

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MICHAEL T. HYSON,)
)
)
 Plaintiff,)
)
 v.) C.A. No. 02-318-SLR
)
 CORRECTIONAL MEDICAL SERVICES,)
 ROBERT HAMPTON, RN DON,)
 DR. CANCINO and DR. RIZWAN)
)
 Defendants.)

Michael T. Hyson, Delaware Correction Center, Smyrna, Delaware.
Pro se Plaintiff.

Kevin J. Connors, Esquire, Marshall, Dennehey, Warner, Coleman &
Goggin, Wilmington, Delaware. Counsel for Defendants.

MEMORANDUM OPINION

Dated: April 5, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On April 30, 2002, Michael T. Hyson, a pro se plaintiff proceeding in forma pauperis, filed the present action pursuant to 42 U.S.C. 1983 against defendants Correctional Medical Services ("CMS"), Robert Hampton, RN DON ("Nurse Hampton"), Dr. Josefina Cancino, and Dr. Mohammad Rizwan. (D.I. 1) Plaintiff complains that the defendants failed to provide adequate medical treatment in violation of the Eighth Amendment.¹ (Id.) As relief, plaintiff seeks medical treatment from an outside orthopedic surgeon, medical costs, and pain and suffering. (Id.) Plaintiff also seeks to be relocated from the top bunk in his prison cell to a bottom bunk. CMS, Nurse Hampton, and Dr. Cancino answered the complaint on March 25, 2003 and May 5, 2003, respectively.² They denied all allegations and asserted numerous

¹Plaintiff filed a motion to correct his civil suit or withdraw without prejudice in order to change his asserted cause of action from negligence to deliberate indifference. (See D.I. 63 at ¶ 7). The court is obligated to construe the complaint liberally where plaintiff is a pro se litigant. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Gibbs v. Roman, 116 F.3d 83, 86 n.6 (3d Cir. 1997); Urrutia v. Harrisburg County Police Dep't., 91 F.3d 451, 456 (3d Cir. 1996). The court, therefore, understood plaintiff's cause of action to be premised on inadequate medical treatment in violation of the Eighth Amendment, despite plaintiff's use of the words "negligence" in the complaint and "deliberate indifference" in the motion at bar. The court, consequently, denies plaintiff's motion to correct his civil suit or withdraw without prejudice as moot.

²Although the U.S. Marshal's Office attempted to serve the instant complaint on Dr. Rizwan, service was not completed because the U.S. Marshal's Office presumably was unable to locate Dr. Rizwan at his last known address. (D.I. 40) The

affirmative defenses. (D.I. 41, 46)

CMS is a private corporation that provided medical care for the inmates at Delaware Correctional Center from July 1, 2000 until June 30, 2002. (D.I. 61 at ¶ 3) Nurse Hampton was a registered nurse employed by CMS. Dr. Cancino and Dr. Rizwan were physicians employed by CMS. (Id.) The court has jurisdiction over the instant suit pursuant to 28 U.S.C. § 1331.

Presently before the court are CMS's, Nurse Hampton's, and Dr. Cancino's motion for summary judgment and Dr. Rizwan's motion to dismiss the complaint for insufficiency of service.³ (D.I. 61, 63) For the reasons that follow, the court grants the motion for summary judgment and grants Dr. Rizwan's motion to dismiss.

II. BACKGROUND

Plaintiff is currently incarcerated in the Delaware Correctional Center. Plaintiff alleges that sometime in February 2001 he slipped in the stairwell of his unit and injured his left foot and ankle. (D.I. 2) Dr. Cancino treated plaintiff following the fall. Plaintiff's foot/ankle were x-rayed three days later. The x-ray did not show any visible injury. (Id.) Plaintiff claims, nevertheless, that he continued to experience

court reaches this conclusion based on the fact that the U.S. Marshal's Office did not file a "Process Receipt and Return" form as to Dr. Rizwan, but did so for the other defendants in suit. (See D.I. 34, 42, 43) Dr. Rizwan did not answer the complaint.

³Plaintiff did not file an answer brief to either the motion for summary judgment or the motion to dismiss.

pain. (Id.) On December 10, 2001, Dr. Rizwan examined plaintiff concerning his alleged foot/ankle injury. (Id.) He ordered a second x-ray, which was taken on December 14, 2001. This x-ray, like the first one, did not show any evidence of a fracture or subluxation.⁴ (D.I. 61, ex. D) On January 9, 2002, Dr. Cancino again examined plaintiff's foot/ankle, prescribed Tylenol three times a day for one month for pain, and referred plaintiff to Dr. Ivers for treatment of a ganglion cyst.⁵ (D.I. 61, ex. B)

Plaintiff filed two grievances on December 12, 2001 and February 24, 2002, respectively, regarding the medical care he received for his alleged foot/ankle injury. (Id.) In response to each, Nurse Hampton recommended that plaintiff purchase Advil for pain and consider a leave of absence from work.⁶ (Id.)

