No. 10-2089

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dallas Cobbs (State Prisoner no. 164276),

Plaintiff-Appellee,

v.

George Pramstaller,

Defendant-Appellant,

and

Craig Hutchinson, Marcella Clark, Gregory Naylor, Bency Mathai, Haresh Pandya, and Correctional Medical Services, Inc.,

Defendants.

Appeal from the United States District Court
Eastern District of Michigan at Detroit
Honorable Anna Diggs Taylor

BRIEF FOR DEFENDANT-APPELLANT

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The defendant-appellee believes that the issues in this case can be adequately addressed in the briefs, and oral argument is therefore not necessary. 6th Cir. Rule 34(j)(2)(C). Furthermore, should oral argument be requested by the Court, the defendant-appellee requests that oral argument be conducted by teleconference due to State budget and time constraints and the fact that the plaintiff is represented by a *pro bono* university law clinic. 6th Cir. Rule 34(h)(4).

JURISDICTIONAL STATEMENT

Plaintiff-Appellee Dallas Cobbs (hereafter Cobbs) is an inmate who sued pursuant to 42 U.S.C. § 1983 for alleged violations of his constitutional rights. The District Court had subject matter jurisdiction because Cobbs raised a federal question.[1]

Defendant-Appellant George Pramstaller (hereafter Pramstaller) appeals the District Court's decision to deny his dispositive motion based on qualified immunity. Denial of a motion based on qualified immunity is immediately appealable under the collateral-order doctrine.[2] Thus, the District Court's decision is properly before this Court pursuant to 28 U.S.C. § 1291.

The District Court's Order denying Pramstaller's dispositive motion was entered on July 22, 2010. [R. 133]. Pramstaller's notice of appeal was filed on August 20, 2010. [R. 138]. Pramstaller's appeal is therefore timely.

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[1] 28 U.S.C. § 1331.

[2] *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1094 (6th Cir. 1992); *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986).

STATEMENT OF ISSUES PRESENTED

I. A prison doctor is not liable under the Eighth Amendment merely for disagreeing with another doctor about a proposed course of care. No controlling authority has found that a cataract surgery is a serious medical need or that a doctor is liable for failure to authorize a second-eye cataract surgery. Is a prison doctor who heads a medical committee that did not authorize a second-eye cataract surgery entitled to qualified immunity even though the prisoner's eye doctors recommended the surgery?

STATEMENT OF THE CASE

This is a 42 U.S.C. § 1983 prisoner civil-rights action that was filed *pro se* on October 30, 2007, by Dallas Cobbs (hereafter Cobbs). [Complaint, R. 1]. Cobbs filed this suit alleging that his Eighth Amendment rights were violated when the Michigan Department of Corrections paid for a cataract surgery for one of his eyes but not the other. Cobbs secured counsel in March 2008. [Attorney Appearance, R. 27].

Defendant George Pramstaller (hereafter Pramstaller), along with other Michigan Department of Corrections defendants, filed a motion for summary judgment on December 1, 2009. [Motion for Summary Judgment, R. 104]. Correctional Medical Services defendants also filed a motion for summary judgment on that date. [Motion for Summary Judgment, R. 103]. Cobbs responded to both motions on December 23, 2009. [Response, R. 106].

On March 25, 2010, the Magistrate Judge entered a Report and Recommendation recommending that Pramstaller's motion for summary judgment be denied. [Report and Recommendation, R. 115]. All parties filed objections to the Report and Recommendation. [Objections, R. 116, 117, 119]. Cobbs responded to Pramstaller's objections on April 21, 2010. [Response, R. 123]. The District Court held oral arguments on all objections on July 12, 2010. [Notice to Appear, R. 130]. The transcript is on file in the District Court. [Transcript, R.

134]. On July 22, 2010, the District Court entered its Order Adopting in Part and Rejecting in Part the Report and Recommendation. [Order, R. 133]. As to the claim against Pramstaller, the District Court adopted the Report and Recommendation and denied Pramstaller's motion for summary judgment based on qualified immunity. Pramstaller filed his notice of appeal on August 20, 2010. [Notice of Appeal, R. 138].

STATEMENT OF FACTS[3]

This case involves the medical care of an inmate housed in the Michigan Department of Corrections; the relevant dates of treatment occurred between 2004 and 2008. During that time, Correctional Medical Services, Inc. (hereafter CMS), was contracted by the State of Michigan to provide primary-care services to state inmates. Prison policy explains the responsibilities of CMS and other healthcare entities.

Michigan Department of Corrections Operating Procedure 03.04.100 provides that the medical service provider at each facility is responsible for providing all necessary prisoner medical care within their level of expertise and the capabilities of the respective facility. [R. 103, Exhibit H, ¶ B]. If the level of care that a prisoner requires is beyond the primary level of care provided at his institution, the medical service provider is responsible for making referral to the Network Provider for offsite specialty care. [R. 103, Exhibit H, ¶ C]. In the present case, the Network Provider was CMS. [R. 103, Exhibit I, pages 18-19]. CMS was responsible for receiving the referral request from the medical service provider and screening it against approved Michigan Department of Corrections criteria for the provision of off-site specialty care. [R. 103, Exhibit H, ¶ E(3)]. In the present case, the referral request was first reviewed by a CMS utilization-

[3] The statement of facts is taken in large part from R. 103, pages 1-16.

review nurse, who screened the request to determine if it was clearly medically necessary based on the nurse's review of certain criteria. [R. 103, Exhibit C, page 16]. The nurse could authorize the referral if the request was clearly medically necessary, or the nurse could pend the request[4] for additional information, but utilization-review nurses did not have the authority to not authorize a request; only a physician could not authorize a request. [R. 103, Exhibit C, pages 16-17].

If the referral request did not meet the criteria, CMS's utilization-review nurse referred the request to its utilization-review physician. [R. 103, Exhibit H, ¶ E(8)]. The utilization-review physician then reviewed the case and made a determination. [R. 103, Exhibit H, ¶ E(9)].

If the request was not authorized by the utilization-review physician, the medical service provider could then initiate the appeals process if the medical service provider believed that the non-approval was unwarranted in the medical service provider's best medical judgment. [R. 103, Exhibit H, ¶ E(11)]. CMS's utilization-review physician would then again review the appeal and any additional documentation submitted with it. [R. 103, Exhibit H, ¶ E(15)].

If an appealed request was again not authorized and the MSP disagreed with the non-authorization, the MSP could then forward the second-step appeal to the MDOC Regional Medical Officer. [R. 103, Exhibit H, ¶ E(20)]. The Regional

[4] "Pending" a request is putting it on hold while additional information is requested.

Medical Officer then reviewed the appeal for completeness and forwarded it to the Chief Medical Officer of the Michigan Department of Corrections, which in this case was Dr. Pramstaller, with a request that the case be placed on the next Medical Services Advisory Committee agenda. [R. 103, Exhibit H, ¶¶ E(21, 22)].

The Medical Services Advisory Committee was chaired by the Chief Medical Officer; it also consisted of the Regional Medical Officers, the Director of Medical Services at Duane L. Waters Hospital, and others as determined by the Bureau of Health Care Services. [R. 103, Exhibit G, ¶ L]. The Chief Medical Officer had the ultimate authority to decide the outcome of the second appeal. [R. 103, Exhibit H, ¶ E(26); Exhibit C, pages 60-61].

On March 31, 2004, Cobbs underwent an optometric vision screening with Michael McGrath, O.D., an optometrist. [R. 103, Exhibit F, pages 136, 370]. Cobbs's visual acuity[5] in his right eye was 20/200, and his best corrected visual

[5] "Visual acuity" is a "measure of the resolving power of the eye. It is usually determined by one's ability to read letters of various sizes at a standard distance from the test chart. The result is expressed as a comparison: for example, 20/20 is normal vision, meaning the subject's eye has the ability to see from a distance of 20 ft (6.1m) what a person with normal vision should see at that distance. Visual acuity of 20/40 means that a person sees at 20 ft (6.1m) what a person with normal vision sees from a distance of 40ft (12.2m)." TABER'S CYCLOPEDIC MEDICAL DICTIONARY (Donald Venes ed., 21st Edition, 2009).

acuity in his left eye was 20/40. [R. 103, Exhibit F, page 370]. Dr. McGrath assessed Cobbs with bilateral cataracts.[6] [R. 103, Exhibit F, page 370].

Dr. McGrath submitted a routine consultation request to CMS's utilization-review department for Cobbs to see an ophthalmologist within one month. [R. 103, Exhibit F, page 353]. On April 1, 2004, Dr. DeMasi, a utilization-review physician employed by CMS, responded that the ophthalmology consultation was not authorized because Cobbs still had a best corrected overall visual acuity of 20/40. [R. 103, Exhibit F, page 350].

On May 10, 2004, Paul Piper, M.D., Cobbs's medical service provider at Ryan Correctional Facility, initiated an appeal of the April 1, 2004, denial, noting that Cobbs's visual acuity in his right eye had changed from 20/20 to 2/200 due to a dense, right-eye cataract. [R. 103, Exhibit F, page 350]. On May 12, 2004, Dr. DeMasi responded to the appeal and again explained that the request was not authorized because Cobbs's visual acuity in his left eye was still 20/40. [R. 103, Exhibit F, page 350]. On May 12, 2004, Dr. Piper noted in the progress notes that the "ophthalmology referral denied by Dr. DeMasi-CMS as inmate is legally blind

[6] "Cataract" is "an opacity of the lens of the eye." TABER'S CYCLOPEDIC MEDICAL DICTIONARY (Donald Venes ed., 21st Edition, 2009).

in O.D.[7] from dense cataract and has 20/40 vision O.S.[8] I think cataract surg[ery] is indicated if it will correct vision." [R. 103, Exhibit F, page 134].

On May 18, 2004, Dr. Piper completed the next step in the MDOC appeal process by completing an appeal form, which was sent to the Regional Medical Director employed by the MDOC, Dr. Clark. [R. 103, Exhibit F, pages 134, 490]. On June 22, 2004, Dr. Clark forwarded the appeal to the MDOC's Medical Services Advisory Committee. The committee conducted a meeting during which it discussed Cobbs's ophthalmology consultation request. [R. 103, Exhibit F, pages 349, 350]. The committee decided that Cobbs should be approved for cataract surgery on his right eye based upon his "lifer status." [R. 103, Exhibit F, pages 349, 350].

On July 27, 2004, Cobbs received an ophthalmology consultation with Ghulam Dastgir, M.D. [R. 103, Exhibit F, pages 132, 341-342, 348]. Cobbs's best corrected visual acuity was hand motion to finger counting at one-half foot in his right eye and 20/70 in the left eye. [R. 103, Exhibit F, pages 341-342]. Dr. Dastgir assessed Cobbs with (1) a hypermature cataract of the right eye and (2) a dense posterior subcapsular cataract in the left eye. [R. 103, Exhibit F, pages 341-342]. Dr. Dastgir recommended an A and B scan of Cobbs's right and left eyes at the

[7] "O.D." is an optometric abbreviation for "right eye." TABER'S CYCLOPEDIC MEDICAL DICTIONARY (Donald Venes ed., 21st Edition, 2009).
[8] "O.S." is an optometric abbreviation for "left eye." TABER'S CYCLOPEDIC MEDICAL DICTIONARY (Donald Venes ed., 21st Edition, 2009).

Parkside Eye Clinic and cataract extraction with lens implants in both eyes, the right eye being first. [R. 103, Exhibit F, pages 341-342]. Dr. Dastgir also scheduled Cobbs to have both surgeries, although the Medical Services Advisory Committee had authorized surgery in the right eye only. [R. 103, Exhibit F, pages 341-42].

On July 29, 2004, Dr. Piper submitted a routine authorization request for Cobbs to undergo bilateral cataract extractions with lens implants. [R. 103, Exhibit F, page 345]. On August 3, 2004, the request for A and B scans of Cobbs's right eye and the cataract extraction of his right eye with a lens implant was non-authorized by Dr. Forshee,[9] another utilization-review physician for CMS. [R. 103, Exhibit F, page 344]. Dr. Forshee authorized the A scan of Cobbs's left eye, cataract removal in his left eye with lens implant, a one day post-op follow-up, and a one week follow-up appointment.[10] [R. 103, Exhibit F, page 344].

On August 23, 2004, Cobbs underwent A and B scans of his right eye and an A scan of his left eye at the Parkside Eye Clinic. [R. 103, Exhibit F, page 337]. On August 30, 2004, Cobbs underwent cataract surgery on his right eye. [R. 103, Exhibit F, page 131]. On August 31, 2004, Cobbs returned to see Dr. Dastgir for

[9] It appears that Dr. Forshee meant to deny the scans and the cataract extraction of the left eye, even though he indicated that his denial was with respect to the right eye.

[10] Again, it appears that Dr. Forshee confused the right and left eye and intended to authorize the A scan and cataract extraction of the right eye.

his one-day follow-up, as scheduled, and his visual acuity in his right eye had improved to 20/70 without correction. [R. 103, Exhibit F, page 333]. Dr. Dastgir then assessed Cobbs with (1) pseudophakia[11] of the right eye and (2) dense posterior subcapsular cataract of the left eye. [R. 103, Exhibit F, page 333]. Dr. Dastgir requested that Cobbs be brought back for cataract extraction with lens implant in his left eye. [R. 103, Exhibit F, page 333].

On September 15, 2004, Cobbs again saw Dr. McGrath for an optometric examination. [R. 103, Exhibit F, page 369]. Dr. McGrath noted that Cobbs had cataract surgery on his right eye two weeks ago and that he was a candidate for cataract surgery on his left eye. [R. 103, Exhibit F, page 369].

On October 7, 2004, Dr. Piper submitted a routine consultation request for Cobbs to see the ophthalmologist, as recommended by Dr. Dastgir. [R. 103, Exhibit F, page 328]. On October 11, 2004, the consultation request was pended by Dr. Forshee, who noted that the request was sent to the Medical Services Advisory Committee for evaluation. [R. 103, Exhibit F, page 329]. On October 26, 2004, the Medical Services Advisory Committee conducted a meeting during which it discussed the request for an extraction of Cobbs's left-eye cataract. [R. 103, Exhibit F, page 326]. Dr. Pramstaller then issued a memorandum directing

[11] "Pseudophakia" is the "condition in which an artificial lens has been implanted in the eye, e.g., after cataract surgery to remove a cloudy lens." TABER'S CYCLOPEDIC MEDICAL DICTIONARY (Donald Venes ed., 21st Edition, 2009).

that the request for a cataract extraction for Cobbs's left eye was not approved. [R. 103, Exhibit F, page 326].

On May 10, 2005, Cobbs saw Sean Connolly, O.D., another optometrist at the Ryan Correctional Facility, for an optometric evaluation. [R. 103, Exhibit F, page 368]. Dr. Connolly noted that Cobbs wanted cataract surgery on his left eye. [R. 103, Exhibit F, page 368]. Dr. Connolly then submitted a routine specialty consultation request for Cobbs to be evaluated for cataracts and possible surgery, noting that Cobbs's best corrected visual acuity was 20/30. [R. 103, Exhibit F, page 325].

On May 18, 2005, the ophthalmology consultation request was pended with a request for the optometry notes from May 10, 2005. [R. 103, Exhibit F, page 323]. On May 31, 2005, after Dr. Connolly's optometry notes were submitted to CMS' utilization review department, the ophthalmology consultation was non-authorized by Keith Ivens, M.D., a utilization-review physician for CMS, because the Medical Services Advisory Committee had already denied the surgery on October 26, 2004. [R. 103, Exhibit F, page 323].

Cobbs was next seen on December 14, 2005, by Dr. McGrath, who recommended that Cobbs receive cataract surgery on his left eye. [R. 103, Exhibit F, page 124]. Dr. McGrath submitted a routine ophthalmology consultation request, noting that Cobbs's best corrected vision in his left eye was only 20/600

and that he had trouble with depth perception; Dr. McGrath also noted that it was not possible to view the lens or retina in Cobbs's left eye and that Cobbs alleged he walked into an object on his left side. [R. 103, Exhibit F, page 322]. On December 27, 2005, the ophthalmology consultation was non-authorized by Dr. Ivens because Cobbs responded well to the surgery on his right eye, thereby providing excellent best corrected visual acuity, and the Medical Services Advisory Committee had already reviewed Cobbs's case and denied the left-eye cataract surgery. [R. 103, Exhibit F, page 321].

On January 11, 2006, Dr. McGrath noted that Cobbs should return to optometry in two months to rule out secondary glaucoma. [R. 103, Exhibit F, page 321]. Two months later, on March 1, 2006, Cobbs returned to see Dr. McGrath for a follow-up optometry examination. [R. 103, Exhibit F, page 367]. Cobbs's visual acuity in his right eye was 20/20, and his left eye was 20/CF.[12] [R. 103, Exhibit F, page 367]. Dr. McGrath then submitted another routine ophthalmology consultation request for Cobbs to have cataract surgery to remove his left-eye cataract. [R. 103, Exhibit F, page 320]. Dr. McGrath noted that Cobbs had a dense left-eye cataract with possible secondary glaucoma as a risk factor. [R. 103, Exhibit F, page 320].

[12] "CF" is an abbreviation for counting fingers.

On March 15, 2006, the ophthalmology request was again non-authorized by Dr. Ivens because Cobbs responded well to the right-eye surgery with a best corrected visual acuity of 20/20 and the Medical Services Advisory Committee had already reviewed the case and had already denied another ophthalmology consultation. [R. 103, Exhibit F, page 314]. On March 29, 2006, Dr. McGrath appealed the non-authorization, stating that surgery was advised to prevent secondary glaucoma and that it was not possible to visually examine the back of Cobbs's eye because his left retina was not visible. [R. 103, Exhibit F, page 314]. On April 3, 2006, the request was pended by Dr. Ivens and was sent back to the Medical Services Advisory Committee for review. [R. 103, Exhibit F, page 314].

On April 25, 2006, Dr. Pramstaller issued a memo directing that the previous non-approval of another ophthalmology consult was upheld. [R. 103, Exhibit F, page 313]. The memo also directed that Cobbs's intraocular pressure[13] should be monitored closely to rule out glaucoma and that a request should be resubmitted if the pressure increased.[14] [R. 103, Exhibit F, page 313].

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[13] Intraocular pressure is measured in mmHg (millimeters of mercury). The normal range for intraocular pressure is 10-21 mmHg. "Tonometry," National Institutes of Health, http://www.nlm.nih.gov/MEDLINEPLUS/ency/article/003447.htm. Measuring the intraocular pressure is one of two ways to evaluate a patient for glaucoma. [R. 103, Exhibit C, page 103].

[14] Cobbs's intraocular pressure never became abnormal in his left eye, and he never developed glaucoma.

