

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

MICHAEL J. PARKER, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civ. No. 00-772-SLR  
 )  
 ROBERTA BURNS, M.D., )  
 DOTTIE JOHNS, N.P., )  
 RICK KEARNEY, Warden, )  
 PRISON HEALTH SYSTEMS, INC. )  
 KEITH IVENS and )  
 CORRECTIONAL MEDICAL SERVICES, )  
 )  
 Defendants. )

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Michael J. Parker, Wilmington, Delaware. Plaintiff, Pro Se.

Stuart B. Drowos, Deputy Attorney General, State of Delaware,  
Wilmington, Delaware. Counsel for Defendant Kearney

William L. Doerler, Esquire of White and Williams, LLP,  
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and Prison Health Service, Inc.

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Correctional Medical Services, Inc.

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**MEMORANDUM OPINION**

Dated: March 24, 2004  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

Plaintiff, a pro se plaintiff proceeding in forma pauperis, filed the present action on August 23, 2000 pursuant to 42 U.S.C. § 1983, alleging violations of his Eight Amendment right to adequate medical care arising from treatment he received while in the custody of the Delaware Department of Correction at the Sussex Correctional Institution ("SCI"). (D.I. 2) Defendants to the present action are Rick Kearney, SCI Warden; Prison Health Services, Inc., Roberta Burns, Dorothy Jahn,<sup>1</sup> Keith Ivens (collectively the "PHS Medical defendants"); and Correctional Medical Services ("CMS"). Presently before the court are the motions of defendants to dismiss. (D.I. 37, 38, 41) For the reasons stated below, the court will grant the motions as to defendants Jahn, Kearney, PHS and CMS and will deny the motions as to defendants Burns and Ivens.

**II. BACKGROUND**

On March 21, 2000, plaintiff was involved in a serious automobile accident in which he sustained a fracture of the right acetabulum, a traumatic hemothorax, fracture of his right femoral condyle, rib fractures and a right dorsal wrist laceration. Plaintiff was hospitalized at Christiana Hospital where he was

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<sup>1</sup>The court notes that plaintiff's complaint misspells defendant Jahn's name as "Johns."

placed in the intensive care unit and required a ventilator to breathe. (D.I. 37, ex. A) While hospitalized, plaintiff underwent several surgeries to repair his right femoral condyle, wrist laceration, and fractured acetabulum. Dr. Eric Johnson performed the reconstructive surgery on plaintiff acetabulum. Plaintiff also received psychiatric services for suicidal ideation and substance abuse.

Plaintiff's dismissal instructions prescribed a regular diet, light activities provided that he conduct no weight bearing on his right lower extremity and ambulation with a walker. He was instructed to follow-up with Drs. Fulda, Johnson and Zabel as well as a rational oncologist. Plaintiff was given home physical therapy and fragment injections, as well as prescriptions for Oxycontin and Neurontin. (Id.) Plaintiff also asserts that Dr. Johnson ordered certain follow-up work including plastic reconstructive surgery on April 12, 2000 and physical therapy to begin on April 19, 2000. (D.I. 2 at 4) On April 5, 2000, plaintiff was discharged to the custody of the police.<sup>2</sup>

Plaintiff alleges that defendant Burns denied plaintiff permission to attend his scheduled follow-up visits with outside

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<sup>2</sup>Between April 5, 2000 and August 11, 2000, plaintiff was held as a detainee after which he became an inmate. Plaintiff has, since the filing of the present action, been released from state custody. (D.I. 44)

medical professionals.<sup>3</sup> (Id.) Plaintiff also states that he was denied access to physical therapy and that the substitute medications that he was given, ibuprofen and acetaminophen with codeine, were inadequate to treat his pain. (Id.)

Plaintiff was treated by defendant Jahn, a nurse practitioner, who stated to plaintiff that his condition was due to poor circulation. In May 2000, plaintiff was seen by defendant Ivens to have sutures removed. Plaintiff contends that he informed defendant Ivens of the "negligent level of care by S.C.I. med. dept." (Id. at 4)

On June 23, 2000, it was arranged for plaintiff to be seen by Dr. Francis Drury, an outside orthopedic specialist. Dr. Drury indicated that there was complete post-traumatic degeneration of the right hip, complete deterioration of the femoral head, and an irregular posterior acetabulum. (Id. at 6) Dr. Drury declined to provide follow-up treatment indicating that plaintiff should be treated by the physician who had initially performed the reconstructive surgery. Dr. Drury indicated that plaintiff's hip had deteriorated and opined that he needed a total hip arthroplasty. (Id. at 6-7) Dr. Drury also indicated that the discoloration plaintiff observed in his right leg was

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<sup>3</sup>From the pleadings and the memoranda it is unclear as to the exact position defendant Burns had during the relevant time period. The court infers, however, that Burns was either the chief medical officer or in a similar position of authority to control plaintiff's medical care.

the result of poor circulation which contributed to the deterioration of plaintiff's hip.