⁴In particular, the radiological report stated: "Frontal, oblique and lateral views of the left foot revealed no evidence of fracture or subluxation. The joint spaces are preserved. There is no erosive change, focal osteolytic process or periosteal elevation. No soft tissue calcification or radioplaque foreign body was noted." (D.I. 61, ex. D)

⁵Plaintiff was scheduled for a treatment appointment with Dr. Ivers on February 25, 2002. (D.I. 61, ex. D) Plaintiff did not appear for this appointment.

⁶At the time of plaintiff's alleged injury, he worked as a cook in the prison kitchen. (D.I. 49 at ¶ 15) Plaintiff eventually transferred to the prison wood shop because he claimed to have difficulty standing due to the severity of his foot/ankle pain. (Id. at ¶ 18) In the wood shop, plaintiff was able to sit while working.

III. STANDARD OF REVIEW

A court shall grant summary judgment only 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 judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted).

If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be

sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In other words, the court must grant summary judgment if the party responding to the motion fails to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. Omnipoint Comm. Enters., L.P. v. Newtown Township, 219 F.3d 240, 242 (3rd Cir. 2000) (quoting Celotex, 477 U.S. at 323)

IV. DISCUSSION

A. CMS's Motion for Summary Judgment on Respondeat Superior Liability Grounds

CMS contends that it cannot be held liable for the activities of its employees, Nurse Hampton, Dr. Cancino, and Dr. Rizwan, based upon the doctrine of respondeat superior. (D.I. 61 at ¶ 7) The court agrees. "A defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior." Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988) (citations omitted); Monell v. Dep't. of Social Servs., 436 U.S. 658 (1978); see Swan v. Daniels, 923 F. Supp. 626, 633 (D.

Del. 1995) (applying principle to liability of private corporations that provide medical services for the State of Delaware). Personal involvement can be established through allegations of either personal direction or actual knowledge and acquiescence; however, such allegations must be made with particularity. See Rode, 845 F.2d at 1207. Plaintiff has offered insufficient evidence to show that CMS had personal involvement. In his complaint, plaintiff only mentions interactions with CMS employees, namely, Nurse Hampton, Dr. Cancino, and Dr. Rizwan. Plaintiff does not state that he engaged in any form of communication with managerial representatives from CMS concerning the alleged constitutional violations. Since his complaint, plaintiff likewise has not offered any evidence to suggest that he discussed his foot/ankle injury with CMS management. The court, therefore, concludes that CMS cannot be held liable under the theory of respondeat superior. Accordingly, the court grants CMS's motion for summary judgment on respondeat superior liability grounds.

B. CMS's, Nurse Hampton's, and Dr. Cancino's Motion for Summary Judgment on Estelle Grounds

CMS, Nurse Hampton, and Dr. Cancino allege that they did not violate plaintiff's Eighth Amendment rights by providing inadequate medical treatment. In Estelle v. Gamble, 429 U.S. 97, 102-05 (1976), the Supreme Court held that the Eighth Amendment prohibits the government from being deliberately indifferent to a

prisoner's serious medical needs and that the government has an obligation to provide medical care for people being punished by incarceration. To state a cognizable civil rights claim based on inadequate medical care, a plaintiff "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id. at 106. In other words, a plaintiff must demonstrate: (1) that he had a serious medical need; and (2) that the defendant was aware of this need and was deliberately indifferent to it. See Gov't of the Virgin Islands v. Martinez, 239 F.3d 293, 301-02 (3d Cir. 2001); see also Boring v. Kozakiewicz, 833 F.2d 468, 473 (3d Cir. 1987).

As to the first requirement, the seriousness of a medical need may be demonstrated by showing that the need is "'one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention.'" Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (quoting Pace v. Fauver, 479 F. Supp. 456, 458 (D.N.J. 1979)). Moreover, "where denial or delay causes an inmate to suffer a life-long handicap or permanent loss, the medical need is considered serious." Lanzaro, 834 F.2d at 347.

Turning to the second requirement, either actual intent or recklessness will afford an adequate basis to show deliberate indifference. Estelle, 429 U.S. at 105. In the prison setting,

a prison official's denial of an inmate's reasonable requests for medical treatment constitutes deliberate indifference if such denial subjects the inmate to undue suffering or a threat of tangible residual injury. Lanzaro, 834 F. Supp. at 346. Additionally, deliberate indifference may also be present if necessary medical treatment is delayed for non-medical reasons or if a prison official bars access to a physician capable of evaluating an inmate's need for medical treatment. Id. at 347. However, a prison official's conduct does not constitute deliberate indifference unless it is accompanied by the requisite mental state. Specifically, "the official [must] know . . . of and disregard . . . an excessive risk to inmate health and safety; the official must be both aware of facts from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994).