On July 27, 2006, Cobbs was seen by Dr. Piper, who noted that Cobbs had markedly decreased vision in his left eye and that a review of the medical chart revealed a deterioration of vision in the left eye from 20/40 in 2004 to 20/400 in December, 2005. [R. 103, Exhibit F, page 122]. Dr. Piper then submitted a routine ophthalmology request, noting that Cobbs had a presumed diagnosis of decreased vision in his left eye with a cataract. [R. 103, Exhibit F, page 312]. On August 8, 2006, the authorization request was pended by Brenda Jones, RN, a utilization review nurse, with a request for more information as follows: "Dr. Piper – MSAC not authorized ophthalmology for Lt eye cataract on 4-25-06. Did you (the prison) receive that information? If not, I could resend it. Would you like to withdraw?" [R. 103, Exhibit F, page 307]. Dr. Piper responded that same day that according to the optometrist, Cobbs's vision in his left eye has deteriorated significantly secondary to cataract and that he did not see anything in the chart from the Medical Services Advisory Committee dated 4/25/06. [R. 103, Exhibit F, page 307]. On August 11, 2006, the authorization request was again pended by RN Jones, noting that the April 2006 decision form and the Medical Services Advisory Committee memorandum were faxed to Dr. Piper. [R. 103, Exhibit F, page 307]. Dr. Piper did not pursue the authorization request further, and it was automatically denied for lack of a response. [R. 103, Exhibit F, page 307].

On December 4, 2006, Dr. Piper performed a medical-chart review and noted that he would refer Cobbs to the optometrist to measure his eye pressure to determine any significant increase since the previous year, as recommended by Dr. Pramstaller on 4/25/06. [R. 103, Exhibit F, pages 114, 313]. On December 13, 2006, Cobbs had an optometry examination with Dr. McGrath. [R. 103, Exhibit F, page 365]. Cobbs's visual acuity in his right eye was 20/20. [R. 103, Exhibit F, page 365]. Dr. McGrath noted that he had no view of Cobbs's left eye, which had a visual acuity of CF. [R. 103, Exhibit F, page 365]. Cobbs's intraocular pressure in both his right and left eyes was 11 mmHg, which was well within the normal range. [R. 103, Exhibit F, page 364]. Dr. McGrath assessed Cobbs with a left-eye cataract and recommended that Cobbs be referred to the ophthalmologist. [R. 103, Exhibit F, page 365]. On that same day, Dr. McGrath submitted a routine ophthalmology consultation authorization request form, noting that Cobbs had a dense cataract on his left eye and that he could not view Cobbs's retina. [R. 103, Exhibit F, page 297]. Dr. McGrath also noted that Cobbs developed anemia and that the health of his left eye could not be evaluated.[15] [R. 103, Exhibit F, page 297].

[15] Dr. McGrath testified at his deposition that his concern for the health of the left eye concerned evaluation for glaucoma and retinopathy. Dr. McGrath stated that he was able to adequately monitor Cobbs's eye for glaucoma by monitoring his interocular eye pressure, which always remained within normal range. Cobbs was not a threat for diabetic retinopathy because he did not have diabetes. Non-

On February 14, 2007, it was noted that the ophthalmology request dated December 13, 2006, was received on February 6, 2007. [R. 103, Exhibit F, page 355]. The authorization request was pended by RN Jones as follows: "Is there an optometry exam from 12/13/06? Need visual acuity." [R. 103, Exhibit F, page 355]. On February 21, 2007, the December 12, 2006 authorization request was pended again by Dr. Hutchinson, who requested a translation of a word on the authorization request form. [R. 103, Exhibit F, page 355]. On February 28, 2007, Dr. McGrath responded by noting that the word was "anemia." [R. 103, Exhibit F, page 355]. On March 6, 2007, the ophthalmology request was non-authorized by Dr. Hutchinson because Cobbs's visual acuity in his right eye was 20/20. [R. 103, Exhibit F, page 354].

On May 30, 2007, Cobbs had another optometry examination with Dr. McGrath. [R. 103, Exhibit F, page 364]. Cobbs reported to Dr. McGrath that he experienced monocular double vision, in his right eye, for the past two months. [R. 103, Exhibit F, page 364]. Dr. McGrath then examined Cobbs's eyes and determined that he had a slight secondary cataract on his right eye and a dense cataract on his left eye. [R. 103, Exhibit F, page 364]. Cobbs's visual acuity in his right eye was 20/50, and his visual acuity in his left eye was CF. [R. 103, Exhibit

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diabetic retinopathy is rare, and even rarer in only one eye; therefore McGrath could adequately monitor Cobbs's corrected eye for retinopathy. Cobbs never developed either glaucoma or retinopathy. [R. 103, Exhibit D, pages 130-132].

F, page 364]. Cobbs's intraocular pressure in each eye was measured twice and revealed readings of 13 mmHg then 14 mmHg in each eye, within normal limits. [R. 103, Exhibit F, page 364]. Dr. McGrath then determined that Cobbs should be referred to ophthalmology, and he submitted an ophthalmology consultation request form, noting that Cobbs had decreased vision in his right eye and a dense cataract in his left eye. [R. 103, Exhibit F, pages 364, 240]. The request did not mention Cobbs's complaint of monocular double vision in his right eye.[16] [R. 103, Exhibit F, page 240].

On June 15, 2007, Dr. Ivens non-authorized the ophthalmology consult request on the grounds that no reason was given for an appeal of the previous decision to not authorize an ophthalmology request form based on the Medical Services Advisory Committee's decision. [R. 103, Exhibit F, page 293].

On July 15, 2007, Dr. McGrath responded that he could not view Cobbs's retina to evaluate the health of Cobbs's left eye due to a dense cataract. [R. 103, Exhibit F, page 293]. On July 19, 2007, the authorization request was pended by RN Jones for the reason that an ophthalmology consultation for Cobbs's left eye was already denied on two occasions and that Dr. McGrath's next step was to appeal it to the Michigan Department of Corrections' Regional Medical Officer and

[16] Dr. McGrath testified at his deposition that Cobbs's reported monocular double vision was not affected by the cataract in his left eye. [R. 103, Exhibit D, pages 130-132].

Medical Services Advisory Committee. [R. 103, Exhibit F, page 293]. Dr. McGrath did not appeal the consultation request to the Regional Medical Officer or the Medical Services Advisory Committee.

On September 31, 2007, Cobbs submitted a kite regarding his eye, and an appointment with a nurse was scheduled for October 5, 2007. [R. 103, Exhibit F, page 113]. On October 5, 2007, Cobbs saw Linda Butts, RN, as scheduled. [R. 103, Exhibit F, page 64]. Nurse Butts noted that Cobbs complained of frequent episodes of eye strain, which sometimes caused him to have headaches, as well as episodes of blurry vision. [R. 103, Exhibit F, page 64]. RN Butts then gave Cobbs an eye patch to wear over his left eye. [R. 103, Exhibit F, page 64].

On November 8, 2007, Cobbs submitted another kite regarding his left eye, and nursing noted that he had an appointment scheduled with a nurse on November 13, 2007. [R. 103, Exhibit F, page 113]. On November 13, 2007, Cobbs was again seen by RN Butts, as scheduled. [R. 103, Exhibit F, page 61]. Cobbs complained that he had headaches that he believed were caused by the strain that he experienced from trying to see out of his right eye only. [R. 103, Exhibit F, page 61]. Cobbs also stated that he reads a lot. [R. 103, Exhibit F, page 61]. RN Butts prescribed acetaminophen and instructed Cobbs to decrease his reading time, take frequent breaks, and blink while reading to reduce the strain. [R. 103, Exhibit F, page 61].

On February 6, 2008, Cobbs was again seen by Dr. McGrath for an optometry examination, and Dr. McGrath noted that Cobbs was wearing an eye patch on his left eye due to his cataract. [R. 103, Exhibit F, page 363]. Cobbs's visual acuity in his right eye was 20/30 after laser surgery, and his visual acuity in his left eye was CF. [R. 103, Exhibit F, page 363]. Cobbs's intraocular pressure in both eyes was 14 mmHg. [R. 103, Exhibit F, page 363]. Dr. McGrath submitted another routine ophthalmology consultation request form, noting that Cobbs now complained of binocular double vision. [R. 103, Exhibit F, page 180]. On February 12, 2008, the ophthalmology consultation request was approved by Dr. Ivens because Cobbs appeared to have binocular double vision, and an appointment was scheduled for Cobbs to see Dr. Dastgir on February 26, 2008. [R. 103, Exhibit F, page 180].

On February 26, 2008, Cobbs had an ophthalmology consultation with Dr. Dastgir as scheduled. [R. 103, Exhibit F, pages 35-36]. Cobbs's visual acuity in his right eye decreased to 20/50, and he experienced barely light perception in his left eye at one-quarter foot. [R. 103, Exhibit F, pages 35-36]. Dr. Dastgir assessed Cobbs with (1) hypermature chalk white cataract of the left eye with inability to see the fundus,[17] (2) pseudophakia of the right eye, and (3) diplopia[18] due to

[17] The "fundus" is the "posterior part of the eye including the retina and optic nerve." TABER'S CYCLOPEDIC MEDICAL DICTIONARY (Donald Venes ed., 21st Edition, 2009).

exotropia[19] of the left eye. [R. 103, Exhibit F, pages 35-36]. Dr. Dastgir recommended A and B scans of Cobbs's left eye and cataract extraction of the left eye with lens implant. [R. 103, Exhibit F, pages 35-36].

On March 10, 2008, Dr. Piper submitted a consultation request for the procedures recommended by Dr. Dastgir. [R. 103, Exhibit F, pages 31, 32]. On March 14, 2008, the consultation request and two post-operative, follow-up appointments, were approved at the request of the Medical Services Advisory Committee due to the decrease in Cobbs's best visual acuity to 20/50 and in consideration of his complaints of double vision.[20] [R. 103, Exhibit F, page 32].

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[18] "Diplopia" is a synonym for "double vision." TABER'S CYCLOPEDIC MEDICAL DICTIONARY (Donald Venes ed., 21st Edition, 2009).

[19] "Exotropia" refers to an "abnormal turning outward of one or both eyes." TABER'S CYCLOPEDIC MEDICAL DICTIONARY (Donald Venes ed., 21st Edition, 2009).

[20] It should be noted that Cobbs's second-eye cataract surgery was authorized at the same or at a less advanced stage than is required by other similar organizations, as well as organizations providing coverage for procedures for un-incarcerated persons. According to the Federal Bureau of Prisons' guidelines, for example, a prisoner may only receive second eye cataract surgery if they have a documented, best corrected visual acuity of 20/100 or worse, or under certain exceptional circumstances. [R. 103, Exhibit J]. Cobbs did not meet these requirements. According to the policy established by Aetna, a leading national insurance company, cataract surgery is considered medically necessary for members with a visual acuity of 20/50 or worse if the member perceives that his ability to carry out daily functions (i.e., driving, watching television, occupation/vocational needs, etc.) is impaired, the member has a visual acuity of 20/50 or worse in the affected eye, and the member is educated about the risks and benefits of cataract surgery as well as alternatives, or if the member has some other condition, such as a lens-induced disease (e.g., certain types of glaucoma) or there is a need to visualize the retina in patients with conditions such as diabetes. [R. 103, Exhibit K]. Finally,

On April 14, 2008, Cobbs underwent a cataract extraction and lens implant on his left eye. [R. 103, Exhibit F, page 190]. Follow-up visits were also completed, some to fix a leaking wound site. [R. 103, Exhibit F, pages 4, 14, 16, 108, 111, 176, 183, 187, 189, 190, 192, 196, 362]. After surgery and suture removal, Cobbs's visual acuity in both his right and left eyes was 20/25. [R. 103, Exhibit F, pages 183, 362].

In his deposition, Dr. Pramstaller explained that cases brought before the Medical Services Advisory Committee were reviewed on a case-by-case basis; each case is considered individually. [R. 103, Exhibit I, page 77]. In determining whether to authorize a second-eye cataract, it was determined whether it was medically necessary to authorize the surgery immediately or whether it could be deferred to a later date without any danger to the patient or any adverse effect on the ability to perform the surgery at a later date. [R. 103, Exhibit I, pages 52-53].

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according to the Local Coverage Determination guidelines established by the Centers for Medicare and Medicaid Services, which are applicable to Medicare/Medicaid eligible persons in Michigan, cataract removal surgery is medically necessary for patients who have decreased ability to carry out activities of daily living (e.g., reading, watching television, driving, or meeting occupational/vocational expectations), a visual acuity of 20/50 or worse, the patient has determined that he can no longer function adequately with the current visual function, other eye diseases have been ruled out as the primary cause of visual function, significant improvement in visual function can be expected as a result of the surgery, the patient has been educated about the risks and benefits of cataract surgery and alternatives, and the patient has undergone an appropriate preoperative ophthalmologic evaluation. [R. 103, Exhibit L]. In the present case, Cobbs received his second-eye surgery when the Medical Services Advisory Committee received information indicating that his condition met these criteria.

Dr. Pramstaller explained that the conditions that would put the patient at risk if the surgery was not authorized are (1) diabetic retinopathy, (2) posterior subcapsular glare, and (3) great discrepancy in vision. [R. 103, Exhibit I, pages 54-58]. Dr. Pramstaller explained that if a patient had one of the three conditions outlined above, cataract surgery would be authorized. [R. 103, Exhibit I, page 76]. Dr. Pramstaller also explained that if none of the above three conditions are a concern for a patient with a second-eye cataract, the risk of harm to the patient is minimal. [R. 103, Exhibit I, page 80]. Dr. Pramstaller developed these criteria in conjunction with ophthalmologists. [R. 103, Exhibit I, page 81].

SUMMARY OF ARGUMENT

Pramstaller was the head of the Medical Services Advisory Committee. When a prisoner's treating physician requests specialty care that requires travel outside the prison, approval is required. The final step in the appeal process for specialty care that has been non-approved is appeal to the Medical Services Advisory Committee. The requesting physician is responsible for providing the committee with the information needed to make a decision – in this case, handwritten notes on the appeal form plus the most recent page of the optometry note from the most recent visit were provided to the committee.

The Medical Services Advisory Committee non-authorized a second-eye cataract surgery for Cobbs in October 2004 and April 2006. The non-authorizations were based on established criteria and the members' medical judgment. A group of doctors met and considered the medical necessity of the requested care. The committee disagreed with the requesting physicians. Such does not equate to deliberate indifference, as careful committee consideration with open deliberation is the opposite of indifference.

There is no clearly established authority holding that failure to provide a second-eye cataract surgery violates a prisoner's rights – Cobbs's cataract was not a serious medical condition, and Pramstaller was never aware of any serious medical condition arising from the cataract. Pramstaller acted reasonably in considering

the case and ordering that Cobbs's condition be monitored to ensure that no risk-prone condition or situation developed. Pramstaller is therefore entitled to qualified immunity.

ARGUMENT

I. Pramstaller acted reasonably and did not any violation of clearly established law – he is entitled to qualified immunity.

A. Standard of Review

This Court reviews a district court's denial of qualified immunity *de novo*.[21] The appeal of a denial of qualified immunity at summary judgment is an interlocutory appeal that this Court hears as a final decision of the district court under 28 U.S.C. § 1291 pursuant to the "collateral order" doctrine.[22]

B. Analysis

Officials or employees of the Michigan Department of Corrections who are sued in their individual capacities "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[23]

This Circuit applies a three-part test to determine whether a government official is entitled to the defense of qualified immunity: (1) whether a constitutional violation has occurred; (2) whether the right that was violated was a clearly established right of which a reasonable person would have known; and (3) whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively

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[21] *Gregory v. City of Louisville*, 444 F.3d 725, 742 (6th Cir. 2005).
[22] *Mitchell*, 472 U.S. at 525-27.
[23] *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999); *Noble v. Schmitt*, 87 F.3d 157, 160 (6th Cir. 1996).

unreasonable in light of the clearly established constitutional rights.[24] If a violation could be made out on a favorable view of the parties' submissions, the next, sequential step "is to ask whether the right was clearly established," and "this inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition."[25] "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation that he confronted."[26]

While the defendants bear the initial burden of presenting facts that, if true, would entitle them to immunity, the ultimate burden of proof falls on the plaintiff to show that the defendants violated a right so clearly established that any official in the defendants' positions would have clearly understood that he was under an affirmative duty to refrain from such conduct.[27] "Once the qualified immunity defense is raised, the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity."[28] The plaintiff also has the burden of showing that a right is clearly established.[29]

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[24] *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001); *Higgason v. Stephens*, 288 F.3d 868, 876-77 (6th Cir. 2002); *Williams v. Mehra*, 186 F.3d 685, 690 (6th Cir. 1999).
[25] *Saucier*, 533 U.S. at 201.
[26] *Saucier*, 533 U.S. at 201.
[27] *Noble*, 87 F.3d at 161.
[28] *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006).
[29] *Barrett v. Steubenville City Schs.*, 388 F.3d 967, 970 (6th Cir. 2004).

The Supreme Court recently altered the qualified-immunity analysis.[30] In *Pearson v. Callahan*, the Court held that courts do not have to adhere to the rigid two-step analysis set forth in *Saucier v. Katz*. Instead, courts have the discretion to decide whether, under the facts of the case before them, there is a violation of a constitutional right, or first go to the second prong and decide whether the defendant's actions violated clearly established law.[31]

This Court, in *Lavado v. Keohane,* set forth the test for finding a clearly established constitutional right:

> [T]o find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.[32]

Furthermore, the right cannot be stated in too general of terms. In other words, it is not enough that the right to be free from cruel and unusual punishment was clearly established. The "right the official is alleged to have violated must have been

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[30] *Pearson v. Callahan,* 555 U.S. ___; 129 S. Ct. 808; 172 L. Ed. 2d 565 (2009).
[31] *Pearson,* 129 S. Ct. at 818.
[32] *Lavado v. Keohane*, 992 F.2d 601, 606-07 (6th Cir. 1993).

'clearly established' in a more particularized, and hence more relevant, sense."[33]

The Sixth Circuit has long followed the rule set forth in *Saucier v. Katz*:

> When determining the objective legal reasonableness portion of the qualified immunity standard, individual claims of immunity must be analyzed on a fact-specific, case-by-case basis to determine whether the plaintiff's constitutional rights were so clearly established when the alleged misconduct was committed that any official in the defendants' position would understand that what he did violated those rights. [34]

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[35] Here, the governing law in question is the Eighth Amendment.