On July 19, 2000, plaintiff met with defendants Burns and Ivens who informed plaintiff that Dr. Hershey would examine him and perform the necessary hip surgery. Plaintiff refused that treatment indicating that he wanted to see Dr. Johnson. (Id. at 5)

Plaintiff presently ambulates with the aid of a walker and reports constant severe pain and cramping. (Id.) He contends that, as a result of defendants' conduct, he has become permanently disabled. Plaintiff alleges that defendants acted with "'reckless disregard' and 'deliberate indifference.'" (Id.)

On November 3, 2003, the PHS Medical defendants filed a motion to dismiss for failure to state a claim upon which relief can be granted. (D.I. 37) The Medical defendants assert three basis for dismissal: (1) failure to exhaust administrative remedies as required by 42 U.S.C. § 1997e; (2) plaintiff's claims are barred by the applicable statute of limitations due to his failure to pay court filing fees; and (3) failure to state an Eighth Amendment violation of the right to adequate medical care.

Defendant CMS filed its motion to dismiss (D.I. 38) on November 17, 2003 asserting two grounds for dismissal: (1) failure to exhaust administrative remedies as required by 42 U.S.C. § 1997e; (2) failure to allege conduct by CMS that gives

rise to an Eighth Amendment violation of the right to adequate medical care.

Defendant Kearney filed his motion to dismiss (D.I. 41) on December 10, 2003 asserting four grounds for dismissal: (1) failure to exhaust administrative remedies as required by 42 U.S.C. § 1997e; (2) failure to allege conduct by defendant Kearney that gives rise to an Eighth Amendment violation of the right to adequate medical care; (3) sovereign immunity; and (4) qualified immunity.

### **III. STANDARD OF REVIEW**

Because the parties have referred to matters outside the pleadings, defendants' motions to dismiss shall be treated as motions for summary judgment. See Fed. R. Civ. P. 12(b)(6). 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.” Pa. 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).

#### **IV. DISCUSSION**

##### **A. Prison Litigation Reform Act**

Defendants argue that plaintiff’s claims must be dismissed pursuant to the Prison Litigation Reform Act (“PLRA”), 42 U.S.C.

1997(e).<sup>4</sup> (D.I. 37, 38, 42) Before filing a civil action, a plaintiff-inmate must exhaust his administrative remedies, even if the ultimate relief sought is not available through the administrative process. See Booth v. Churner, 206 F.3d 289, 300 (3d Cir. 2000), cert. granted, 531 U.S. 956 (2000), aff'd, 121 S. Ct. 1819 (2001). See also Ahmed v. Sromovski, 103 F. Supp. 2d 838, 843 (E.D. Pa. 2000) (quoting Nyhuis v. Reno, 204 F.3d 65, 73 (3d Cir. 2000) (stating that § 1997e(a) "specifically mandates that inmate-plaintiffs exhaust their available administrative remedies"). Prison conditions have been held to include the "environment in which prisoners live, the physical conditions of that environment, and the nature of the services provided therein." Booth, 206 F.3d at 295.

SCI has detailed grievance procedures in place which include a specific procedure for medical grievances. (D.I. 37, ex. B) A medical grievance is to be filed first with an inmate grievance chairperson who will log the grievance and then forward the grievance to the medical services contractual staff to attempt an

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<sup>4</sup>The PLRA provides, in pertinent part:

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

42 U.S.C. § 1997e(a).

informal resolution. If the grievance is resolved informally, the prisoner's signature is obtained on a form indicating the matter has been resolved. If the grievance is not resolved at the informal resolution level, the next step is a medical grievance committee hearing. Finally, a prisoner may appeal that decision to the Bureau Chief of Prisons. Throughout the grievance process, records are to be kept of the grievance and any resolution thereof.

