 949-50 (6th Cir.1981). However, a district court may, in its discretion, enlarge the time for filing objections. See Fed.R.Civ.P. 6(b); Patterson v. Mintzes, 717 F.2d 284, 286-87 (6th Cir.1983). This was Riley's first request for an extension in which to file objections. It was dated within the ten-day period for filing objections and was, in fact, filed within ten days of entry of the report and recommendation. As cause, Riley cited the need for additional legal research to respond to the magistrate judge's lengthy report. Such a request is not unreasonable and is often routinely granted by district courts, albeit not always for the length of time requested. Therefore, despite the

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district court's denial of Riley's motion, this court departs from the general rule in this case and considers Riley's appeal on the merits.

**2 Pursuant to 42 U.S.C. § 1997e(a), a prisoner must exhaust all of his available administrative remedies, even in money damages cases, before filing in federal court a civil rights action challenging the conditions of his confinement. See *Wyatt v. Leonard*, 193 F.3d 876, 878-79 (6th Cir.1999); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir.), cert. denied, 119 S.Ct. 88 (1998). The prisoner has the burden of demonstrating that he has exhausted these remedies. See *Brown*, 139 F.3d at 1104. Before the district court adjudicates any claim set forth in the plaintiff's complaint, the court must determine that the plaintiff has complied with this exhaustion requirement. See *id.* The prisoner "cannot simply fail to file a grievance or abandon the process before completion and claim that he has exhausted his remedies or that it is futile for him to do so because his grievance is now time-barred under the regulations." *Hartsfield v. Vidor*, 199 F.3d 305, 309 (6th Cir.1999). To establish that he has exhausted his administrative remedies prior to filing suit, a prisoner should attach to his § 1983 complaint any decision demonstrating the administrative disposition of his claims. See *Wyatt*, 193 F.3d at 878; *Brown*, 139 F.3d at 1104. If a complaint contains exhausted and unexhausted claims, the district court may address the merits of the exhausted claims and dismiss only those that are unexhausted. See *Hartsfield*, 199 F.3d at 309. The court may dismiss unexhausted claims on the merits only on the ground that the claims on their face satisfy 42 U.S.C. § 1997e(c)(2). See *Brown*, 139 F.3d at 1104.

Neither the magistrate judge nor the district court expressly addressed the exhaustion of administrative remedies in this case. Nonetheless, the record contains evidence that at least some of Riley's claims were processed through the prison grievance system. Specifically, Riley's claims regarding the opening of his legal mail, the seizure of his two footlockers and legal materials, and the law librarian's refusal to photocopy and confiscation of the employee handbook were the subject of grievances. However, there is no indication whether Riley's claims regarding restriction of his access to the grievance system, exposure to toxic chemicals, and subsequent lack of medical care were exhausted through the prison grievance system. We, therefore, affirm the district court's judgment as to the exhausted claims

for the reasons stated by the district court. We affirm the district court's judgment as to the unexhausted claims on the ground that they satisfy 42 U.S.C. § 1997e(c)(2).

Accordingly, the district court's judgment, entered on February 26, 1999, is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

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Only the Westlaw citation is currently available.

United States District Court, E.D. Michigan,
Southern Division.

Samuel D. HILL, Plaintiff,
v.
Sergeant HOWE, et al., Defendants.

No. 00-71151.

June 27, 2000.

OPINION AND ORDER

ZATKOFF, Chief J.

AT A SESSION of said Court, held in the United
States Courthouse, in the City
of Detroit, State of Michigan, on

I. INTRODUCTION

*1 This matter is before the Court on Defendants' Motion to Dismiss Plaintiff Samuel D. Hill's (hereinafter "plaintiff") complaint under Fed.R.Civ.P. 12(b)(6) for failure to exhaust administrative remedies. The Court finds the facts and the legal arguments are adequately presented in the briefs and the decisional process would not be significantly aided by oral argument. Accordingly, the motion before this Court will be disposed of upon the briefs that the parties have submitted. See E.D. Mich. Local R. 7.1(e)(2). For the reasons that follow, Defendants' Motion to Dismiss is GRANTED.

II. BACKGROUND

Plaintiff is an inmate at the St. Louis Correctional Facility in Gratiot County, Michigan. His complaint states claims for violations of his constitutional rights under the First, Fourth, Eighth, and Fourteenth Amendments of the United States Constitution brought pursuant to 42 U.S.C. § § 1983 and 1985. Specifically, plaintiff alleges that his decision not to participate in a drug sting operation within the prison system resulted in assault, harassment, and other physical, mental, and emotional abuses. Plaintiff filed numerous grievances that were investigated internally and by the Federal Bureau of Investigations.

Defendants claim that plaintiff's complaint must be dismissed for his failure to exhaust his administrative remedies through Step 3 of the grievance procedure

under 42 U.S.C. § 1997e(a). See *Wyatt v. Leonard*, 193 F.3d 876, 878 (1999). Plaintiff alleges that he has "substantially complied" with the exhaustion requirement.