Prison officials are forbidden from "unnecessarily and wantonly inflicting" pain on an inmate by acting in "deliberate indifference" toward the inmate's serious medical needs.[36] "Neither negligent medical care nor delay in medical care constitutes a violation of the Eighth Amendment unless there has been deliberate indifference, which results in substantial harm."[37] Mere disagreement with medical staff's prescriptions does not state a claim for violation of constitutional

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[33] *Saucier*, 533 U.S. at 202.
[34] *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 999 (6th Cir. 1994).
[35] *Dorsey v. Barber*, 517 F.3d 389, 394 (6th Cir. 2008) (quoting *Humphrey v. Mabry*, 482 F.3d 840, 847 (6th Cir. 2007)).
[36] *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).
[37] *Acord v. Brown*, 1994 U.S. App. LEXIS 34320 at *5 (6th Cir. 1994) (unpublished).

rights.[38] A prison official cannot be found liable under the Eighth Amendment unless the official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference."[39]

To reach the level of a constitutional violation, a deprivation "must result in the denial of 'the minimal civilized measure of life's necessities.'"[40] The Eighth Amendment is only concerned with "deprivations of essential food, medical care, or sanitation" or "other conditions intolerable for prison confinement."[41] "[N]ot every unpleasant experience a prisoner might endure while incarcerated constitutes cruel and unusual punishment within the meaning of the Eighth Amendment."[42] "Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law."[43]

"[A]n inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to

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[38] *See Estelle*, 429 U.S. at 104-06, 107.
[39] *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).
[40] *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *see also Wilson v. Yaklich*, 148 F.3d 596, 600-01 (6th Cir. 1998).
[41] *Rhodes*, 452 U.S. at 348.
[42] *Ivey v. Wilson*, 832 F.2d 950, 954 (6th Cir. 1987).
[43] *Westlake v. Lucas*, 537 F.2d 857, 860, n. 5 (6th Cir. 1976).

establish the detrimental effect of the delay in medical treatment to succeed."[44] "[T]he 'verifying medical evidence' requirement is relevant to those claims involving minor maladies or non-obvious complaints of a serious need for medical care."[45]

Deliberate indifference "entails something more than mere negligence" or gross negligence.[46] It is well established that mere medical malpractice or negligence is insufficient to state a constitutional violation under the Eighth Amendment.[47]

"To satisfy the subjective component, the plaintiff must allege facts which, if true, would show that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk."[48] The subjective component of an Eight Amendment claim requires a plaintiff to show that the prison officials had "a sufficiently culpable state of mind."[49] "[T]he standard for that state of mind is the 'deliberate indifference' standard of *Estelle v. Gamble*, 429 U.S. 97, 50 L. Ed. 2d

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[44] *Blackmore v. Kalamazoo County*, 390 F.3d 890, 898 (6th Cir. 2004) (quoting *Napier v. Madison County*, 238 F.3d 739, 742 (6th Cir. 2001)).
[45] *Blackmore*, 390 F.3d at 898.
[46] *Farmer*, 511 U.S. at 835; *Walker v. Norris*, 917 F.2d 1449, 1454 (6th Cir. 1990); *McGhee v. Foltz*, 852 F.2d 876, 880-81 (6th Cir. 1988).
[47] *Daniels v. Williams*, 474 U.S. 327; 106 S. Ct. 662; 88 L. Ed. 2d 662 (1986); *Estelle*, 429 U.S. at 105.
[48] *Comstock v. McCrary*, 273 F.3d 693, 707 (6th Cir. 2001) (citing Farmer, 511 U.S. at 837).
[49] *Brown v. Bargery*, 207 F.3d 863, 863, 867 (6th Cir. 2000).

251, 97 S. Ct. 285 (1976)."[50] To satisfy the subjective prong, a plaintiff must show that the defendant's conduct demonstrated a level of deliberateness "'tantamount to an intent to punish.'"[51]

The Sixth Circuit does not appear to have ever addressed the issue of whether a cataract constitutes a sufficiently serious medical need to invoke Eighth Amendment protections. However, federal district courts have routinely denied Eighth Amendment claims premised on denials of cataract surgery.[52] Though those cases are not perfectly analogous to ours, they are indicative of the non-serious nature of cataract complaints. In the District Court, the Magistrate Judge's reasoning, adopted by the court, relied on non-controlling cases that were not analogous to our case, some of which could not be controlling authority from 2004 to 2008 because they were decided after that timeframe. [*See* R. 115, pages 14-17; R. 116, pages 1-6]. The lower court could find no clearly established authority

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[50] *Helling v. McKinney,* 509 U.S. 25, 30 (1993).
[51] *Hicks v. Frey*, 992 F.2d 1450, 1455 (6th Cir. 1993) (quoting *Molton v. City of Cleveland*, 839 F.2d 240, 243 (6th Cir.1988)).
[52] *Espinosa v. Saladin*, 2009 U.S. Dist. LEXIS 87199 (W.D. Mich. 2009) (denying claim where specialist recommended cataract surgery but CMS's utilization-review physician denied surgery); *Hurt v. Mahon*, 2009 U.S. Dist. LEXIS 79295 at *7-8 (E.D. Va. 2009) (inmate failed to state a claim because there was no evidence that second-eye cataract was medically necessary); *Edwards v. Bradford*, 1997 U.S. Dist. LEXIS 15089 at *4, 6-7 (S.D. Ala. 1997) (no claim where prisoner alleged "more difficulty with the tasks of daily living, that he has had several 'incidents' while in prison, and that he may be forced to withdraw from trade school"; the prison had a policy of not removing a single eye cataract because it will not cause permanent damage) (attached as Exhibits A, B, C).

holding Pramstaller's actions to be unconstitutional. And other cataract cases support Pramstaller's motion for qualified immunity.

In *Samonte v. Bauman*, the court held that a doctor's "refusal to authorize cataract surgery after another doctor determined that such surgery was an option was a 'difference of medical opinion,' insufficient by itself to raise a triable issue of deliberate indifference."[53] Likewise, in *Stevenson v. Pramstaller*, the plaintiff alleged "that he has suffered from psychological symptoms, including fear, anger, anxiety, and emotional suffering, as well as an increased risk of injury due to the resulting lack of peripheral vision and depth perception" due to "the [d]efendants' failure to treat a hyper cataract in his left eye."[54] There, Eastern District of Michigan Judge Denise Page Hood found that neither the subjective nor objective components of a deliberate-indifference claim were met because the "panel of physicians that form the MSAC reached a consensus, based on documentation accompanying the request for cataract surgery, that the surgery was not immediately necessary."[55]

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[53] *Samonte v. Bauman*, 264 Fed. Appx. 634, 636 (9th Cir. 2008) (unpublished) (R. 103, Exhibit T).
[54] *Stevenson v. Pramstaller, et al.*, no. 07-cv-14040, 2009 U.S. Dist. LEXIS 25495 at *2 (E.D. Mich. 2009) (attached as Exhibit D).
[55] *Stevenson*, 2009 U.S. Dist. LEXIS 25495 at *15-16.

In *Williams v. Shelton*, a prison medical committee delayed removing a prisoner's second-eye cataract for more than a year.[56] The court dismissed an Eighth Amendment claim premised on the delay because there was no indication "that the delay caused any harm, much less substantial harm."[57] "Cataracts, a natural result of aging, cause blurred vision but are not painful. Early removal of a cataract does not create a better medical outcome and late removal does not create a worse medical outcome. The decision for surgical removal is usually based on the cataract's effect on the activities of daily living."[58]

In *Leyser v. D'Amico,* another Ninth Circuit Court of Appeals case, the court affirmed the dismissal of a cataract case.[59] The reasoning was two-fold: (1) the prisoner failed to show that the utilization-review panel's denial of surgery led to further injury to his eye and (2) a difference of medical opinion between a utilization panel and the treating physician does not amount to deliberate indifference.[60]

In *Rylee v. Bureau of Prisons*, the "Federal Bureau of Prison's Ophthalmology Guidelines require[d] both of an inmate's eyes to have a best-

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[56] *Williams v. Shelton*, 2008 U.S. Dist. LEXIS 54394 at *7-8 (E.D. Or. 2008) (attached as Exhibit E).
[57] *Williams*, 2008 U.S. Dist. LEXIS 54394 at *8.
[58] *Williams*, 2008 U.S. Dist. LEXIS 54394 at *7.
[59] *Leyser v. D'Amico*, 182 Fed. Appx. 697 (9th Cir. 2006) (unpublished) (R. 103, Exhibit P).
[60] *Leyser*, 182 Fed. Appx. at 697-98.

corrected visual acuity of less than 20/60 for at least six months, and [because] only the vision of [the] Plaintiff's right eye [met] this criterion," cataract surgery was denied.[61] The prisoner's vision was 20/30 in his left eye; his right eye went from 20/80 to 20/400 to 20/CF.[62] The prisoner also complained of "burning and excessive lacrimation in his left eye."[63] The treating physician recommended surgery, but the prison clinical director denied the request because the plaintiff had 20/30 vision in one eye.[64] Prison medical staff said they would continue to monitor the prisoner's condition.[65] The court granted summary judgment to the defendants because an Eighth Amendment violation could not be made out under these facts.[66]

In *Dupuis v. Caskey*, the prisoner complained of a delay in cataract surgery from September 2007 until February 2009.[67] The treating optometrist diagnosed the prisoner with "a Grade III left cataract," extensive astigmatism, anisometropia due to swelling from the cataract development, and aniseikonia.[68] The treating

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[61] *Rylee v. Bureau of Prisons*, 2009 U.S. Dist. LEXIS 24609 at *2 (D.S.C. 2009) (attached as Exhibit F).
[62] *Rylee*, 2009 U.S. Dist. LEXIS 24609 at *4-5.
[63] *Rylee*, 2009 U.S. Dist. LEXIS 24609 at *4.
[64] *Rylee*, 2009 U.S. Dist. LEXIS 24609 at *3, 4-5.
[65] *Rylee*, 2009 U.S. Dist. LEXIS 24609 at *11-12.
[66] *Rylee*, 2009 U.S. Dist. LEXIS 24609 at *14.
[67] *Dupuis v. Caskey*, 2009 U.S. Dist. LEXIS 89002 at *4 (S.D. Miss. 2009) (attached as Exhibit G).
[68] *Dupuis*, 2009 U.S. Dist. LEXIS 89002 at *7. The court described the last two conditions listed as "a condition in which the two eyes have unequal refractive

physician recommended surgery, but the prison medical director disagreed.[69] The court granted summary judgment to the defendants because a difference in medical opinion between the physician and medical director does not amount to deliberate indifference.[70] In addition, although the inmate preferred earlier surgery and was disturbed by his worsening sight, such did not show that he suffered any substantial harm.[71]

In our case, Cobbs was monitored closely through medical appointments for the entire relevant period of time. Although his physicians requested cataract removal on his left eye, the case was considered by a group of physicians at the Michigan Department of Corrections (the Medical Services Advisory Committee), and they determined that there was no or minimal risk involved in putting off surgery until Cobbs met appropriate criteria. Very literally, a group of doctors sat around a table and discussed Cobbs's case – this is the very definition of what is not deliberate indifference. The committee merely disagreed with the referring

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power and may cause a difference in images coming from the two eyes" and "a binocular condition such that the image in one eye is perceived as different in size compared to the image in the other eye." These are conditions that would presumably qualify as "great discrepancy in vision" in the instant case.

[69] *Dupuis*, 2009 U.S. Dist. LEXIS 89002 at *7-8.

[70] *Dupuis*, 2009 U.S. Dist. LEXIS 89002 at *12.

[71] *Dupuis*, 2009 U.S. Dist. LEXIS 89002 at *13-15 (citing *Cash v. Sadeghi*, 2009 U.S. Dist. LEXIS 26306, 2009 WL 839132 (N.D. Cal. Mar. 30, 2009) (blurriness and double vision not found to be serious medical need resulting in further significant injury or unnecessary and wanton infliction of pain if untreated)) (other citations omitted).

physician's recommendation. If such a committee was required to defer to outside physicians requesting services, then the very existence of the committee would be rendered meaningless.

Dr. Pramstaller, as the Chief Medical Officer, chaired the Medical Services Advisory Committee. Per policy, it was Pramstaller's vote and decision that ultimately counted. In this case, there is no evidence that any doctor on the committee disagreed with the decisions made or had any contrary opinion. Aside from chairing the committee, Pramstaller had no involvement in the care of Cobbs, and he never had personal contact with Cobbs.

On June 22, 2004, the Medical Services Advisory Committee approved Cobbs's right-eye surgery. On October 26, 2004, the committee non-approved the left-eye surgery. At this time, the right-eye surgery had been successful, and Cobbs's right-eye vision had improved to 20/70 *without correction*. There was no indication at this time that Cobbs met any criteria for providing second-eye cataract surgery. He had good vision in one eye, permitting him to function normally in his daily activities. Pramstaller and the Medical Services Advisory Committee were not presented with any evidence to the contrary.

Pramstaller's next and final involvement came at the April 25, 2006, meeting of the Medical Services Advisory Committee. On March 1, 2006, a doctor examined Cobbs and made a request for left-eye cataract surgery. The requesting

document noted that Cobbs had 20/20 vision in his right eye. Neither the requesting document nor the corresponding optometry note gave any indication that Cobbs met any criteria that would qualify him for a second-eye surgery. The requesting document did, however, note "possible 2d glaucoma a risk factor." Based on the information provided to the committee, the surgery was not approved. The requesting physician never gave any indication of why glaucoma was a risk factor – the plaintiff never developed glaucoma. But knowing that glaucoma can be monitored by monitoring interocular pressure, Pramstaller instructed that the physicians "monitor closely for increase in interocular pressure and resubmit if pressure increases." Pramstaller was not indifferent to Cobbs's care – he ordered that Cobbs be monitored to make sure that no condition would arise that would actually present a risk to Cobbs.

Under the circumstances of this case, no clearly established law holds Pramstaller's actions to be unconstitutional. There is no Sixth Circuit precedent directly on point, but the numerous other cases cited above all indicate that Pramstaller's actions were reasonable – it is common medical practice to set criteria for second-eye cataract surgery. And the criteria followed in this case were such that Cobbs would be protected if there was any indication of risk to him. And the three criteria relied upon were not an exhaustive list – Pramstaller testified that

each patient is considered on a case-by-case basis, based on the information presented to the committee.

When Cobbs eventually presented with a great discrepancy in vision, i.e. double vision, and the Medical Services Advisory Committee was informed of that condition, the second-eye surgery was approved. It was not the job of the Medical Services Advisory Committee to search for such a condition or to conduct an independent evaluation of Cobbs. Rather, it was the duty of the referring physicians to present the pertinent information to the committee. The information was presented on each occasion in the form of the surgery/referral requests and the accompanying medical note from the most recent visit.

As to Pramstaller, the facts of this case do not even tend to show negligence, let alone deliberate indifference. Pramstaller approved Cobbs's right-eye surgery, and Cobbs had excellent overall vision after that surgery. Pramstaller relied on his own medical judgment and the medical judgment of the other Medical Services Advisory Committee members when they did not approve the October 2004 and April 2006 requests. The plaintiff cannot show that Pramstaller was deliberately indifferent to any serious medical condition. In fact, clearly established law protects prison doctors when they rely on their medical judgment to dictate a prisoner's course of care. Pramstaller acted reasonably and did not violate Cobbs's constitutional rights. Because there is no clearly established law holding

Pramstaller's actions to be unconstitutional, Pramstaller is entitled to qualified immunity.

CONCLUSION

Defendant-Appellant Pramstaller respectfully requests that this Court overrule the District Court's Order denying Pramstaller's motion for summary judgment based on qualified immunity.

Respectfully submitted,

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ADDENDUM – DESIGNATION OF RECORD ON APPEAL

Defendant-Appellant, per Sixth Circuit Rule 28(c), 30(b), hereby designates the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.
Complaint	10/30/2007	R. 1
Amended Complaint	06/10/2008	R. 38
Motion for Summary Judgment by Hutchinson, Mathai, and CMS	12/01/2009	R. 103
Motion for Summary Judgment by Clark, Naylor, Neighbors, Pandya, and Pramstaller	12/01/2009	R.104
Plaintiff's Response to motions for summary judgment (R. 103, R. 104)	12/23/2009	R. 106
Report and Recommendation on motions for summary judgment (R. 103, R. 104)	03/25/2010	R. 115
Objections to R&R (R. 115) by Clark, Naylor, Pandya, and Pramstaller	04/08/2010	R. 116
Objections to R&R (R. 115) by Cobbs	04/08/2010	R. 117
Objections to R&R (R. 115) by CMS, Hutchinson, and Mathai	04/12/2010	R. 119
Response to Objections (R. 116) by Cobbs	04/21/2010	R. 123
Response to R&R (R. 115) by Cobbs	04/21/2010	R. 124
Supplemental Brief regarding R. 124	04/22/2010	R. 125
Response to Cobbs's Objections (R. 117)	04/26/2010	R. 126
Reply to Response (R. 126) by Cobbs	04/30/2010	R. 127
Reply to R. 119 by CMS, Hutchinson, and Mathai	05/03/2010	R. 128
Notice to Appear	06/10/2010	R. 130
Supplemental Brief regarding R. 126 by Cobbs	06/17/2010	R. 131

Reply to Supplemental Brief by CMS, Hutchinson, and Mathai	06/28/2010	R. 132
Minute Entry regarding hearing	07/12/2010	
Order Adopting in Part R&R (R. 115)	07/22/2010	R. 133
Transcript of 07/12/2010 Hearing	07/29/2010	R. 134
Notice of Appeal by Pramstaller	08/20/2010	R. 138
Certificate of Service regarding Notice of Appeal	08/20/2010	R. 139

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more that 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 7,325 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2003 in 14 point Times New Roman.

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PROOF OF SERVICE

I certify that on October 4, 2010, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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No. 10-2089

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dallas Cobbs (State Prisoner no. 164276),

Plaintiff-Appellee,

v.

George Pramstaller,

Defendant-Appellant,

and

Craig Hutchinson, Marcella Clark, Gregory Naylor, Bency Mathai, Haresh Pandya, and Correctional Medical Services, Inc.,

Defendants.

Appeal from the United States District Court
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INDEX OF EXHIBITS

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EXHIBIT A

Pedro Espinosa v. J. Saladin and L. Hudson

LEXSEE 2009 U.S. DIST. LEXIS 87199

PEDRO ESPINOSA, Plaintiff, v. J. SALADIN and L. HUDSON, Defendants.

Case No. 1:08-CV-736

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2009 U.S. Dist. LEXIS 87199

September 23, 2009, Decided
September 23, 2009, Filed

PRIOR HISTORY: *Espinosa v. Saladin, 2009 U.S. Dist. LEXIS 87408 (W.D. Mich., July 1, 2009)*

COUNSEL: [*1] Pedro Espinosa # 139973, plaintiff, Pro se, Ionia, MI.

For J. Saladin, Nurse Supervisor, in his individual and official capacities, L. Hudson, HUM, in his individual and official capacities, defendants: Julia R. Bell, MI Dept Attorney General (Corrections), Corrections Division, Lansing, MI.

JUDGES: HON. GORDON J. QUIST, UNITED STATES DISTRICT JUDGE.

OPINION BY: GORDON J. QUIST

OPINION

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court has before it Plaintiff's Objection to the report and recommendation dated July 1, 2009, in which Magistrate Judge Brenneman recommended that Defendants' Motion for Summary Judgment be granted and Plaintiff's action be dismissed. The magistrate judge concluded that Defendants' motion should be granted because Defendants were merely involved in responding to Plaintiff's grievance and did not personally deny Plaintiff the eye surgery Plaintiff contends he needs.

After conducting a *de novo* review of the report and recommendation, the Court concludes that the report and recommendation should be adopted by the Court.

In support of the motion for summary judgment, Defendant Julie Saladin submitted an affidavit in which she stated that she was only involved in interviewing Plaintiff and responding [*2] to Plaintiff's grievance. She further stated that she was not involved in, and had no authority to act on, the decision of whether Plaintiff would receive the requested surgery. Defendant Leonzo Hudson submitted an affidavit in which she stated that she merely reviewed Defendant Saladin's response as a reviewer and that she was not involved in the decision to deny Plaintiff's request for eye surgery.

Plaintiff offers no evidence to the contrary in his Objection. Rather, he asserts that someone must have made the decision to deny his request for eye surgery, and he should be allowed to amend his complaint to add John and Jane Does as defendants and file a motion for discovery to determine who was responsible for denying Plaintiff's request for corrective eye surgery.