In the case at bar, an affidavit has been filed attesting that no records exist of a grievance having been filed by plaintiff during the time periods relevant to this action related to his medical treatment. (D.I. 51 at ex. C) Plaintiff alleges that he followed "proper chanel[sic] and procedures, i.e. grievances accompanied by certified letters to the (warden) Rick Kearney. To no avail." (D.I. 2 at 4) In plaintiff's memorandum he indicates that he filed grievances which were heard by a "Lt. Brenda Brasure."<sup>5</sup> (D.I. 44 at 2) Plaintiff indicates that he was told that she "could not do anything so plaintiff [would be] put on a list to go in front of the grievance committee." (Id.) Plaintiff contends that he also sent letters to defendant Kearney and Susan Rickers to follow up on his grievances. (Id.) The court concludes that there is a genuine issue of material fact as

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<sup>5</sup>For purposes of this motion, the court will infer that Lt. Brasure was the Inmate Grievance Chairperson to whom plaintiff should have directed his grievance.

to whether plaintiff exhausted his administrative remedies.

**B. Defendant Kearney**

Plaintiff has named Warden Kearney as a defendant in the present action but has not alleged any actual conduct by defendant Kearney that might form the basis for an Eighth Amendment violation of plaintiff's right to adequate medical care. Plaintiff has not alleged that defendant Kearney was directly involved with the medical care administered and defendant Kearney may not be held liable for actions of the medical provider, its employees or contractors. See Monell v. Dept. Of Social Serv., 436 U.S. 658, 694 (1979) (holding that respondeat superior may not be asserted in a § 1983 action). Moreover, a warden can not be considered deliberately indifferent under Eighth Amendment standards for failing to respond to a prisoner's medical complaints when the prisoner is under the care of a prison doctor. See Durmer v. O'Carroll, 991 F. 2d 64 (3d Cir. 1993). Consequently, the court concludes that plaintiff has failed to state a § 1983 claim against defendant Kearney and the case will be dismissed as to that defendant.<sup>6</sup>

**D. Statute of Limitations**

The PHS Medical defendants raise a novel issue that

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<sup>6</sup>Having concluded that the complaint should be dismissed as to defendant Kearney on these grounds, it is not necessary for the court to consider whether the various immunity doctrines raised by defendant apply.

plaintiff's complaint has not been properly filed because plaintiff has not complied with the court's August 23, 2000 filing fee assessment. On August 23, 2000 the court granted plaintiff leave to proceed in forma pauperis and assessed a \$150 filing fee. (D.I. 1) The court required that plaintiff pay twenty percent of the average monthly balance in plaintiff's prison trust account pursuant to 28 U.S.C. 1915(b). Plaintiff paid his first installment of \$4.74 on September 18, 2000. No further payments have been received by the court. Nevertheless, there is no basis in law for defendants' contention that a balance owed on a filing fee can serve as a basis for an opposing party's motion to dismiss.<sup>7</sup>

#### **E. Right to Adequate Medical Care**

The facts forming the basis for plaintiff's complaint arose between April 5, 2000 and July 19, 2000, during which time plaintiff was a pre-trial detainee. Where a pre-trial detainee alleges a denial of adequate medical care, the court's analysis must proceed under the Fourteenth Amendment rather than the Eighth Amendment. See Inmates of Allegheny County Jail v.

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<sup>7</sup>The case cited by defendants actually compels the opposite conclusion. See Redmond v. Gill, No. 03-1806 (3d Cir. Dec. 11, 2003). In Redmond, the Third Circuit overturned the district court's dismissal without prejudice of a pro se plaintiff proceeding in forma pauperis, holding that district courts may provide a reasonable time for plaintiffs to comply with procedural requirements. Id. at 3-4. In the present case, while plaintiff has not made further payments toward the filing fee, there is no evidence that he has had the ability to do so.

Pierce, 612 F.2d 754, 762 (3d Cir. 1979). The Third Circuit instructs that the appropriate test remains the Estelle v. Gamble deliberate indifference standard. See id. (citing Estelle v. Gamble, 429 U.S. 97 (1976)).

Under Estelle, a plaintiff "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976); accord White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990). A plaintiff must demonstrate: (1) that he had a serious medical need; and (2) that the defendants were aware of this need and were deliberately indifferent to it. See West v. Keve, 571 F.2d 158, 161 (3d Cir. 1978); see also Boring v. Kozakiewicz, 833 F.2d 468, 473 (3d Cir. 1987). Either actual intent or recklessness will afford an adequate basis to show deliberate indifference. See Estelle, 429 U.S. at 105.

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." Id.

As to the second requirement, an 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. Id. at 346. Deliberate indifference may also be present if necessary medical treatment is delayed for non-medical reasons, or if an official bars access to a physician capable of evaluating a prisoner's need for medical treatment. Id. at 347. However, an 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). While a plaintiff must allege that the official was subjectively aware of the requisite risk, he may demonstrate that the official had knowledge of the risk through circumstantial evidence and "a fact finder may conclude that a[n] . . . official knew of a substantial risk from the very fact that the risk was obvious." Id. at 842.