A motion brought pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted tests the legal sufficiency of the plaintiff's complaint. In evaluating the motion, this Court "[m]ust construe the complaint in a light most favorable to the plaintiff, accept as true all of the plaintiff's well-pleaded factual allegations, and determine whether the plaintiff can prove no set of facts supporting his claims that would entitle him to relief." *Ludwig v. Board of Trustees of Ferris State University*, 123 F.3d 404, 408 (6th Cir.1997). However, a court need not accept as true legal conclusions or unwarranted factual inferences. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir.1987). A district court may properly grant a motion to dismiss when no set of facts exists which would allow the plaintiff to recover. *Garter by Carter v. Cornwall*, 983 F.2d 52, 54 (6th Cir.1993).

III. ANALYSIS

42 U.S.C. § 1997e(a)(1) provides that "no action shall be brought with respect to prison conditions under section 1983 until all administrative remedies are exhausted." *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir.1998), cert. denied, 525 U.S. 833 (1998). In *Brown*, the court of appeals stated that "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 proceeding and its outcome." *Id.* In the absence of particularized averments concerning exhaustion showing the nature of the administrative proceeding and its outcome, the action must be dismissed under § 1997e. *Id.*

*2 In *Knuckles v. Toombs*, 2000 WL 767833, *1 (6th Cir.2000), the plaintiffs stated in their complaint that certain claims had been exhausted without providing the documentation or other details required by *Brown*. The court stated that "[t]here are none of the particularized averments necessary for the district court to determine what, if any, claims have been exhausted or what has been done in an attempt to exhaust the claims." *Id.* Therefore, the court of appeals held that the complaint was properly dismissed.

Similarly, in this case, plaintiff's complaint has not

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provided the Court with any of the particularized averments necessary for the district court to determine what, if any, claims have been exhausted. Although plaintiff states that he did not receive an response to his grievances, he has not submitted any documentation that he forwarded his grievances to the next step or appealed his grievances under the Michigan Department of Correction's grievance procedures. Therefore, plaintiff has not "completely exhausted" his administrative remedies. Wolff v. Moore, 199 F.3d 324, 327-29 (6 th Cir.1999). Accordingly, plaintiff's complaint must be dismissed under 42 U.S.C. §. 1997e(a)(1).

IV. CONCLUSION

Accordingly, for the reasons stated above, defendant's Motion to Dismiss under Fed.R.Civ.P. 12(b)(6) is GRANTED.

IT IS SO ORDERED.

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(Cite as: 2002 WL 1498802 (Mich.App.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.

Kelvin SIMMONS, Plaintiff-Appellant,

v.

COUNTY OF WAYNE and Wayne County Sheriff,
Defendants-Appellees.

No. 230936.

July 12, 2002.

Before: HOOD, P.J., and SAAD and E.M.
THOMAS [FN*], JJ.

[FN* Circuit judge, sitting on the Court of
Appeals by assignment.

UNPUBLISHED

MEMORANDUM.

*1 Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition. We affirm.

Plaintiff, a prisoner, filed this action seeking damages on the ground that he was twice subjected to strip searches that were conducted in violation of the law. Defendants moved to dismiss, asserting that plaintiff had failed to exhaust his administrative remedies prior to filing suit and that they were immune from liability for any tort claims. The trial court granted the motion without explanation. The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v. Davidson*, 241 Mich.App 611, 616; 617 NW2d 351 (2000).

The Prisoner Litigation Reform Act (PLRA), which took effect November 1, 1999, prohibits a prisoner from filing a civil action concerning prison conditions until he has exhausted all available administrative remedies. MCL 600.5503(1). Plaintiff contends that the PLRA was not applicable because he submitted his complaint to the court on or about

October 29, 1999. A civil action is commenced upon the filing of a complaint, MCR 2.101(B), and plaintiff's complaint was not actually filed until December 16, 1999. Although it had been sent in for filing earlier, the court had to review his request for suspension of fees and costs. Pursuant to M.C.L. § 600.2963(1) and (3), the court ordered plaintiff to pay a partial filing fee and was required to "suspend the filing of the civil action" until plaintiff paid the fee. MCL 600.2963(1).

Plaintiff next contends that if the PLRA did apply, he was excused from exhausting his administrative remedies due to fear of retaliation. Because plaintiff has not cited any case law or other authority in support of his argument, the issue has not been preserved for appeal. *Price v. Long Realty, Inc.*, 199 Mich.App 461, 467; 502 NW2d 337 (1993).

Plaintiff next contends that to the extent the court found that defendants were entitled to immunity, it erred in so ruling because the rule of governmental immunity was abrogated as to counties in *Myers v. Genesee Co Auditor*, 375 Mich. 1; 133 NW2d 190 (1965). That case predates the adoption of the Government Tort Liability Act, M.C.L. § 691.1401 et seq., pursuant to which counties are in fact entitled to claim immunity from tort liability. MCL 691.1401(b), (d); MCL 691.1407(1).

We have reviewed plaintiff's remaining claims of error and find that they are irrelevant to either basis for the trial court's ruling.

Affirmed.

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