Plaintiff has offered no basis for denying Defendants' Motion for Summary Judgment in light of Defendants'

uncontradicted affidavits stating that they were not responsible for the decision to deny his request for corrective eye surgery. Although Plaintiff might be able to discover the identity of the person or persons who were responsible for denying his request if he is permitted to amend his complaint to add John and Jane [*3] Doe Defendants, any such amendment would be futile because, in the Court's judgment, Plaintiff does not allege an *Eighth Amendment* claim.

The *Eighth Amendment* prohibits the infliction of cruel and unusual punishment against those convicted of crimes. *U.S. Const. amend. VIII*. The *Eighth Amendment* obligates prison authorities to provide medical care to incarcerated individuals, as a failure to provide such care would be inconsistent with contemporary standards of decency. *Estelle v. Gamble, 429 U.S. 97, 102, 103-04, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*. The *Eighth Amendment* is violated when a prison official is deliberately indifferent to the serious medical needs of a prisoner. *Id. at 104-05*; *Comstock v. McCrary, 273 F.3d 693, 702 (6th Cir. 2001)*.

A claim for the deprivation of adequate medical care has an objective and a subjective component. *Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)*. To satisfy the objective component, the plaintiff must allege that the medical need at issue is sufficiently serious. *Id.* In other words, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. *Id.* The objective component of the adequate medical care test is satisfied "[w]here the seriousness [*4] of a prisoner's need[ ] for medical care is obvious even to a lay person." *Blackmore v. Kalamazoo County, 390 F.3d 890, 899 (6th Cir. 2004)*. If, however the need involves "minor maladies or non-obvious complaints of a serious need for medical care," *Blackmore, 390 F.3d at 898*, the inmate must "place verifying medical evidence in the record to establish the detrimental effect of the delay in medical treatment." *Napier v. Madison County, Ky., 238 F.3d 739, 742 (6th Cir. 2001)*.

The subjective component requires an inmate to show that prison officials have "a sufficiently culpable state of mind in denying medical care." *Brown v. Bargery, 207 F.3d 863, 867 (6th Cir. 2000)* (citing *Farmer, 511 U.S. at 834*). Deliberate indifference "entails something more than mere negligence," *Farmer, 511 U.S. at 835*, but can be "satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id.* Under *Farmer*, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id. at 837*.

Not every claim by a prisoner that he has received inadequate [*5] medical treatment states a violation of the *Eighth Amendment*. *Estelle, 429 U.S. at 105*. As the Supreme Court explained:

> [A]n inadvertent failure to provide adequate medical care cannot be said to constitute an unnecessary and wanton infliction of pain or to be repugnant to the conscience of mankind. Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the *Eighth Amendment*. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.

Estelle, 429 U.S. at 105-06 (quotations omitted). Thus, differences in judgment between an inmate and prison medical personnel regarding the appropriate medical diagnoses or treatment are not enough to state a deliberate indifference claim. *Sanderfer, 62 F.3d at 154-55*; *Ward v. Smith, No. 95-6666, 1996 U.S. App. LEXIS 28322, 1996 WL 627724, at *1 (6th Cir. Oct. 29, 1996)*. This is so even if the misdiagnosis results in an inadequate course of treatment and considerable suffering. [*6] *Gabehart v. Chapleau, No. 96-5050, 1997 U.S. App. LEXIS 6617, 1997 WL 160322, at *2 (6th Cir. Apr. 4, 1997)*.

The Sixth Circuit distinguishes "between cases where the complaint alleges a complete denial of medical care and those cases where the claim is that a prisoner received inadequate medical treatment." *Westlake v. Lucas, 537 F.2d 857, 860 n. 5 (6th Cir. 1976)*. Where, as here, "a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical

judgments and to constitutionalize claims which sound in state tort law." *Id.; see also Perez v. Oakland County, 466 F.3d 416, 434 (6th Cir. 2006)*; *Kellerman v. Simpson, 258 F. App'x 720, 727 (6th Cir. 2007)*; *McFarland v. Austin, 196 F. App'x 410 (6th Cir. 2006)*; *Edmonds v. Horton, 113 F. App'x 62, 65 (6th Cir. 2004)*; *Brock v. Crall, 8 F. App'x 439, 440 (6th Cir. 2001)*; *Berryman v. Rieger, 150 F.3d 561, 566 (6th Cir. 1998)*.

In this case, Plaintiff alleges that prison medical officials referred him to a specialist, who recommended cataract surgery. Plaintiff submitted a request for the recommended surgery, but medical personnel responded that the cataract removal was not [*7] authorized because Plaintiff "maintained acceptable L eye vision per Dr. Ivens." Plaintiff filed a grievance, which was denied because prison medical staff reviewed the specialists' recommendations and test results and concluded that surgery was not "necessary at this time." These allegations disclose that Plaintiff's claim concerns a disagreement over the necessity and/or adequacy of treatment as opposed to a complete denial of medical treatment. In other words, the claim involves differences in medical judgment regarding the proper treatment. Thus, while Plaintiff may have a state law claim for malpractice, his allegations do not suffice to establish deliberate indifference under the *Eighth Amendment*. Therefore,

IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation issued July 1, 2009 (docket no. 19) is **APPROVED AND ADOPTED** as the Opinion of this Court.

IT IS FURTHER ORDERED that Defendants' *Rule 56(b)* Motion for Summary Judgment (docket no. 13) is **GRANTED,** and Plaintiff's complaint is **dismissed.**

This case is **concluded.**

Dated: September 23, 2009

/s/ Gordon J. Quist

GORDON J. QUIST

UNITED STATES DISTRICT JUDGE

No. 10-2089

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dallas Cobbs (State Prisoner no. 164276),

Plaintiff-Appellee,

v.

George Pramstaller,

Defendant-Appellant,

and

Craig Hutchinson, Marcella Clark, Gregory Naylor, Bency Mathai, Haresh Pandya, and Correctional Medical Services, Inc.,

Defendants.

Appeal from the United States District Court
Eastern District of Michigan at Detroit
Honorable Anna Diggs Taylor

EXHIBIT B

Donald O. Hurt v. D.T. Mahon, et. al.

LEXSEE 2009 U.S. DIST. LEXIS 79295

Donald O. Hurt, Plaintiff, v. D.T. Mahon, et al., Defendants.

1:09cv958 (LO/JFA)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

2009 U.S. Dist. LEXIS 79295

August 31, 2009, Decided
August 31, 2009, Filed

COUNSEL: [*1] Donald O. Hurt, Plaintiff, Pro se, Haynesville, VA.

JUDGES: Liam O'Grady, United States District Judge.

OPINION BY: Liam O'Grady

OPINION

MEMORANDUM OPINION AND ORDER

Donald O. Hurt, a Virginia inmate proceeding pro se, has filed a civil rights action, pursuant to *42 U.S.C. § 1983*, apparently alleging that he is suffering deliberate indifference to his serious medical needs. Plaintiff has neither paid the filing fee required by *28 U.S.C. § 1914(a)* nor applied to proceed in forma pauperis in this action. After reviewing plaintiff's complaint, the claim against the defendants must be dismissed pursuant to *28 U.S.C. § 1915A(b)(1)* for failure to state a claim. [1]

1 *Section 1915A* provides:

> (a) **Screening**.--The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
>
> (b) **Grounds for dismissal**.--On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
>
> (1) is frivolous, malicious, or fails to state a claim upon which relief can be granted; or
>
> (2) seeks monetary relief [*2] from a defendant who is immune from such relief.

I.

Plaintiff, an inmate confined at Haynesville Correctional Center, alleges that he was diagnosed in

early 2008 by the institutional doctor with having cataracts in both eyes. A doctor at the MCV Hospital Eye Clinic confirmed the diagnosis in July, 2008, and told plaintiff that he needed surgery to have both cataracts removed. However, institutional physician Dr. Johnson told plaintiff that his eyesight was not bad enough for surgery, and that plaintiff had less than two years left on his sentence. Beginning in September, 2008, plaintiff started the grievance procedure, seeking surgery to remove the cataracts from both of his eyes. In October, 2008, surgery was approved, and plaintiff underwent surgery to remove the cataract from his left eye at the MCV Hospital Eye Clinic in January, 2009. However, in March, 2009, surgery for the cataract in plaintiff's right eye was denied, and plaintiff began a second grievance procedure seeking a second surgery. Plaintiff has attached exhibits to his complaint which show that he pursued his grievance to Level II Health Services Director of the Virginia Department of Corrections ("VDOC"), the last [*3] level of appeal for plaintiff's complaint, which determined that his claim was unfounded.

While plaintiff does not use the term, it can fairly be inferred that he intends to claim that the denial of a second cataract surgery amounts to deliberate indifference to his serious medical needs, in violation of his rights under the *Eighth Amendment*. [2] Plaintiff seeks injunctive relief in the form of an order directing that the surgery be performed.

2 It is well established that courts are obliged to construe pro se pleadings liberally. *Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).*

II.

In reviewing a complaint pursuant to *§ 1915* A, a court must dismiss a prisoner complaint that is frivolous, malicious, or fails to state a claim upon which relief can be granted. *28 U.S.C. § 1915A(b)(1).* Whether a complaint states a claim upon which relief can be granted is determined by "the familiar standard for a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*." *Sumner v. Tucker, 9 F. Supp. 2d 641, 642 (E.D. Va. 1998).* Thus, the alleged facts are presumed true, and the complaint should be dismissed only when "it is clear that no relief could be granted under any set of facts that could be proved consistent with [*4] the allegations." *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984).*

To survive a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. , , 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to meet this standard, id., and a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level...". *Twombly, 550 U.S. at 555.* Moreover, a court "is not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal, 129 S. Ct. at 1949-1950.*

Courts may also consider exhibits attached to the complaint. *United States ex rel. Constructors, Inc. v. Gulf Ins. Co., 313 F. Supp. 2d 593, 596 (E.D. Va. 2004)* (citing 5 A Charles A. Wright & Arthur R. Miller, Federal [*5] Practice and Procedure § 1357, at 299 (2d ed. 1990), cited with approval in *Anheuser-Busch v. Schmoke, 63 F.3d 1305, 1312 (4th Cir.1995)).* Where a conflict exists between "the bare allegations of the complaint and any attached exhibit, the exhibit prevails." *Gulf Ins. Co., 313 F. Supp. 2d. at 596* (citing *Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1465 (4th Cir.1991)).*

III.

To state a cognizable *Eighth Amendment* claim for denial of medical care, plaintiff must allege facts sufficient to show that jail officials were deliberately indifferent to a serious medical need. *Estelle v. Gamble, 429 U.S. 97, 105, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); Staples v. Va. Dep't of Corr., 904 F.Supp. 487, 492 (E.D.Va. 1995).* To establish that inadequate medical treatment rises to the level of a constitutional violation, a plaintiff "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id. at 105*; see also *Staples v. Va. Dep't of Corr., 904 F. Supp. 487, 492 (E.D. Va. 1995).* Thus, plaintiff must allege two distinct elements to state a claim upon which relief can be granted. First, he must allege a sufficiently serious medical need. See, e.g., *Cooper v. Dyke, 814 F.2d 941, 945 (4th Cir. 1987)* [*6] (determining that intense pain from an untreated bullet

wound is sufficiently serious); *Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978)* (concluding that the "excruciating pain" of an untreated broken arm is sufficiently serious). Second, he must allege deliberate indifference to that serious medical need.

Under this second prong, an assertion of mere negligence or even malpractice is not enough to state an *Eighth Amendment* violation; instead, plaintiff must allege deliberate indifference "by either actual intent or reckless disregard." *Estelle, 429 U.S. at 106*; *Daniels v. Williams, 474 U.S. 327, 328, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)*; *Miltier v. Beorn, 896 F.2d 848, 851 (4th Cir. 1990)*. However, the prisoner must demonstrate that defendants' actions were "[s]o grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." Id. (citations omitted). A prisoner's disagreement with medical personnel over the course of his treatment does not make out a cause of action. *Wright v. Collins, 766 F.2d 841, 849 (4th Cir. 1985)*; *Russell v. Sheffer, 528 F.2d 318, 319 (4th Cir. 1975)* (per curiam); *Harris v. Murray, 761 F. Supp. 409, 414 (E.D. Va. 1990)*.

At this juncture, it [*7] is apparent that plaintiff's claim of inadequate medical care fails to meet the requirements for an actionable *Eighth Amendment* violation. As to the first prong of the standard applicable to such a claim, it is doubtful that a cataract is a sufficiently serious medical need to support an *Eighth Amendment* violation. [3] Cf. *Cooper, 814 F.2d at 945*. However, even assuming *aguendo* that plaintiff's cataracts could be considered sufficiently serious to satisfy the first element of an *Eighth Amendment* claim, his allegations regarding the prison medical staff's efforts to treat that condition belie his assertion that defendants were deliberately indifferent to his medical needs. According to plaintiff's own account, he was provided with surgery to remove the cataract from his left eye, so clearly there was no deliberate indifference to plaintiff's overall vision problems, either through actual intent or reckless disregard. Cf. *Miltier, 896 F.2d at 851*. As to the cataract remaining on plaintiff's right eye, which is the focus of the instant complaint, plaintiff's grievances seeking removal of that cataract were deemed unfounded by VDOC's Health Services Director on May 13, 2009, because "[t]here [*8] is no medical indication for surgery at this time." See Inmate Grievance Response Form, Level II. Thus, plaintiff's insistence that the second cataract surgery is immediately necessary amounts to a disagreement with prison medical personnel over the course of his treatment, which as a matter of law is insufficient to state a claim for *§ 1983* relief. *Wright, 766 F.2d at 849*; *Russell, 528 F.2d at 319*.

3 In his "regular grievance" dated April 4, 2009, plaintiff states that the cataract in his right eye causes his vision to be cloudy and "empowered," that he sees "shimmers and light dancing in the sunlight," and that at night "lights look like starbursts." Nowhere in any of his submissions to the Court does plaintiff claim to suffer pain as the result of his condition.

Throughout the administrative grievance process reflected in the attachments to the complaint, plaintiff makes repeated mention of the fact that he is due to be released from incarceration in April, 2010, and will be on a limited income thereafter, so he needs to get the surgery performed on his right eye before his release. However, as noted, the surgery plaintiff requests has been determined not to be medically indicated [*9] at present, and there is no authority which suggests that prison authorities are obliged to provide plaintiff with such care prophylactically, as a hedge against the possibility that he might require such a procedure after his release and be unable to afford to pay for it. See generally, *Couch v. Wexler, 2007 U.S. Dist. LEXIS 68446, 2007 WL 2728987 (N.D. Ga. Sept. 13, 2007) at *7, n.4* (state has no duty to provide a former inmate with surgery following his release when state imposed no restriction on former prisoner's ability to procure treatment on his own behalf).

IV.

For the foregoing reasons, plaintiff's complaint states no claim for violation of his rights under the *Eighth Amendment*, and must be dismissed for failure to state a claim. *28 U.S.C. § 1915A(b)(1)*.

Accordingly, it is hereby

ORDERED that plaintiff's complaint be and is DISMISSED, WITH PREJUDICE for failure to state a claim pursuant to *28 U.S.C. § 1915A(b)(1)*; and it is further

ORDERED that plaintiff is advised that, pursuant to *28 U.S.C. § 1915(g)*, [4] this dismissal may affect his ability to proceed in forma pauperis in future civil actions; and it is further

ORDERED that the Clerk record this dismissal for purposes of the Prison Litigation Reform Act.

4 *28 U.S.C. § 1915(g)* [*10] provides:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

To appeal, plaintiff must file a written notice of appeal with the Clerk's Office within thirty (30) days of the date of this Order. *Fed R. App. P. 4(a)*. A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order plaintiff wants to appeal. Plaintiff need not explain the grounds for appeal until so directed by the court.

The Clerk is directed to send of copy of this Memorandum Opinion and Order to plaintiff and to close this civil case.

Entered this 31st day of August 2009.

Alexandria, Virginia

/s/ Liam O'Grady

Liam O'Grady

United States District Judge

No. 10-2089

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dallas Cobbs (State Prisoner no. 164276),

Plaintiff-Appellee,

v.

George Pramstaller,

Defendant-Appellant,

and

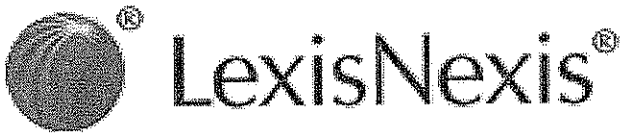
Craig Hutchinson, Marcella Clark, Gregory Naylor, Bency Mathai, Haresh Pandya, and Correctional Medical Services, Inc.,

Defendants.

Appeal from the United States District Court
Eastern District of Michigan at Detroit
Honorable Anna Diggs Taylor

EXHIBIT C

James R. Edwards v. Michael Bradford, et. al.



LEXSEE 1997 U.S. DIST. LEXIS 15089

JAMES R. EDWARDS, Plaintiff, v. MICHAEL BRADFORD, et al., Defendants.

CIVIL ACTION 94-0523-BH-M

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

1997 U.S. Dist. LEXIS 15089

July 16, 1997, Decided
July 16, 1997, Filed

SUBSEQUENT HISTORY: [*1] Adopting Order of September 17, 1997, Reported at: *1997 U.S. Dist. LEXIS 15177.*

DISPOSITION: Recommended that this Defendants' Motion for Summary Judgment be granted (Docs. 10-12, 14), action be dismissed, and judgment be entered in favor of Defendants Dr. Michael Bradford, C. E. Jones, Tommy Herring, and Tom Allen and against Plaintiff James R. Edwards on all claims.

COUNSEL: JAMES R. EDWARDS, plaintiff, Pro se, Atmore, AL.

For MICHAEL BRADFORD, defendant: E. Martin Bloom, Felice Ann Stern Goldstein, Birmingham, AL.

For C. E. JONES, TOMMY HERRING, TOM ALLEN, defendants: Alice Ann Byrne, Esq., Alabama Department of Corrections, Montgomery, AL.

JUDGES: BERT W. MILLING, JR., UNITED STATES MAGISTRATE JUDGE.

OPINION BY: BERT W. MILLING, JR.

OPINION

REPORT AND RECOMMENDATION

This is an action under *42 U.S.C. § 1983* by an Alabama prison inmate which has been referred for report and recommendation pursuant to *28 U.S.C. § 636(b)(1)(B)* and SD ALA LR 72.2(c)(4). Plaintiff claims that Defendants denied him necessary medical attention. Plaintiff has named the following Defendants: Dr. Michael Bradford, C. E. Jones, Tommy Herring, and Tom Allen. Plaintiff seeks the following relief: a Court declaration ordering Defendants to provide the medical services Plaintiff seeks, injunctive relief, [*2] and compensatory and punitive damages (Doc. 1).

Defendants filed special reports (Docs. 10-12, 14) which are being treated as a Motion for Summary Judgment, taken under submission, after notice, on April 15, 1997 (Doc. 23); Plaintiff filed one additional responsive pleading (Doc. 24). It is recommended that Defendants' Motion be granted, that this action be dismissed, and that judgment be entered in favor of Defendants Dr. Michael Bradford, C. E. Jones, Tommy Herring, and Tom Allen and against Plaintiff James R. Edwards on all claims.