Mere medical malpractice is insufficient to present a constitutional violation. Estelle, 429 U.S. at 106; Durmer v. O'Carroll, 991 F.2d 64, 67 (3d Cir. 1993). Prison authorities are given extensive liberty in the treatment of prisoners. See Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979); see also White v. Napoleon, 897 F.2d 103, 110 (3d Cir. 1990) ("Certainly no claim is stated when a doctor disagrees with the professional judgment of another doctor. There may, for

example, be several acceptable ways to treat an illness."). Thus, the proper forum for a medical malpractice claim is in state court under the applicable tort law. Estelle, 429 U.S. at 107.

Viewing the facts and all reasonable inferences therefrom in a light most favorable to plaintiff, the court finds that plaintiff has not proffered any support, other than the allegations made in his complaint, to establish either of the two Estelle prongs. Considering the first prong, the undisputed evidence shows that plaintiff does not have a serious need. X-rays were taken of plaintiff's foot/ankle on two occasions across a ten-month time span. Neither revealed any injury. After thoroughly reviewing plaintiff's medical history offered by CMS, Nurse Hampton, and Dr. Cancino in support of their motion for summary judgment, the court finds no documentation to contradict the x-rays. Although the court notes that plaintiff wore insoles in his shoes at one time to alleviate pain and now uses an ankle brace for support, the court is not persuaded that these considerations alone call the x-rays into question. The court, therefore, concludes that plaintiff fails to meet the "serious need" requirement of the first Estelle prong for inadequate medical care.⁷

⁷The court notes that CMS, Nurse Hampton, and Dr. Cancino conceded for purposes of their motion for summary judgment that "plaintiff **may** satisfy the 'serious' medical condition

Regarding the second prong, the court finds that the medical providers were not indifferent to plaintiff's claims of foot/ankle pain. In this regard, neither Dr. Cancino nor Nurse Hampton appear to have the mental state associated with deliberate indifference. Dr. Cancino prescribed medication for plaintiff's pain (i.e., Tylenol three times a day for one month). Dr. Cancino also referred plaintiff to Dr. Ivers for treatment of a ganglion cyst. Dr. Cancino further indicated that this referral was urgent because plaintiff suffered pain. Similarly, Nurse Hampton suggested that plaintiff take Advil for pain and consider a leave of absence from work likely to allow time for any injury that he may have incurred to heal. "Courts will not 'second-guess the propriety or adequacy of a particular course of treatment [which] remains a question of sound professional judgment.'" Ellegood v. Taylor, 2002 WL 449758, *3 (D. Del. 2002) (citations omitted). "Where the plaintiff has received some care, inadequacy or impropriety of the care that was given will not support an Eighth Amendment claim." Norris v. Frame, 585 F.2d 1183, 1186 (3d Cir. 1978) (citing Roach v. Kligman, 412 F. Supp. 521 (E.D. Pa. 1976)). Moreover, the Third Circuit has opined in Singletary v. Pennsylvania Dep't of Corrections, 266 F.3d 186, 193 n.2 (3d Cir. 2001), that unsupported allegations of

requirement of Estelle with regard to his need for an ankle brace." (D.I. 61 at ¶ 11) (emphasis added)

deliberate indifference are insufficient to survive summary judgment. Accordingly, in line with Third Circuit precedent, the court grants CMS's, Nurse Hampton's, and Dr. Cancino's motion for summary judgment.

C. Dr. Rizwan's Motion to Dismiss for Insufficiency of Service of Process

Dr. Rizwan claims that he has never been served with process in this action and moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(5). Without touching upon the merits of this motion, the court finds that the interests of justice favor granting it. The court infers that plaintiff is not interested in pursuing his civil rights claim against Dr. Rizwan since he has not responded to Dr. Rizwan's insufficient service allegations after more than four months. (*See infra*, note 3) Moreover, the court herein has determined that plaintiff fails to show sufficient evidence to establish either of the Estelle prongs for inadequate medical care and, consequently, is unable to survive summary judgment. Therefore, the court grants Dr. Rizwan's motion to dismiss for insufficiency of service of process.

V. CONCLUSION

For the reasons that follow, the court grants CMS's, Nurse Hampton's, and Dr. Cancino's motion for summary judgment, grants Dr. Rizwan's motion to dismiss, and denies plaintiff's motion to correct the civil suit or withdraw without prejudice as moot. An appropriate order shall issue.

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 Plaintiff,)
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 v.) C.A. No. 02-318-SLR
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 CORRECTIONAL MEDICAL SERVICES,)
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 DR. CANCINO and DR. RIZWAN)
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 Defendants.)

O R D E R

At Wilmington this 5th day of April, 2004, having reviewed papers submitted in connection therewith, for the reasons stated;

IT IS ORDERED that:

1. The court grants CMS's, Nurse Hampton's, and Dr. Cancino's motion for summary judgment. (D.I. 61)
2. The court grants Dr. Rizwan's motion to dismiss. (D.I. 62)
3. The court denies plaintiff's motion to correct the civil suit or withdraw without prejudice. (D.I. 63)
4. The Clerk of Court is directed to enter judgment in favor of defendants CMS, Nurse Hampton, Dr. Cancino, and Dr. Rizwan and against plaintiff.

Sue L. Robinson
United States District Judge