The Federal Rules of Civil Procedure grant this Court authority, under *Rule 56*, to render "judgment as a matter of law" to a party who moves for summary judgment. "Summary 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.'" *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), quoting Fed.R.Civ.P. 56(c).* "The moving party is entitled to 'judgment as a matter of law'" if the non-moving party cannot sufficiently show "an essential element of the case to which the [*3] non-moving party has the burden of proof." *Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987), quoting Fed.R.Civ.P. 56(c).*

The Court must view the evidence produced by "the non-moving party, and all factual inferences arising from it, in the light most favorable to" that party. *Barfield v. Brierton, 883 F.2d 923, 934 (11th Cir. 1989).* However, *Fed.R.Civ.P. 56(e)* requires that

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but **the adverse party's response**, by affidavits or as otherwise provided in this rule, **must set forth specific facts showing that there is a genuine issue for trial**. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Id. (emphasis added).

Plaintiff, James R. Edwards, has stated the following as the basis for this action. On July 1, 1993, Edwards went to see the prison doctor, Defendant Michael Bradford, who told him that he had a contract which caused blurred vision in his right eye (Docs. 1, 4-5). Although Bradford [*4] told him that surgery was the only effective treatment for the cataract, the doctor did not recommend surgery, but prescribed glasses to aid his impaired vision. Plaintiff claims that the doctor's initial and continuing refusal to operate has directly led to failed vision in his right eye and to diminishing vision in his left eye. Edwards states that he has more difficulty with the tasks of daily living, that he has had several "incidents" [1] while in prison, and that he may be forced to withdraw from trade school, all because of his visual condition. Plaintiff claims that he is now blind in his right eye and that all Bradford has done is issue him glasses, now seven different pair. Edwards further claims that even though he filed a grievance against Defendant Bradford with the prison system and has written letters of complaint to Defendants Jones, Herring, and Allen, no action has been taken.

> 1 Plaintiff has not stated, either generally or in detail, the nature of those incidents. Furthermore, Edwards has not informed the Court how those incidents were related to his visual impairment.

[*5] Defendant Michael Bradford states, by way of affidavit, that he is an optometrist who worked for "Questcare, Inc. (Questcare) from November 20, 1991 through November 19, 1994;" Questcare was the former health care provider for the Alabama Department of Corrections (Doc. 14, Bradford Certificate). [2] More recently, Bradford worked "for Correctional Medical Systems, Inc. (CMS), the current health care provider for the Department of Corrections." Bradford reviewed Edward's medical records and found them to indicate "that he has an opaque cataract in his right eye" which is, essentially, "a clouding of the lens inside the eye." Plaintiff had "excellent distant vision with his left eye" as of May 26, 1994. The records indicate that Edwards has experienced "a normal decrease in his near reading vision," a condition which "is age-related and is in no way affected by the presence of a cataract on his right eye." Defendant Bradford stated that he had prescribed safety glasses for Plaintiff to wear to protect his good eye but that the records indicated that he did not consistently wear them. Dr. Bradford stated that he is an optometrist and not an ophthalmologist as Plaintiff has alleged and [*6] that he is not qualified to perform cataract surgery (Doc. 11, Bradford Certificate). The doctor also denies having "been deliberately indifferent to Plaintiff's medical needs."

> 2 Though the document styles itself a "certificate," the Court will treat it as an affidavit. In keeping with this decision, the Court will treat all "certificates" of record as affidavits.

Dr. George Lyrene, who is not a party in this action, has worked in various capacities as a physician for Questcare and CMS, both of which provided health care to the inmates incarcerated with the Alabama Department of Corrections; he is currently Medical Director for CMS (Doc. 14, Lyrene Certificate). Lyrene stated that the policies for Questcare and CMS were "that cataract surgery would be elective IF the cataract was on one eye only AND IF the vision was unimpaired in the other eye"

though this policy was not in writing (emphasis in original). Dr. Lyrene stated that the removal of a "single-eye" cataract is elective surgery because "cataracts do [*7] not cause a patient's health to deteriorate as a cataract will cloud the patient's vision until it is surgically removed, but it will not cause permanent damage to the eye." Under the terms of the contract that existed between Questcare and the Department of Corrections, the health care provider did not have to provide elective health care, defined as "medical care which, if not provided, will not cause the Inmate's health to deteriorate or cause definite harm to the Inmate's well being" (*see* Doc. 14, Health Services Agreement (attached to Lyrene Certificate), PP 1.3, 2.4). [3]

> 3 The Court also notes, although it is not binding on this Court, the opinion issued by the Alabama Attorney General which stated that "the requirement of adequate medical care does not include an 'elective type of medical care'" (Doc. 14, Exhibit attached to Lyrene Certificate).

Defendant Charlie E. Jones is the Warden at Holman Prison (Doc. 12, Jones Affidavit). Jones states, by way of affidavit, that it is his responsibility to [*8] see that inmates at his prison "are afforded the opportunity to be examined and treated by medical personnel" and that Plaintiff's medical records indicate that he has had access to medical treatment. Jones further indicates that he was not a physician and would not second guess the opinion, diagnosis, and treatment of Defendant Bradford.

Defendant T. L. Allen, the Associate Commissioner of Programs and Treatment Division of the Alabama Department of Corrections, states that he has no medical training and was not in a position to make decisions regarding the medical treatment of prison inmates (Doc. 12, Allen Affidavit).

Defendant Tommy Herring, Commissioner for the Alabama Department of Corrections, states that he did "not make decisions regarding medical treatment for inmates, and [did] not attempt to intercede, overrule, or influence any decisions made by medical personnel regarding medical treatment for inmates" (Doc. 12, Herring Affidavit).

The U.S. Supreme Court, in *Estelle v. Gamble, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976)*, has addressed the necessary showing for a prisoner to make in bringing a medical claim, stating as follows:

> Deliberate indifference [*9] to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' (*quoting Gregg v. Georgia, 428 U.S. 153, 182-83, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859 (1976)* (joint opinion)), proscribed by the *Eighth Amendment*. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

Gamble, 429 U.S. at 104-05. The Eleventh Circuit Court of Appeals, in *Mandel v. Doe, 888 F.2d 783, 788 (11th Cir. 1989)*, has fashioned the following analysis for reviewing claims of this nature: (1) Was there "evidence of a serious medical need?" and (2) if the answer is yes, were the Defendants deliberately indifferent to that need?

Plaintiff has failed, first, to demonstrate that he has a serious medical need and, second, that the Defendants were deliberately indifferently to the needs that he did have. Rather, the evidence demonstrates that Edwards has a cataract on his right eye, that he has been examined regularly by medical personnel for the cataract, and that [*10] the cataract has not, does not, and will not cause any damage or harm to that eye, the other eye, or to any other aspect of Plaintiff's health. At most, Plaintiff has demonstrated that he disagrees with the course of treatment provided by Defendant Bradford; such dispute, however, does not amount to a showing of deliberate indifference. *Hamm v. DeKalb County, 774 F.2d 1567, 1575 (11th Cir. 1985), cert. denied, 475 U.S. 1096, 89 L. Ed. 2d 894, 106 S. Ct. 1492 (1986)*. This claim is of no merit.

"There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)* (citations omitted). Summary judgment may be granted against a party who fails to establish the existence of an element essential to that party's case and

on which that party will bear the burden of proof at trial. *Id.*

Plaintiff has brought this action under *§ 1983*. His claim that the Defendants were deliberately indifferent to his medical [*11] needs is without evidentiary support. As such, Plaintiff has not met his burden of proof. There is no issue left which needs to be addressed at trial. Therefore, it is recommended that Defendants' Motion for Summary Judgment be granted (Docs. 10-12, 14), that this action be dismissed, and that judgment be entered in favor of Defendants Dr. Michael Bradford, C. E. Jones, Tommy Herring, and Tom Allen and against Plaintiff James R. Edwards on all claims.

MAGISTRATE JUDGE'S EXPLANATION OF PROCEDURAL RIGHTS AND RESPONSIBILITIES FOLLOWING RECOMMENDATION AND FINDINGS CONCERNING NEED FOR TRANSCRIPT

1. **Objection**. Any party who objects to this recommendation or anything in it must, within ten days of the date of service of this document, file specific written objections with the clerk of court. Failure to do so will bar a de novo determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the magistrate judge. See *28 U.S.C. § 636(b)(1)(C)*; *Lewis v. Smith, 855 F.2d 736, 738 (11th Cir. 1988)*; *Nettles v. Wainwright, 677 F.2d 404* (5th Cir. Unit B, 1982)(en banc). The procedure for challenging [*12] the findings and recommendations of the magistrate judge is set out in more detail in SD ALA LR 72.4 (June 1, 1997), which provides that:

> A party may object to a recommendation entered by a magistrate judge in a dispositive matter, that is, a matter excepted by *28 U.S.C. § 636(b)(1)(A)*, by filing a "Statement of Objection to Magistrate Judge's Recommendation" within ten days after being served with a copy of the recommendation, unless a different time is established by order. The statement of objection shall specify those portions of the recommendation to which objection is made and the basis for the objection. The objecting party shall submit to the district judge, at the time of filing the objection, a brief setting forth the party's arguments that the magistrate judge's recommendation should be reviewed de novo and a different disposition made. It is insufficient to submit only a copy of the original brief submitted to the magistrate judge, although a copy of the original brief may be submitted or referred to and incorporated into the brief in support of the objection. Failure to submit a brief in support of the objection may be deemed an abandonment of the objection.

[*13] A magistrate judge's recommendation cannot be appealed to a Court of Appeals; only the district judge's order or judgment can be appealed.

2. **Transcript (applicable where proceedings tape recorded)**. Pursuant to *28 U.S.C. § 1915* and *Fed.R.Civ.P. 72(b)*, the magistrate judge finds that the tapes and original records in this action are adequate for purposes of review. Any party planning to object to this recommendation, but unable to pay the fee for a transcript, is advised that a judicial determination that transcription is necessary is required before the United States will pay the cost of the transcript.

DONE this 16th day of July, 1997.

BERT W. MILLING, JR.

UNITED STATES MAGISTRATE JUDGE

No. 10-2089

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dallas Cobbs (State Prisoner no. 164276),

Plaintiff-Appellee,

v.

George Pramstaller,

Defendant-Appellant,

and

Craig Hutchinson, Marcella Clark, Gregory Naylor, Bency Mathai, Haresh Pandya, and Correctional Medical Services, Inc.,

Defendants.

Appeal from the United States District Court
Eastern District of Michigan at Detroit
Honorable Anna Diggs Taylor

EXHIBIT D

Burvin Stevenson v. George Pramstaller, et. al.

LEXSEE 2009 U.S. DIST. LEXIS 25495

BURVIN STEVENSON, Plaintiff, v. GEORGE PRAMSTALLER, CRAIG HUTCHINSON, ROCCO DEMASI, WILLIAM BORGERDING, MARK VENTOCILLA TERRY MALLOY, GOVERNOR OF MICHIGAN, PATRICIA CARUSO, MDOC BUREAU OF HEALTH SERVICES, UNKNOWN BOARD MEMBERS OF MSAC and CORRECTIONAL MEDICAL SERVICES, INC., Defendants.

Case No. 07-cv-14040

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2009 U.S. Dist. LEXIS 25495

March 24, 2009, Decided
March 24, 2009, Filed

PRIOR HISTORY: *Stevenson v. Pramstaller, 2008 U.S. Dist. LEXIS 106448 (E.D. Mich., Oct. 2, 2008)*

COUNSEL: [*1] Burvin Stevenson, Plaintiff, Pro se, Muskegon, MI.

For George Pramstaller, Chief Medical Officer, Governor of Michigan, Governor, Patricia Caruso, MDOC Director, John Does, Unknown Board Members of MSAC, Defendants: Julia R. Bell, Michigan Department of Attorney General, Lansing, MI.

For Craig Hutchinson, Senior Regional Medical Director, Rocco DeMasi, Doctor, Correctional Medical Services, Incorporated, Defendants: Kimberley A. Koester, Chapman Assoc., Bloomfield Hills, MI.

JUDGES: Hon. Denise Page Hood, United States District Judge.

OPINION BY: Denise Page Hood

OPINION

ORDER ACCEPTING AND ADOPTING THE MAGISTRATE JUDGE'S REPORTS AND RECOMMENDATIONS AND DISMISSING ALL CLAIMS

I. INTRODUCTION

This matter is before the Court on Magistrate Judge Mona K. Majzoub's Reports and Recommendations ("R&R") **[Docket Nos. 51 and 60]**. The first R&R, filed on October 2, 2008 **[Docket No. 51]**, recommends granting Defendants Correctional Medical Services, Inc. ("CMS"), Dr. Craig Hutchinson, and Dr. Rocco DeMasi's Motion to Dismiss **[Docket No. 32, filed July 17, 2008]**. The first R&R also recommends granting Defendants George Pramstaller, Jennifer Granholm, Patricia Caruso, and Medical Services Advisory Committee's ("MSAC") Motion for Summary [*2] Judgment **[Docket No. 33, filed July 18, 2008]**. On October 17, 2008, Plaintiff filed an Objection **[Docket No. 54]** to the first R&R.

The second R&R, filed on December 18, 2008 **[Docket No. 60]**, recommends that the remaining Defendants: William Borgerding, Mark Ventocilla, Terry Malloy, and MDOC Bureau of Health Care Services be

dismissed without prejudice for failure to effect proper service. To date, neither party has filed an objection to the second R&R and time to do so has expired.

II. STATEMENT OF FACTS

Plaintiff filed this *pro se* action on August 25, 2007. At the time of the events described in the Complaint, Plaintiff was incarcerated at the Michigan Department of Correction's ("MDOC") Parnell Correctional Facility in Jackson, Michigan. [1] In sum, Plaintiff alleges that the Defendants' failure to treat a hyper cataract in his left eye amounted to deliberate indifference of a serious medical need in violation of the *Eighth Amendment*. As a result, Plaintiff claims that he has suffered from psychological symptoms, including fear, anger, anxiety, and emotional suffering, as well as, an increased risk of injury due to the resulting lack of peripheral vision, and depth perception. The Plaintiff [*3] also claims that he was discriminated against in violation of Title II of the American with Disabilities Act ("ADA"), *42 U.S.C. § 12131 et seq.*, and the Rehabilitation Act of 1973, *29 U.S.C. § 794*.

1 Plaintiff has completed his prison sentence, and is no longer housed at this facility.

Liberally construing the Complaint, and the documents attached, it appears that Plaintiff first requested the aid of an eye specialist on April 2, 2003, as he was losing vision in his left eye. (Complaint, "Factual Basis for Claim" section). Plaintiff claims that he was initially diagnosed on April 24, 2003, as having a "Hyper Cataract" in his left eye, which if left untreated could cause him to go blind. (*Id.*). Plaintiff traces his cataract condition to the Hytrin that was prescribed for the treatment of his prostate. (*Id.*). As a result, Plaintiff instituted a number of health kites, grievances, and correspondence, all related to receiving the aid of a specialist for the removal of his cataract. (*Id.*). According to Plaintiff, the eleven named Defendants either knowingly refused to provide medical treatment, or knowingly refused to investigate Plaintiff's requests for treatment. (*Id.* at "Defendants Unconstitutional [*4] Action" section) In particular, Plaintiff takes issue with the Medical Services Advisory Committee's ("MSAC") decision to deny his referral for ophthalmic evaluation and surgery. (*Id.* at "Factual Basis for Claim" section). Plaintiff seeks damages and declaratory and injunctive relief. (*Id.*)

III. STANDARDS OF REVIEW

A. Report and Recommendation

The standard for review to be employed by the Court when examining a Report and Recommendation is set forth in *28 U.S.C. § 636*. This Court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *28 U.S.C. § 636(b)(1)*. This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*

B. *Rule 12(b)(6)* Dismissal & *Rule 56(b)* Summary Judgment

Dismissal is appropriate under the *Federal Rules of Civil Procedure 12(b)(6)* where a plaintiff fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. Dismissal is appropriate where a plaintiff cannot establish any set of facts that would entitle him to the relief sought. *Conley v. Gibson, 355 U.S. 41, 45- 46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. [*5] When ruling on a *Rule 12(b)(6)* motion, a court must construe the complaint liberally in plaintiff's favor and accept as true all factual allegations and permissible inferences therein. *Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976)*.

Summary Judgment is appropriate where the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The moving party has the burden of showing an absence of evidence to support the non-moving party's case. *Convington v. Knox County Sch. Sys., 205 F.3d 912, 915 (6th Cir. 2000)*. Once the moving party has met is burden of production, the non-moving party must come forward with significant probative evidence showing that a genuine issue exist for trial. *Id.* A mere scintilla of evidence is insufficient to defeat a supported for motion for summary judgment; rather, "there must be evidence on which the jury could reasonably find for the [non-moving party.]" *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

C. *Pro Se* Standards of Review

When reviewing [*6] *pro se* complaints, the court must employ standards less stringent than if the complaint had been drafted by counsel. *Haines v. Kerner,*

404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). However, the court "need not accept as true legal conclusions or unwarranted factual inferences." *Montgomery v. Huntington Bank, 346 F.3d 693, 698 (6th Cir. 2003)* (quoting *Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987))*. In other words, "the lenient treatment generally accorded to *pro se* litigants has limits," and *pro se* litigants are "not automatically entitled to take every case to trial." *Pilgrim v. Littlefield, 92 F.3d 413, 416 (6th Cir. 1996)*.

IV. LAW & ANALYSIS

A. October 2, 2008 Report & Recommendation

The October 2, 2008 R&R recommends granting all of the Defendants' pending dispositive motions. As it relates to Defendants Granholm, Caruso, Pramstaller, and unknown board members of MSAC ("State Defendants"), the Magistrate Judge found that Plaintiff failed to create a genuine issue of material fact that his rights under the ADA or the Rehabilitation Act have been violated. In so finding, the Magistrate Judge reasoned that the Plaintiff has not alleged that he is being [*7] excluded from a prison program, service, or activity, or of discrimination because of his disability, which is actionable under the ADA or Rehabilitation Act; but rather his claim is based on incompetent treatment for a medical condition. The Magistrate Judge also concluded that Plaintiff is incapable of demonstrating a genuine issue of material fact with regard to his deliberate indifference claim under the *Eighth Amendment*. In particular, Plaintiff failed to demonstrate a sufficiently culpable state of mind in the Defendants as their decision was based on the MSAC medical determination that the subject cataract surgery was not medically necessary. In reference to Defendants CMS, Dr. Hutchinson, and Dr. DeMasi ("CMS Defendants"), the Magistrate Judge also recommended granting the Motion to Dismiss because the Plaintiff is equally unable to demonstrate a claim of deliberate indifference against these Defendants. The Magistrate Judge also urges this Court to dismiss the CMS Defendants because Plaintiff failed to allege any specific facts to support his claim that CMS is liable based an unconstitutional policy or custom.

It appears, based on a liberal construction of the Objection, that [*8] Plaintiff opposes three portions of the October 2, 2008 R&R. First, much of Plaintiff's Objection is dedicated to arguing that the loss of vision in his left eye qualifies as a disability under the ADA. Secondly, Plaintiff contends that the Magistrate Judge erroneously relied on the affidavit of George Pramstaller, as it "provides no documentation to refute plaintiffs complaint of blindness nor why the recommended diagnosis wasn't followed [through]." (Plaintiff's Objection to Oct. 2, 2008 R&R, p. 3). More specifically, Plaintiff challenges the following factual averments in the affidavit: (1) the cataract was the result of an injury Plaintiff received in 1989; (2) that his vision was stable for nearly a year; and (3) that his cataract removal surgery was not medically necessary because the patient could attend to his activities of daily living. Finally, Plaintiff maintains that MSAC's decision to deny Plaintiff's cataract removal surgery demonstrates a sufficiently culpable state of mind in order to establish a deliberate indifference claim under the *Eighth Amendment*.

1. ADA & Rehabilitation Act Claims

This Court accepts and adopts the October 2, 2008 R&R as it relates to Plaintiff's [*9] ADA and Rehabilitation Act claims. Plaintiff's objection is without merit as Plaintiff has failed to allege the elements necessary to state a viable claim under the ADA or the Rehabilitation Act. The Americans with Disabilities Act was enacted in order to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *42 U.S.C. § 12101(b)(1)*. As Plaintiff correctly notes, "A person is disabled under the ADA if he or she has 'a physical or mental impairment that substantially limits one or more of the major life activities of such individual; [has] a record of impairment; or [is] regarded as having such an impairment." *Tucker v. Tennessee, 539 F.3d 526, 531-32 (6th Cir. 2008)* (citing *42 U.S.C. § 12102(2)(A)-(C)*). Plaintiff's claim falls under Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *42 U.S.C. § 12132*. The Supreme Court has conclusively settled that the protections of [*10] Title II of the ADA and the Rehabilitation Act [2] extend to inmates in state prisons. *See Pennyslvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998)*. In order to make a prima facie showing of discrimination in violation of the ADA, a plaintiff must prove that he or she: (1) has a disability; (2) is otherwise qualified; and (3)

is being excluded from participation in, being denied benefits of, or being subjected to discrimination under, the program solely because of the plaintiff's disability. *Dillery v. City of Sandusky, 398 F.3d 562, 567 (6th Cir. 2005)* (citing *Jones v. City of Monroe, 341 F.3d 474, 477 (6th Cir. 2003)*.

> 2 "Because the standards under both of the acts are largely the same, cases construing one statute are instructive in construing the other." *Andrews v. State of Ohio, 104 F.3d 803, 807 (6th Cir. 1997)*.

In the case at bar, Plaintiff's Complaint does not allege any facts that would give rise to a claim under the ADA or Rehabilitation Act. Rather, both his Objection and Complaint only argue the initial element, namely that he was disabled. However, even accepting that Plaintiff is disabled for the purposes of the ADA, Plaintiff still [*11] fails to demonstrate, and the Court is unable to ascertain, how the instant facts support the second two elements necessary to make a prima facie showing of an ADA violation. It appears that Plaintiff conflates his deliberate indifference claim with the ADA and Rehabilitation Act claims, as all of his arguments center on the Defendants' determination that a cataract surgery was not medically necessary. *See Baldridge-El v. Gundy, 238 F.3d 419, at *2 [published in full-text format at 2000 U.S. App. LEXIS 29195] (6th Cir. Nov. 8, 2000)* (table)("Baldridge-El's claims against Wexford defendants fail because neither the RA nor the ADA provide a cause of action for medical malpractice.").

2. Challenged Affidavit

Plaintiff's second objection is equally without merit. Plaintiff takes issue with the Magistrate Judge's reliance on the affidavit of Defendant George Pramstaller. This Court finds that none of the challenged factual averments creates a triable question of material fact. *Anderson, 477 U.S. at 248* ("Factual disputes that are irrelevant or unnecessary will not be counted"). When reviewing the record the Court is cognizant of the fact that certain verified complaints can carry "the [*12] same weight as would an affidavit for the purposes of summary judgment." *See El Bey v. Roop, 530 F.3d 407, 414 (6th Cir. 2008)*; *Lavado v. Keohane, 992 F.2d 601, 605 (6th Cir. 1993)* (explaining that where a party files a verified complaint, the allegations contained therein "have the same force and effect as an affidavit for purposes of responding to a motion for summary judgment"); *Williams v. Browman, 981 F.2d 901, 905 (6th Cir. 1992)* (concluding that a prisoner's signed complaint with a statement declaring the truth of the allegations under penalty of perjury was sufficient to place controverted facts into issue)). As a preliminary matter, the first of the three challenged assertions is not material to the instant claims. Plaintiff's challenge regarding the cause of the subject cataract will not impact the ultimate resolution of his deliberate indifference claim. The remaining two challenges -- whether the surgery was medically necessary, and whether the medical documentation supports the fact that his eyesight was stable for over a year -- go directly to the heart of Plaintiff's deliberate indifference claim. It is to the merits of this claim that the Court now turns.

3. Deliberate [*13] Indifference Claim

With regard to the Plaintiff's deliberate indifference claim, the Magistrate Judge found that the Plaintiff failed to present any evidence refuting the Defendants' reason for denying the Plaintiff's surgery -- that there was no documentation that delaying Plaintiff's surgery would adversely affect Plaintiff's daily activities or his ability to have the procedure done at a later time. In his final challenge, Plaintiff appears to argue that he has demonstrated a genuine issue of material fact with regard to his deliberate indifference claim. More specifically, Plaintiff's objection goes directly to the subjective prong of the deliberate indifference analysis:

> The fact that Defendants motivation to avoid the cost associated with fixing an ailment that limits a major life activity/function, when its your contractual duty to provide the primary care required to fix the problem, denotes a state of mind thats "subjectively reckless." Surely Defendants herein have and continue to recklessly disregard the risk of Plaintiff permanently losing eyesight.

(Pl.'s Objection to Oct. 2, 2008 R&R) (sic throughout). However, viewing the evidence in a light most favorable to the Plaintiff, [*14] this Court concludes that Plaintiff has failed to make a sufficient showing that Defendants were deliberately indifferent to his medical needs.

Under the *Eighth Amendment*, an inmate may bring a §1983 claim regarding his conditions of confinement

only when he can show that there has been "deliberate indifference" to his "medical needs." *Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*; *see also Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811* ("The Amendment [] imposes duties on these officials [to] ensure that inmates receive adequate food, clothing shelter, and medical care...") (quoting *Hudson v. Palmer, 468 U.S. 517, 526-27, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)).* The Supreme Court has established a two-part test, with both a subjective and objective prong, to determine whether a prisoner's right to adequate medical care has been violated. *Farmer, 511 U.S. at 834*. First, the deprivation alleged must be "sufficiently serious' [in that] a[n] ... official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities,'" *Id.* The second subjective prong requires plaintiff to show that police or jail physicians had a "sufficiently culpable [*15] state of mind." *Wilson v. Seiter, 501 U.S. 294, 297, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991)*. Specifically, to satisfy the subjective prong, "the plaintiff must allege facts which, if true, would show that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk." *Comstock v. McCrary, 273 F.3d 693, 703 (6th Cir. 2001).*

The gravamen of Plaintiff's instant objection is that Defendants' refusal to approve his cataract surgery was motivated by cost savings, and as such demonstrates a "sufficiently culpable state of mind." This Court disagrees. As correctly noted by the Magistrate Judge, the Plaintiff has failed to rebut the evidence, provided by Defendants from Plaintiff's medical files, that indicates Defendants' decision was motivated by a medical finding that his eye condition was stable for almost a year. The record before the Court does not indicate that MSAC's denial of the request for cataract surgery constituted deliberate indifference. This subjective component requires the plaintiff to show that the defendant's conduct demonstrated a level of deliberateness [*16] "tantamount to an intent to punish." *See Hicks v. Frey, 992 F.2d 1450, 1455 (6th Cir. 1993)*. Such was not the case here, as the panel of physicians that form the MSAC reached a consensus, based on documentation accompanying the request for cataract surgery, that the surgery was not immediately necessary. Accordingly, this Court agrees with the Magistrate Judge that Plaintiff has failed to satisfy either prong of the deliberate indifference test. *See Samonte v. Bauman, 264 Fed. Appx. 634, 635-36 (9th Cir. 2008)* ("Samonte also claims that the significant delay prior to his eye surgeries, over two years from his initial complaint.... amounted to deliberate indifference ... Dr. Bauman's refusal to authorize cataract surgery after another doctor determined that such surgery was an option was a 'difference of medical opinion,' insufficient by itself to raise a triable issue of deliberate indifference."); *Dunville v. Morton, 234 F.3d 1272, (7th Cir. 2000)*; *but see Campbell v. Fry, 896 F.2d 1366 (4th Cir. 1990)*. For the reasons stated herein, the Court concludes that all of Plaintiff's objections lack merit, and accordingly accepts and adopts the October 2, 2008 Report and Recommendation.

B. December [*17] 18, 2008 Report & Recommendation

The December 18, 2008 R&R, filed on December 18, 2008 **[Docket No. 60]**, recommends that the remaining Defendants: William Borgerding, Mark Ventocilla, Terry Malloy, and MDOC Bureau of Health Care Services be dismissed without prejudice for failure to effect proper service. To date, neither party has filed an objection to the second R&R and time to do so has expired. The Court has had an opportunity to review this matter and finds that the Magistrate Judge reached the correct conclusions for the proper reasons.

V. CONCLUSION

Accordingly,

IT IS ORDERED that the October 2, 2008 Report and Recommendation of Magistrate Judge Mona K. Majzoub **[Docket No. 51]** is **ACCEPTED** and **ADOPTED** as this Court's findings and conclusions of law in addition to the reasons set forth above.

IT IS FURTHER ORDERED that Defendants Correctional Medical Services, Craig Hutchinson, and Rocco DeMasi's Motion to Dismiss **[Docket No. 32, filed July 17, 2008]** is **GRANTED**.

IT IS FURTHER ORDERED that Defendants Governor of Michigan, Patricia Caruso, Unknown Board Members of MSAC, and George Pramstaller's Motion for Summary Judgment **[Docket No. 33, filed July 18, 2008]** is **GRANTED**. **IT IS** [*18] **FURTHER ORDERED** that the December 18, 2008 Report and Recommendation **[Docket No. 60]** of Magistrate Mona K. Majzoub is **ACCEPTED** and **ADOPTED** as this Court's findings

and conclusions of law.

IT IS FURTHER ORDERED that the remaining Defendants William Borgerding, Mark Ventocilla, Terry Malloy, and MDOC Bureau of Health Care Services are **DISMISSED WITHOUT PREJUDICE** pursuant to *Fed. R. Civ. P. 4(m)* for failure to effect service.

IT IS FURTHER ORDERED that Plaintiff's Complaint **[Docket No. 1, filed Sept. 25, 2007]** is **DISMISSED WITH PREJUDICE** as to Defendants Correctional Medical Services, Craig Hutchinson, Rocco DeMasi, Governor of Michigan, Patricia Caruso, Unknown Board Members of MSAC, and George Pramstaller. As to Defendants William Borgerding, Mark Ventocilla, Terry Malloy, and MDOC Bureau of Health Care Services the Complaint is **DISMISSED WITHOUT PREJUDICE**.

/s/ Denise Page Hood

Denise Page Hood

United States District Judge

Dated: March 24, 2009

No. 10-2089

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dallas Cobbs (State Prisoner no. 164276),

Plaintiff-Appellee,

v.

George Pramstaller,

Defendant-Appellant,

and

Craig Hutchinson, Marcella Clark, Gregory Naylor, Bency Mathai, Haresh Pandya, and Correctional Medical Services, Inc.,

Defendants.

Appeal from the United States District Court
Eastern District of Michigan at Detroit
Honorable Anna Diggs Taylor

EXHIBIT E

Clint C. Williams v. Dr. Shelton, et. al.

LEXSEE 2008 U.S. DIST. LEXIS 54394

CLINT C. WILLIAMS, Plaintiff, vs. DR. SHELTON, et al., Defendants.

Civil Case No. 06-95-KI

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

2008 U.S. Dist. LEXIS 54394

July 16, 2008, Decided

COUNSEL: [*1] Clint C. Williams, Plaintiff, Pro se, Salem, Oregon.

For Defendant: Hardy Myers, Attorney General, Portland, Oregon; Leonard W. Williamson, Assistant Attorney-In-Charge, Portland, Oregon.

JUDGES: Garr M. King, United States District Judge.

OPINION BY: Garr M. King

OPINION

OPINION AND ORDER

KING, Judge:

Plaintiff Clint Williams suffers from several medical problems and is unsatisfied with the treatment provided by the Oregon Department of Corrections at Snake River Correctional Institution ("SRCI"). Williams alleges claims for *Eighth Amendment* violations against several of the health care providers at SRCI. Before the court is Defendants' Motion for Summary Judgment (# 42). For the reasons below, I grant the motion and dismiss all claims with prejudice.

LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be [*2] tried. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. *Universal Health Services, Inc. v. Thompson, 363 F.3d 1013, 1019 (9th Cir. 2004)*.

DISCUSSION

I. *Standard for Eighth Amendment Violation*

The *Eighth Amendment* is violated if prison officials are deliberately indifferent to a prisoner's serious medical needs. *Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004)*.

> To establish an *Eighth Amendment* violation, a prisoner must satisfy both the objective and subjective components of a two-part test. First, there must be a demonstration that the prison official deprived the prisoner of the minimal civilized measure of life's necessities. Second, a prisoner must demonstrate that the prison official acted with deliberate indifference in doing so.
>
> A prison official acts with deliberate

> indifference . . . only if the [prison official] knows of and disregards an excessive risk to inmate health and safety. Under this standard, the prison official must not only be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, but that person must also [*3] draw the inference. If a [prison official] should have been aware of the risk, but was not, then the [official] has not violated the *Eighth Amendment*, no matter how severe the risk. This subjective approach focuses only on what a defendant's mental attitude actually was. Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's *Eighth Amendment* Rights.

Id. (internal citation and quotation omitted).

> [A] mere difference of medical opinion . . . [is] insufficient, as a matter of law, to establish deliberate indifference. Rather, to prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the chosen course of treatment was medically unacceptable under the circumstances, and was chosen in conscious disregard of an excessive risk to [the prisoner's] health.

Id. at 1058(internal quotations and citations omitted). Delay in treatment does not violate the *Eighth Amendment* unless the delay causes substantial harm. *Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990)*.

II. *Claim One--Steroid Injections and Ostectomy* [1]

> 1 Surgical removal of all or part of a bone. *Merriam Webster's Medical Desk Dictionary* [*4] 570 (1996).

Williams alleges that defendants were deliberately indifferent to his serious medical needs because they did not provide a steroid injection and an ostectomy for his right hip, as recommended by an orthopedist outside of SRCI, Dr. Dahlin, on February 12, 2002.

Between July 13, 2005 and June 22, 2007, Williams was examined and treated for his hip problems and degenerative joint disease 22 times. Defendants prescribed narcotic pain medication, the use of a cane and wheelchair, and helpers for Williams. He was notorious for refusing to follow doctor's orders and arguing with the health care providers about his treatment. Williams was transferred to Oregon State Correctional Institution ("OSCI") to be examined by a specialist. On August 15, 2006, Dr. Jerry Becker, a Salem surgeon who consults with the Oregon Department of Corrections, examined Williams and recommended replacement of his right hip. The Therapeutic Level of Care Committee ("TLCC") approved the surgery on August 24, 2006.

Williams also has problems with pain in his shoulder. Dr. Becker and Dr. Mike Puerini, OSCI Chief Medical Officer, both tried to explain to Williams that he had to rehabilitate his shoulder prior [*5] to the hip replacement because he would have to limit the weight put on his hip for six weeks after the surgery. Williams refused to do the work necessary to rehabilitate his shoulder. Instead, he insisted that he just wanted his hip fixed. On November 27, 2006, Dr. Becker noted in Williams' chart the difficulty in getting Williams to understand the necessity of the shoulder rehabilitation. Dr. Becker also stated that he was reluctant to ignore the community standard of care concerning Williams' ability to limit his weight on his hip post-surgery. On December 14, 2006, the TLCC declined to approve the hip replacement procedure because the unrehabilitated right shoulder pain made Williams an inappropriate surgical candidate.

Williams disagrees with his doctors' treatment choices, namely, that hip replacement is not a good idea until his shoulder is rehabilitated so that he can walk with crutches post-surgery. The delay in treatment is caused by Williams' refusal to work on his shoulder. Williams has not raised a factual issue that defendants' choice of treatment is medically unacceptable under the circumstances. Accordingly, there is no deliberate indifference. I grant summary judgment [*6] dismissing Claim One.

III. *Claim Two--Eyeglasses*

Williams alleges that defendants were deliberately indifferent to his serious medical needs because they have not issued him eyeglasses since he informed them on September 4, 2002 that the lack of glasses was causing extreme headaches.

On October 25, 2004, Dr. Duncan wrote Williams urging him to demonstrate willingness to assist in the process of obtaining eyeglasses as an indigent person by participating in institutional programming and being compliant with prison rules. On December 21, 2004, the Eyeglass Review Committee authorized Williams to incur debt for new eyeglasses. On November 21, 2006, Williams received a pair of indigent bifocal glasses but refused to use them because they were not progressive bifocals, namely, there was a visible line between the parts of the lenses with different focal lengths. Williams wanted an invisible line on his glasses but that more expensive cosmetic option is not allowed for indigent eyeglass purchases.

According to Dr. Gulick of SRCI, eyestrain itself is rarely the sole cause of headaches. Although Williams complained of headaches in his kyles requesting glasses, he only complained of headaches to [*7] medical providers a few times and was given pain medication.

Williams again is unhappy with the medical treatment offered. There is no evidence that the bifocal glasses were not appropriate for him other than Williams' displeasure with their appearance. There is also no evidence that Williams's headaches were caused by his lack of glasses or that he did not receive appropriate treatment.

Williams has failed to raise a factual issue that defendants were deliberately indifferent to his serious medical needs. I grant summary judgment and dismiss Claim Two.

IV. *Claim Four--Cataract Surgery*

Williams alleges that defendants were deliberately indifferent to his serious medical needs because they have not provided cataract surgery for his left eye even though his vision is very blurry.

Williams was diagnosed with cataracts, with the cataract in the right eye worse than the left. Cataracts, a natural result of aging, cause blurred vision but are not painful. Early removal of a cataract does not create a better medical outcome and late removal does not create a worse medical outcome. The decision for surgical removal is usually based on the cataract's effect on the activities of daily living. Optometrist [*8] Dr. Enyeart recommended removal of the cataract in Williams' right eye on April 6, 2005 and July 27, 2005. The TLCC approved surgery on November 30, 2005 and it was performed by an ophthalmologist on March 9, 2006. On April 25, 2006, the TLCC declined to approve cataract surgery on Williams' left eye. On January 31, 2007, Dr. Enyeart noted that the cataract in the left eye was not of immediate importance but would benefit from cataract removal. He referred the matter to the TLCC on June 27, 2007 and that committee approved surgery on July 11, 2007. The record does not reflect if Williams had the left cataract removed yet.

Williams is unhappy with the delay in his cataract removal surgeries. There is no evidence, however, that the delay caused any harm, much less substantial harm. Thus, defendants have not been deliberately indifferent to Williams' serious medical needs. I grant summary judgment and dismiss Claim Four.

V. *Claim Five--Medication Interactions*

Williams alleges that defendants were deliberately indifferent to his serious medical needs because they prescribed both the NSAID indomethacin and the diuretic hydrochlorothazide, even though Williams informed them that he had heart [*9] palpitations from indomethacin in the past and that the two medications should not be used together.

On December 27, 2005, Williams complained that the indomethacin gave him heart palpitations. He also produced several pharmacy drug handouts and claimed that the two drugs should not be prescribed together. There is no evidence that Williams took both medications or that he suffered any serious ill effects. The pills were both authorized for in-cell use so Williams could decide for himself whether to take them.

This is another instance of Williams being unhappy with the treatment choices provided by defendants. There is no evidence that the treatment was medically unacceptable. Consequently, I grant summary judgment and dismiss Claim Five.

CONCLUSION

Defendants' Motion for Summary Judgment (# 42) is granted. All claims are dismissed with prejudice.

IT IS SO ORDERED.

Dated this 16th day of July, 2008.

/s/ Garr M. King

Garr M. King

United States District Judge

No. 10-2089

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dallas Cobbs (State Prisoner no. 164276),

Plaintiff-Appellee,

v.

George Pramstaller,

Defendant-Appellant,

and

Craig Hutchinson, Marcella Clark, Gregory Naylor, Bency Mathai, Haresh Pandya, and Correctional Medical Services, Inc.,

Defendants.

Appeal from the United States District Court
Eastern District of Michigan at Detroit
Honorable Anna Diggs Taylor

EXHIBIT F

Samuel W. Rylee v. Bureau of Prisons, et. al.

LEXSEE 2009 U.S. DIST. LEXIS 24609

Samuel W. Rylee, # 52476-019, Plaintiff, v. Bureau of Prisons, Dr. Z. Robert Vendel, and Warden M.L. Riveria, Defendants.

Civil Action No.: 8:08-CV-1643-PMD-BHH

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

2009 U.S. Dist. LEXIS 24609

March 9, 2009, Decided

SUBSEQUENT HISTORY: Appeal dismissed by, As moot, Motion denied by, Costs and fees proceeding at *Rylee v. United States Bureau of Prisons, 2009 U.S. App. LEXIS 20352 (4th Cir. S.C., Sept. 14, 2009)*

PRIOR HISTORY: *Rylee v. Bureau of Prisons, 2009 U.S. Dist. LEXIS 7221 (D.S.C., Feb. 2, 2009)*

COUNSEL: [*1] Samuel W Rylee, also known as Samuel Wayne Rylee, Plaintiff, Pro se, Estill, SC.

For United States Bureau of Prisons, Z Robert Vendel, MD, US BOP, M L Rivera, Warden FCI Estill, Defendants: Beth Drake, LEAD ATTORNEY, US Attorneys Office, Columbia, SC.

JUDGES: PATRICK MICHAEL DUFFY, United States District Judge.

OPINION BY: PATRICK MICHAEL DUFFY

OPINION

ORDER

This matter is before the Court upon Plaintiff Samuel W. Rylee's ("Plaintiff") Objections to a United States Magistrate Judge's Report and Recommendation ("R&R") that the court grant Defendants' Motion for Summary Judgment. Having reviewed the entire record, including the Plaintiff's Objections, the court finds the Magistrate Judge fairly and accurately summarized the facts and applied the correct principles of law. Accordingly, the court adopts the R&R and fully incorporates it into this Order.

BACKGROUND

Plaintiff, a federal prisoner proceeding *pro se,* seeks relief pursuant to *Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).* Plaintiff asserts that Defendants have exhibited a deliberate indifference to his medical need for cataract surgery, as recommended by an optometrist, and asks the court to require Defendants to provide him with such surgery. [*2] The record, as further discussed in the following paragraphs, indicates that doctors have assessed Plaintiff's right eye with a cataract, and because of such impairment, the vision in his right eye has rapidly deteriorated. Meanwhile, the vision in Plaintiff's left eye has remained the same. Although all the optometrists that have evaluated Plaintiff have recommended he receive cataract surgery, the Federal Bureau of Prison Guidelines on Patient Care does not require Bureau physicians to follow all consultation's recommendations. Since the Federal Bureau of Prison's Ophthalmology Guidelines require both of an inmate's eyes to have a best-corrected visual acuity of less than 20/60 for at least six months and only the vision of Plaintiff's right eye meets this criterion,

Defendants have elected not to allow Plaintiff to receive cataract surgery.

Beginning on April 5, 2007, after receiving complaints from Plaintiff about his eyes, the medical staff at the Federal Correctional Institution in Estill, South Carolina ("FCI, Estill") referred Plaintiff for an evaluation by an optometrist. After being evaluated by the optometrist on June 27, 2007, the optometrist found that Plaintiff had 20/80 [*3] vision in his right eye and 20/30 vision in his left eye, and diagnosed Plaintiff with cataracts of the right eye and Presbyopia (cannot focus on things up close). The optometrist prescribed eyeglasses for Plaintiff and recommended a referral to the ophthalmologist for cataract surgery. This recommendation for cataract surgery was reviewed by Defendant Dr. Z. Robert Vendel, the Clinical Director at FCI, Estill. Dr. Vendel assessed whether Plaintiff qualified for cataract surgery according to the Federal Bureau of Prisons Ophthalmology Guidelines, which requires that "[t]here must be documentation of a best-corrected visual acuity of less than 20/60 in both eyes with current (less than six months old) refraction." Based on his assessment, Dr. Vendel did not concur with the recommendation for cataract surgery. Instead, he documented a treatment plan to monitor Plaintiff every six months. At this time, Dr. Vendel believed that, although Plaintiff had visually significant cataracts in his right eye, his left eye corrective vision enabled him to perform his daily activities.

On December 21, 2007, the medical staff at FCI, Estill examined Plaintiff's vision again and concluded that his vision [*4] was 20/80 in his right eye and 20/30 in his left eye. On February 21, 2008, Dr. Vendel evaluated Plaintiff after he complained of visual deterioration in his right eye and burning and excessive lacrimation in his left eye. Dr. Vendel assessed Plaintiff with cataracts in his right eye and found Plaintiff's left eye to be normal. Dr. Vendel referred Plaintiff to an optometrist, and on February 27, 2008, the optometrist also assessed Plaintiff with cataracts of his right eye. As of this date, Plaintiff's vision was 20/30 in his left eye and 20/400 in his right eye, and the optometrist recommended cataract surgery for Plaintiff. Dr. Vendel attested that he informed the optometrist of the Federal Bureau of Prison's criteria for when cataract surgery will be approved for an inmate and that the optometrist agreed that Plaintiff did not meet those guidelines.

On August 20, 2008, Plaintiff was evaluated by an optometrist, which--again--assessed him with cataracts of his right eye. As of this date, Plaintiff's vision was 20/30 in his left eye and 20/CF (count fingers) in his right eye. Again, the optometrist recommended cataract surgery, and again, Defendants denied Plaintiff the surgery because [*5] it was considered only elective in nature under the Bureau of Prison's Guidelines due to Plaintiff's left eye having 20/30 vision. Plaintiff filed suit, alleging that Defendants violated his constitutional rights because they have continuously denied him cataract surgery for his right eye, as recommended several times by an optometrist.

STANDARD OF REVIEW

I. The Magistrate Judge's Report and Recommendation

The Magistrate Judge made his review in accordance with *28 U.S.C. § 636(b)(1)(B)* and Local Civil Rule 73.02. The Magistrate Judge only makes a recommendation to the court. It has no presumptive weight, and the responsibility for making a final determination remains with the court. *Mathews v. Weber, 423 U.S. 261, 270-71, 96 S. Ct. 549, 46 L. Ed. 2d 483 (1976)*. Parties are allowed to make a written objection to a Magistrate Judge's report within ten days after being served a copy of the report. *28 U.S.C. § 636(b)(1)*. From the objections, the court reviews *de novo* those portions of the R&R that have been specifically objected to, and the court is allowed to accept, reject, or modify the R&R in whole or in part. *Id.* Additionally, the court may recommit the matter to the Magistrate Judge with instructions. *Id.*

II. Legal [*6] **Standard for Summary Judgment**

To grant a motion for summary judgment, the court must find that "there is no genuine issue as to any material fact." *Fed. R. Civ. P. 56(c)*. The judge is not to weigh the evidence but rather must determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. All evidence should be viewed in the light most favorable to the nonmoving party. *Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 123-24 (4th Cir. 1990)*. "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d*

115, 119 (4th Cir. 1991). "[T]he plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the [*7] burden of proof.'" *Hughes v. Bedsole, 48 F.3d 1376, 1381 (4th Cir. 1995)* (quoting *Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990))*.

Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual bases." *Celotex, 477 U.S. at 327*. The court remains mindful that Plaintiff is a *pro se* petitioner, and therefore, his pleadings are accorded liberal construction. *Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*. The requirement of liberal construction, however, does not mean that the court can ignore a clear failure in pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990)*.

ANALYSIS

In their Motion for Summary Judgment, Defendants concede that Plaintiff has exhausted his administrative remedies with respect to his claim for cataract surgery; therefore, the court may proceed with its review of Plaintiff's assertion that Defendants have exhibited a deliberate indifference to his serious medical needs. [1]

> 1 The Magistrate Judge found that any statements made by Plaintiff concerning hemorrhoids and anal fissures [*8] are unrelated to his present case over cataract surgery; therefore, he instructed Plaintiff to file a separate action regarding those issues. Plaintiff did not object to this recommendation. Thus, the court is not required to give any explanation for adopting it. *See Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983)*.

It is well established that deliberate indifference by prison personnel to an inmate's serious illness or constitutes cruel and unusual punishment contravening the *Eighth Amendment*. *Estelle v. Gamble, 429 U.S. 97, 104-05, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*. To prove a claim of deliberate indifference to a serious injury under the *Eighth Amendment*, a plaintiff must show that a defendant's "action or inaction [1] result[ed] in or creat[ed] a sufficiently serious risk of a deprivation that objectively results in denial of the 'minimal civilized measure of life's necessities' and [2] a 'sufficiently culpable state of mind.'" *Winfield v. Bass, 106 F.3d 525, 531 (4th Cir. 1997)* (quoting *Farmer v. Brennan, 511 U.S. 825, 831-34, 114 S. Ct. 1970, 128 L. Ed. 2d 811 & n. 2 (1994))*. In order to be liable for deliberate indifference, the plaintiff must prove that the official was both aware of facts from which the inference could be drawn that a [*9] substantial risk of serious harm exists, and also that he had drawn the inference. *See Young v. City of Mount Rainer, 238 F.3d 567, 575-76 (4th Cir. 2001)* ("Deliberate indifference requires a showing that the defendants . . . actually knew of and ignored a detainee's serious need for medical care."). The mere fact that a prisoner may believe he had a more serious injury or that he required better treatment does not establish a constitutional violation. *See, e.g., Russell v. Sheffer, 528 F.2d 318, 319 (4th Cir. 1975)*.

Defendants moved for summary judgment on the ground that Plaintiff has failed to show they acted with deliberate indifference when declining to afford Plaintiff with cataract surgery. The Magistrate Judge recommended that the court grant Defendants' Motion for Summary Judgment. He noted that Plaintiff did not contend that the evidence before the Court is incomplete nor did he produce any contradictory evidence that showed the vision in both of his eyes did, in fact, satisfy the Bureau of Prison's Ophthalmology Guidelines and warranted cataract surgery. (R&R at 7.) The Magistrate Judge characterized Plaintiff's case as a mere disagreement with the course of treatment taken [*10] by the Defendants, which the Magistrate Judge concluded was insufficient grounds for a deliberate indifference claim. *Id.* Plaintiff objected to this recommendation on several grounds.

First, Plaintiff argues that he has not had adequate time for discovery; therefore, any motion for summary judgment is premature. The court disagrees. The Magistrate Judge issued a scheduling order on June 17, 2008 that notified Plaintiff and Defendants that all dispositive motions from defendants had to be filed no later than forty-five days after the answer of that particular defendant had been filed. (*See* Doc. 12.) The

Magistrate Judge found that Plaintiff conducted no discovery prior to this deadline. Furthermore, Defendants have represented that they have served Plaintiff with his medical records twice, out of an abundance of caution, and Plaintiff has made no effort to explain what other medical records he needs concerning his claim that he needs cataract surgery. Although the Magistrate Judge did issue Defendants request for a protective order on January 8, 2009 that stayed any additional discovery until the court ruled on their Motion for Summary Judgment, Plaintiff has had ample time to conduct [*11] whatever discovery he thought he needed.

Second, Plaintiff argues that a triable issue exists over whether or not Defendants exhibited "deliberate indifference" to his need for cataract surgery. Specifically, Plaintiff asserts that Defendants exhibited deliberate indifference to his medical needs by choosing to adhere to the Federal Bureau of Prison's Ophthalmology Guidelines rather than following the optometrist's recommendation of cataract surgery. Deliberate indifference is a very high standard, and although the court does not take lightly the undisputed condition of Plaintiff's right eye, it disagrees with Plaintiff's contentions. Deliberate indifference may be demonstrated by proof that Defendants actually knew of a substantial risk of serious harm and failed to act. *Farmer v. Brennan, 511 U.S. 825, 832-34, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)*. Thus, deliberate indifference "describes a state of mind more blameworthy than negligence." *Id. at 835*.

The record before the court indicates that Defendants have acted in regards to Plaintiff's eye problems. Dr. Vendel provided a declaration, in which he declared that the medical staff continues to monitor Plaintiff's vision and cataracts. Furthermore, in his professional [*12] opinion, he attests that, while cataract surgery on Plaintiff's right eye would improve the vision in that eye, waiting to have the surgery "will most likely not cause him to have irreparable damage to his eye since he is being monitored." (Vendel Decl. at P 5.) Also, Dr. Vendel declared that "[a]ny delay in performing the surgery will not likely alter the success of the procedure." (*Id.*) Finally, Dr. Vendel declared that "[w]hen Mr. Rylee meets the criteria to have the cataract surgery (vision in both eyes is less than 20/60 for six months) and his condition interferes with his activities of daily living, Mr. Rylee will be considered for cataract surgery." (*Id.*) These statements indicate that Defendants are aware of the risk of harm to Plaintiff's right eye and have chosen to act by monitoring Plaintiff's vision until he meets prison guidelines to have the surgery. Thus, the record, in no way, reflects that Defendants exhibited deliberate indifference to Plaintiff's condition. Defendants' decision to adhere to federal prison guidelines rather than follow the optometrist's recommendation of cataract surgery constitutes a difference of medical opinion, which is insufficient, by itself, [*13] to raise a triable issue of deliberate indifference. *Brown v. Thompson, 868 F. Supp. 326, 331 (S.D. Ga. 1994)*; *see also Samonte v. Bauman, 264 F. App'x 634, 636 (9th Cir. 2008)*; *Hill v. Haviland, 68 F. App'x 603, 604 (6th Cir. 2003)*; *Waldrop v. Evans, 871 F.2d 1030, 1033 (11th Cir. 1989)* (citing *Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977)* ("We disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment. Along with all other aspects of health care, this remains a question of sound professional judgment.")).

Finally, Plaintiff asserts that Defendant Dr. Z. Robert Vendel is not qualified to monitor and exercise judgment over his eye condition. He bases this argument on the fact that Dr. Vendel does not appear to be licensed to practice medicine in South Carolina. According to Dr. Vendel's declaration, he is licensed to practice medicine in Georgia, although he has been employed as a physician for F.C.I., Estill since 1998. Regardless of the technicalities surrounding Dr. Vendel's state-license status, he has continuously referred Plaintiff to an optometrist, who presumably is licensed to practice in South Carolina, and the optometrist's own [*14] medical conclusions reveal that Plaintiff has failed to satisfy prison guidelines for cataract surgery. Therefore, the court also disagrees with Plaintiff's assertion that Defendants' continued monitoring of his eye condition, which includes referrals to outside optometrists, exhibits deliberate indifference to his medical needs.

Because the court finds that Plaintiff has not raised a triable issue over whether Defendants exhibited deliberate indifference to his medical needs, it does not address the issue of whether Plaintiff has shown a genuine issue of fact with respect to a serious medical need. *See Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)* (noting that the *Eighth Amendment* standard contains both subjective and objective components).

CONCLUSION

For the foregoing reasons, the court **GRANTS** Defendants' Motion for Summary Judgment.

AND IT IS SO ORDERED.

/s/ Patrick Michael Duffy

PATRICK MICHAEL DUFFY

United States District Judge

Charleston, South Carolina

March 9, 2009

No. 10-2089

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dallas Cobbs (State Prisoner no. 164276),

Plaintiff-Appellee,

v.

George Pramstaller,

Defendant-Appellant,

and

Craig Hutchinson, Marcella Clark, Gregory Naylor, Bency Mathai, Haresh Pandya, and Correctional Medical Services, Inc.,

Defendants.

Appeal from the United States District Court
Eastern District of Michigan at Detroit
Honorable Anna Diggs Taylor

EXHIBIT G

Timothy Dupuis v. Dale Caskey, et. al.

LEXSEE 2009 U.S. DIST. LEXIS 89002

TIMOTHY DUPUIS, # K9498, PLAINTIFF VS. DALE CASKEY, SANDRA ATWOOD, KENTRELL LIDDELL AND CHRISTOPHER EPPS, DEFENDANTS

CIVIL ACTION NO. 4:08cv63-LRA

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

2009 U.S. Dist. LEXIS 89002

September 28, 2009, Decided
September 28, 2009, Filed

COUNSEL: [*1] Timothy Dupuis, Plaintiff, Pro se, Wiggins, MS.

For Mr. Caskey, Mr. Atwood, Defendants: Lee Thaggard, LEAD ATTORNEY, BOURDEAUX & JONES, LLP, Meridian, MS.

For Mr. Christopher Epps, Defendant: Pelicia Everett Hall, LEAD ATTORNEY, Charles B. Irvin, MISSISSIPPI ATTORNEY GENERAL'S OFFICE, Jackson, MS.

JUDGES: Linda R. Anderson, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: Linda R. Anderson

OPINION

MEMORANDUM OPINION AND ORDER

I. Procedural History

Timothy Dupuis [hereinafter "Plaintiff"], *pro se,* and Lee Thaggard, Pelicia E. Hall and Charles B. Irvin, counsel for Warden Dale Caskey, Sandra Atwood, and Christopher Epps [hereinafter "Defendants"], appeared before the undersigned United States Magistrate Judge on the 22nd day of October, 2008, for an omnibus hearing. This hearing was scheduled to insure the just, speedy and inexpensive determination of this *pro se* prisoner litigation and to determine whether or not Plaintiff's claims were supported by a factual or legal basis pursuant to *28 U.S.C. § 1915*, as amended. On February 23, 2009, Defendants Caskey and Atwood filed a Motion for Summary Judgment, document number 28, which is now before the Court. This motion was amended by document number 30, filed on March 11, 2009, [*2] Defendants' Amended Motion for Summary Judgment. Plaintiff has filed responses to the motions, document numbers 29 and 33. The Court shall also consider Plaintiff's sworn testimony in the omnibus hearing as responsive to the motions.

Jurisdiction of this case is based upon *42 U.S.C. § 1983*, and it was assigned to the undersigned United States Magistrate Judge for all purposes pursuant to the consent of the parties by Order [docket entry number 20] entered by District Judge Tom S. Lee on October 27, 2008. Plaintiff has voluntarily dismissed the named Defendant, Ms. Kentrell Liddell, as she no longer works at the Mississippi Department of Corrections and has not been served with process.

II. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure

provides, in relevant part, that summary judgment "shall be rendered forthwith 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." *FED. R. CIV. P. 56(c)*. The United States Supreme Court has held that this language "mandates the [*3] entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *see also Moore v. Mississippi Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989)*; *Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988)*.

III. Factual Basis for Complaint

Most of the facts in this case are not in dispute. Plaintiff was incarcerated in the East Mississippi Correctional Facility in Meridian, Mississippi, from August 9, 2002, to the present. Defendant Dale Caskey is the Senior Warden of that facility, and Defendant Sandra Caskey is a Registered Nurse and the Health Services Administrator. Dr. Stephen Butler was the Medical Director of ECMF until sometime prior to October 1, 2008. Dr. Rolando T. Abangan became the Medical Director beginning on October 1, 2008, until the present. Neither doctor is named as a Defendant.

Plaintiff had a cataract in his left eye. Plaintiff complained of failing sight as early as August 2, 2006, but he was [*4] not examined by an outside optometrist until September 27, 2007. The optometrist, Dr. Clark, recommended surgery. The medical director Dr. Butler disagreed and did not direct a specialist consultation or recommend surgery. Later, on January 21, 2009, after this lawsuit was filed, the new medical director Dr. Abangan recommended that Plaintiff be treated by an opthalmologist, Dr. Davis. Dr. Davis performed successful cataract surgery on February 10, 2009. Plaintiff's complaint at this time is that the surgery was delayed from September 2007, when Dr. Clark recommended it, until February 2009, approximately 17 months, and that the delay violated his constitutional rights. He also charges that he should have been examined after his first sick call request on August 2, 2006. [1]

1 The medical records do not confirm this sick call request. The records do show that Plaintiff made a sick call request asking for his eyes to be checked on August 22, 2003, and that he was given an eyeglass prescription by Dr. Jason Read on February 23, 2004. See Exhibit 2 to Defendants' Motion for Summary Judgment, Affidavit of Sandra Atwood, p. 2.

The Court has reviewed Plaintiff's extensive medical records which [*5] are contained in Exhibit "I" to Defendants' Supplemental Motion for Summary Judgment. [2] The records confirm that Plaintiff has a history of mental health problems, including bipolar disorder, as well as a history of hypertension. He has been treated for those health problems extensively during his incarceration. In her Affidavits, Exhibits 1 & 2, Sandra Atwood reviewed the records in regard to Plaintiff's eyesight. Dr. Rolando T. Abangan also reviewed portions of Plaintiff's medical history by Affidavit, Exhibit "3." These affidavits give the medical history regarding Plaintiff's eyes, as set forth hereafter.

2 All references to exhibits hereafter are to those submitted in connection with Defendants' Supplement to Motion for Summary Judgment, document 30.

A Medical History & Physical Assessment taken on August 15, 2002, after Plaintiff arrived at EMCF, reveals that Plaintiff had no vision problems. On August 22, 2003, Plaintiff wrote a Sick Call Request asking to get his eyes checked, stating it had been three years since his last exam, and that he thought he might have an eye infection. He was given an eye exam on August 28, 2003, which showed him to have 20/70 vision in each eye without [*6] glasses.

On February 23, 2004, Dr. Jason Read, MD, with the Eye Clinic of Meridian, PLLC, wrote an eye glasses prescription for Plaintiff to address nearsightedness and astigmatism. On February 26, 2004, an Optical Laboratory Order for new glasses for Plaintiff was completed to order the glasses from PRIDE Enterprises. On February 22, 2005, a Pre-Segregation History & Physical was completed by Nurse Bobbie Edwards, RN, showing Plaintiff's pupils to be reactive and normal. On September 21, 2005, Dr. Stephen Butler (the EMCF's medical doctor at that time) completed a

Physician/Advanced Practitioner Treatment Plain during Chronic Care Clinic. He noted that Plaintiff had dry eyes and allergic conjunctivitis. On January 24, 2007, a Medical History & Physical Assessment was completed by Dr. Butler and Nurse Atwood; it showed Plaintiff had vision problems for which he had eyeglasses.

On April 27, 2007, during Chronic Care Clinic, Dr. Butler completed a Physician/Advanced Practitioner Treatment Plan and noted that Plaintiff's right eye was normal but that he was questionable for a cataract in his left eye. He made no recommendations for cataract care.

Upon EMCF's referral, Plaintiff was treated [*7] on September 26, 2007, by Dr. Grady M. Clark, Jr., an optometrist with Eyetech Eyecare Center in Meridian. Dr. Clark opined that Plaintiff had a Grade III left cataract and an extensive astigmatism in both eyes. He recommended surgery as soon as possible on the left eye. He opined that Plaintiff had anisometropia [3] due to swelling from the cataract development and also had aniseikonia [4] in both eyes. Dr. Clark reported that if he prescribed eyeglasses, Plaintiff would have double vision. He nevertheless ordered new glasses for Plaintiff, and Plaintiff received new glasses.

3 According to Nurse Atwood's affidavit, "anisometropia" is a condition in which the two eyes have unequal refractive power and may cause a difference in images coming from the two eyes. Affidavit, Exhibit 2, p. 3.

4 "Aniseikonia" means "unequal images" and is a binocular condition such that the image in one eye is perceived as different in size compared to the image in the other eye. Affidavit, Exhibit 2, p. 3.

Dr. Butler examined Plaintiff on October 24, 2007, and noted that Plaintiff complained of decreased visual acuity in his left eye. He noted that Plaintiff's right eye had 20/20 vision and stated that he was positive [*8] for cataract in the left eye. Dr. Butler did not recommend surgery at that time or that Plaintiff be referred to an ophthalmologist.

Dr. Butler examined Plaintiff again on April 29, 2008, and again did not recommend cataract surgery. This was Plaintiff's last time to be treated by Dr. Butler before he left the employ of EMCF.

On October 28, 2008, Plaintiff was seen by Dr. Abangan, the new medical director, and Dr. Abangan noted the cataract in his left eye and noted that he needed a referral to an ophthalmologist. Dr. Abangan saw Plaintiff again on January 21, 2009, [5] and confirmed the need for an examination by an ophthalmologist. An appointment was made that day for Plaintiff to be seen by an ophthalmologist on January 28, 2009.

5 Paragraph 19 of Defendant Atwood's affidavit and paragraph 5 of Dr. Abangan's affidavit erroneously state this date as January 21, "2008." The date was apparently January 21, "2009."

On January 28, 2009, Plaintiff was examined by Dr. Woody D. Davis, an ophthalmologist. He concluded that surgery was necessary, and he performed that surgery successfully on February 10, 2009. At a follow-up visit on February 23, 2009, Dr. Davis issued a written report to Dr. Abangan, [*9] stating the following:

> I saw Mr. Dupuis who had a very advanced cataract in his left eye. He is 20/40 in the right with an early cataract and 20/400 in the left with a very dense cataract. He was taken to surgery where uneventful cataract extraction and astigmatic correction was done. Post-op he is doing very well and seeing 20/40 with pinhole.

Exhibit "A" to Affidavit, Exhibit "2".

At the omnibus hearing, Plaintiff orally reviewed his claims against the named Defendants. According to Plaintiff, since Defendant Warden Caskey agreed with Dr. Butler that Plaintiff did not need surgery, Defendant Caskey refused to obtain the needed care for Plaintiff. Defendant Atwood had told Plaintiff that she would monitor his case but she did not do so; she also refused to recommend the needed care. Defendant Epps is the Commissioner of the Mississippi Department of Corrections ["MDOC"] and was sued in his supervisory capacity; Plaintiff contended that Defendant Epps could have intervened in his case during the Administrative Remedy Program ["ARP"] proceedings and could initiate settlement of his claims.

IV. Legal Analysis

A. Deliberate Indifference

Deliberate indifference to a prisoner's serious medical [*10] needs [6] constitutes an actionable *Eighth Amendment* violation under *§ 1983. Estelle v. Gamble, 429 U.S. 97, 105-07, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976)*. However, delay in medical care can only constitute an *Eighth Amendment* violation if there has been deliberate indifference, *which results in substantial harm. Mendoza v. Lynaugh, 989 F.2d 191, 193 (5th Cir. 1993)*, citing *Wesson v. Oglesby, 910 F.2d 278, 284 (5th Cir. 1990)* (delay must constitute "deliberate indifference"); *Mayweather v. Foti, 958 F.2d 91 (5th Cir. 1992)* (delay must result in substantial harm); *Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985)* (delay must result in "substantial harm). See also *Olivas v. Correctional Corporation of America, 215 Fed. Appx. 332 (5th Cir. 2007)* (no substantial harm in delay in providing dental care). Furthermore, the *§ 1983* plaintiff must show that the defendants had a sufficiently culpable state of mind. *See Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321, 2322, 115 L. Ed. 2d 271 (1991)* (at a minimum prisoner must allege deliberate indifference to serious medical needs); *Jackson v. Cain, 864 F.2d 1235, 1244 (5th Cir. 1989)*.

> 6 The court in *Hurt v. Mahon, 2009 U.S. Dist. LEXIS 79295, 2009 WL 2877001 at *2 (E.D. Va. Aug. 31, 2009)*, [*11] opined that "it is doubtful that a cataract is a sufficiently serious medical need to support an *Eighth Amendment* violation."

Additionally, as the Fifth Circuit has stated, "[d]eliberate indifference encompasses only the unnecessary and wanton infliction of pain repugnant to the conscience of mankind." *McCormick v. Stalder, 105 F.3d 1059, 1061 (5th Cir. 1997)*. Negligent or even erroneous medical treatment or judgment does not provide the basis for a constitutional claim. *Graves v. Hampton, 1 F.3d 315, 319 (5th Cir. 1993)*.

In this case, Plaintiff cannot establish "deliberate indifference" on the part of Warden Caskey, Nurse Atwood, and Commissioner Epps. Warden Caskey played no role in the medical treatment of prisoners; that duty was delegated to the medical unit. Exhibit 4. Nurse Atwood deferred to the recommendations of the physicians in charge of patients' care; she had no reason to disagree with Dr. Butler's opinion regarding cataract surgery. Commissioner Epps was sued only in his supervisory capacity and was unaware that this situation existed until such time as suit was filed. To find deliberate indifference on their part, the official "must both be aware of facts from which the [*12] inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference." *Harris v. Hegmann, 198 F.3d 153, 159 (5th Cir. 1999)*. This standard cannot be met. It is common for cataract surgeries to be delayed, and cataract surgery is considered elective, according to the American Optometric Association's Optometric Clinical Practice Guidelines. Exhibit "2," p.3, n.4. There was no reason for these Defendants to doubt the medical recommendations of Dr. Butler.

There was also no requirement under the law that Dr. Butler yield to the recommendation of the optometrist, Dr. Clark. Deliberate indifference is not established simply because medical opinions differ. *Stewart v. Murphy, 174 F.3d 530, 535 (5th Cir. 1999)*; *Norton v. Dimazana, 122 F.3d 286, 292 (5th Cir. 1997)*. A prisoner plaintiff's medical claims are contentions that their *Eighth Amendment* rights to be free from cruel and inhuman treatment have been violated. However,

> ... neither inconsistencies or differences in medical diagnoses, nor refusal to consider inmates's self-diagnoses, to summoning the medical specialist of the inmate's choice, to perform tests or procedures that the inmate desires, to [*13] explain to the inmate the reason for medical action or inaction, or to take measures to ensure against a hypothetical future medical problem cannot amount to cruel and unusual punishment.

*Jackson v. Grondolsky, 2009 U.S. Dist. LEXIS 70697, 2009 WL 2896511, *5 (D.N.J. Aug. 11, 2009)*.

In this case, there was no legal requirement that Dr. Butler follow Dr. Clark's advice or that a medical specialist be summoned at a particular time. The failure to do so simply does not establish the required deliberate indifference to a serious medical need; thus, no *Eighth Amendment* violation can be established.

B. Substantial Harm

As earlier stated, a *delay* in medical care can only be a constitutional claim if it results in *substantial harm. Mendoza, 989 F.2d at 193*. In this case, although the cataract surgery was delayed for a significant period, the

cataract was successfully removed and Plaintiff's sight was restored. The Court finds that Plaintiff suffered no *substantial harm* due to the delay. Plaintiff surely would have preferred an earlier removal, and his worsening sight was disturbing to him. Yet, in order to receive a money judgment for a constitutional violation against these Defendants, he must show that he was substantially [*14] harmed.

Additionally, there was a legitimate medical disagreement in this case as to when the cataract should have been removed. Although Dr. Butler was not a specialist, he was capable of determining the general timing of cataract surgery. Plaintiff's dissatisfaction with the timing of the surgery does not render this a constitutional claim, even if the surgery was recommended earlier. All parties agree that the surgery was successful.

Plaintiff's medical records confirm that Plaintiff received much medical care during the 17 months the surgery was delayed. This included examinations by physicians regarding other medical conditions, as well as examinations of his eyes and provision of eyeglasses. Under these circumstances, no substantial harm resulted from the delay. *See, e.g., Rylee v. Bureau of Prisons, 2009 U.S. Dist. LEXIS 24609, 2009 WL 633000 (D.S.C. Mar. 9, 2009), appeal dismissed as moot, 343 Fed. Appx. 865, 2009 U.S. App. LEXIS 20352, 2009 WL 2917820 (4th Cir. Sept. 14, 2009)* (no *Eighth Amendment* violation where prison officials delayed cataract surgery but monitored inmate's condition, even though optometrist recommended surgery); *Samonte v. Bauman, 264 Fed. Appx. 634, 635 (9th Cir. 2008)* (delay of more than two years before cataract surgery did not [*15] amount to deliberate indifference where inmate saw doctors to monitor his condition); *Cash v. Sadeghi, 2009 U.S. Dist. LEXIS 26306, 2009 WL 839132 (N.D. Cal. Mar. 30, 2009)* (blurriness and double vision not found to be serious medical need resulting in further significant injury or unnecessary and wanton infliction of pain if untreated); *Williams v. Shelton, 2008 U.S. Dist. LEXIS 54394, 2008 WL 2789031 (D. Or. July 16, 2008)* (delay in cataract surgery did not amount to deliberate indifference even where vision is inhibited, because delay did not cause harm).

C. Delay of the medical care

Plaintiff complains that he did not receive the appropriate medical care until **after** he filed this lawsuit. Such delay, if it does not result in substantial harm, does not render this claim actionable. In *Williams v. Miles, 2009 U.S. Dist. LEXIS 57833, 2009 WL 2044679 (S.D.W.Va. July 7, 2009)*, a prisoner's cataract surgery was delayed until after the complaint was filed. One doctor recommended on three occasions that the prisoner have cataract surgery to address dizziness, double vision, and poor depth perception. Although plaintiff was seen medically during that period, no surgery was provided until after the lawsuit was filed. *2009 U.S. Dist. LEXIS 57833, [WL] at *2*. The court found that no serious harm resulted from [*16] the delay, and deliberate indifference could not be established. The court noted that "disagreements between an inmate and a physician over the inmate's proper medical care do not state a *§ 1983* claim unless exceptional circumstances are alleged." *2009 U.S. Dist. LEXIS 57833, [WL] at *1*, citing *Wright v. Collins, 766 F.2d 841, 849 (4th Cir 1985)*. The right to treatment is "limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical *necessity* and not simply that which may be considered merely *desirable." Id.*, citing *Bowring v. Godwin, 551 F.2d 44, 47-48 (4th Cir. 1977)*.

The Court also notes the case of *Smith v. Kelly*, 2006 WL 3469610 (S.D. Miss. 2006). In that case, the plaintiff complained that a doctor had recommended that one of his eyes should be removed but that the prison would not allow the surgery. The court directed that medical records be obtained for review. In response to that Order, the defendants notified the court that the surgery had been scheduled. The surgery was successfully performed during the pendency of the lawsuit. Thereafter, concluding that appropriate medical care had been rendered, Judge Sumner dismissed the complaint with prejudice. [*17] *Id.* at *1-2. The case does not become actionable simply because a prison defendant went forward with the medical care the prisoner plaintiff desired.

In *Rylee v. United States Bureau of Prisons, 343 Fed. Appx. 865, 2009 U.S. App. LEXIS 20352 , 2009 WL 2917820 (4th Cir. Sept. 14, 2009)*, a federal inmate filed a *Bivens* claim, alleging deliberate indifference to his serious medical need for cataract surgery. The district court dismissed his complaint, and he appealed. During the appeal, the prisoner underwent cataract surgery. For that reason, the Fourth Circuit Court of Appeals dismissed his appeal, holding that the controversy must be present at all stages of review. "When a case becomes

moot after judgment in the district court, the appellate court has no jurisdiction to hear the appeal." *2009 U.S. App. LEXIS 20352 , [WL] at *1.*

Although the facts in *Rylee* are not directly on point, the Court finds its holding to be instructive under the present circumstances. The issues regarding the medical care for Plaintiff's cataracts are now moot. Defendants cannot be "punished" for providing Plaintiff the care he desired.

D. Supervisory Liability

There are insufficient facts stated by Plaintiff to sustain a claim of supervisory liability under *section 1983* against Commissioner [*18] Epps or against Warden Caskey. There is no vicarious liability under *section 1983. Monell v. Department of Social Services, 436 U.S. 658, 691-95, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).* Fifth Circuit precedent requires either **personal involvement by an individual Defendant** in the alleged violation, or the **enforcement of some policy or practice resulting in the constitutional deprivation.** *Champagne v. Jefferson Parish Sheriff's Office, 188 F.3d 312, 314 (5th Cir. 1999); Stewart v. Murphy, 174 F.3d 530, 536-37 (5th Cir. 1999); Alton v. Texas A & M University, 168 F.3d 196, 200 (5th Cir. 1999).* Neither Defendant Epps or Warden Caskey were personally involved in the health care of Plaintiff. Warden Caskey has submitted an affidavit setting forth his responsibilities and duties as Senior Warden of EMCF. Exhibit 4. He asserts that he has never denied Plaintiff medical care because only the medical staff makes decisions regarding inmates' medical care. The policy of EMCF was to delegate the medical care of inmates to the fully operational medical clinic and infirmary. The Court takes judicial notice of the fact that Commissioner Epps delegates the health care of prisoners to the facilities housing the inmates. Under these [*19] circumstances, no individuality liability could be established against either Defendants Epps or Caskey.

V. Conclusion

For the reasons set forth herein, the Court finds that there are no genuine issues of material fact; that Defendants' motion is meritorious and should be granted; and, that Final Judgment in favor of all Defendants should be entered. This lawsuit shall not count as a strike against Plaintiff, as the Court finds it to be nonfrivolous.

THEREFORE, it is hereby ordered that Defendants' Motion for Summary Judgment, as supplemented is GRANTED, that this case is dismissed with prejudice, and a Final Judgment in favor of Defendants shall be entered on this date.

IT IS SO ORDERED, this the 28th day of September, 2009.

/s/ Linda R. Anderson

UNITED STATES MAGISTRATE JUDGE