The law is clear that mere medical malpractice is insufficient to present a constitutional violation. See 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, 897 F.2d at 110 (“[C]ertainly 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.”).

The essence of plaintiff’s claim is that between April 5, 2000 and July 19, 2000, he was denied the medical treatment prescribed by his pre-detention physicians.<sup>8</sup> Plaintiff alleges that defendants were in possession of his medical records, were aware of his physicians’ instructions, but denied him the right to follow through with those instructions. Plaintiff contends that this denial resulted in unnecessary pain, suffering, and contributed to a deterioration in his physical condition. In Durmer, the Third Circuit concluded that a delay in providing medical treatment may give rise to liability under § 1983 where the medical provider has knowledge of the prisoner’s condition, the recommendations of pre-incarceration treating physicians and the need for medical attention, but deliberately for non-medical reasons delays access to treatment. 991 F.2d at 68. In the present case, as in Durmer, the issue is not simply one of

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<sup>8</sup>July 19, 2000 is the latest date for which conduct giving rise to liability might have occurred as it was on that date that plaintiff refused the medical treatment offered by defendants.

medical negligence but whether defendants were aware of a serious medical need and deliberately ignored that need.<sup>9</sup>

With that in mind, however, plaintiff has not alleged facts which support a claim against each of the named defendants. First, plaintiff has alleged no facts which would suggest that defendant Jahn was responsible for denying him access to medical attention. At most, plaintiff has alleged that defendant Jahn was aware of his condition. Jahn was a nurse practitioner that apparently treated plaintiff on at least one occasion. Plaintiff has not alleged that Jahn had discretion to approve his surgical, pharmacological, or physical therapy needs. Consequently, the complaint will be dismissed as to defendant Jahn.

With respect to defendants CMS and PHS, plaintiff has failed to allege any facts which give rise to § 1983 liability. A private corporation is only liable under § 1983 if it has a policy or custom which demonstrates deliberate indifference. See Miller v. Correctional Medical Services, Inc., 802 F. Supp. 1126 (D. Del. 1992). Vicarious liability as a result of a contract to provide medical services is not available under § 1983. See Monell, 436 U.S. at 692. Plaintiff has not alleged that his injuries were sustained as a result of a policy or custom of

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<sup>9</sup>To be clear, plaintiff does not have a constitutionally protected right to be treated by the physician of his choosing. Nor would defendants be liable solely on the basis that plaintiff was prevented from attending the follow-up visits scheduled prior to his incarceration.

either CMS or PHS. Consequently, as to defendants CMS and PHS the complaint will be dismissed.

With respect to defendants Burns and Ivens, plaintiff has alleged sufficient facts to withstand dismissal and summary judgment at this point. Burns and Ivens, as treating physicians, may be liable under § 1983 if they denied plaintiff access to medical treatment and did so with deliberate indifference to a serious medical condition. Consequently, the court finds that there are genuine issues of material fact as to the following: (1) whether defendants had knowledge of plaintiff's condition; (2) whether defendants, with the requisite intent, unreasonably denied plaintiff access to medical treatment; and (3) whether defendants' conduct was the proximate cause of further injury to plaintiff. Therefore, defendants' motion to dismiss as to defendant Burns and Ivens will be denied.

#### **V. CONCLUSION**

For the reasons stated above, the motions of defendants will be granted in part and denied in part. An order consistent with this opinion shall issue.

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 PRISON HEALTH SYSTEMS, INC. )  
 KEITH IVENS and )  
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 )  
 Defendants. )

**O R D E R**

At Wilmington, this 24<sup>th</sup> day of March, 2004, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. The joint motion of defendants Burns, Ivens, Johns and Prison Health Systems, Inc. to dismiss the complaint is **granted** with respect to defendants Jahn and Prison Health Systems, Inc. and **denied** with respect to defendants Burns and Ivens. (D.I. 37)

2. The motion of defendant Correctional Medical Services, Inc. to dismiss the complaint is **granted**. (D.I. 38)

3. The motion of defendant Kearney to dismiss the complaint is **granted**. (D.I. 41)

4. **Answer Deadline.** Defendants Burns and Ivens shall file

answers to the complaint by **April 19, 2004**.

5. **Discovery.** All discovery in this case shall be initiated so that it will be completed on or before **June 22, 2004**.

6. **Application by Motion.** Any application to the court shall be by written motion filed with the Clerk. Unless otherwise requested by the court, the parties shall **not** deliver copies of papers or correspondence to chambers.

7. **Summary Judgment Motions.** All summary judgment motions and an opening brief and affidavits, if any, in support of the motion, shall be served and filed on or before **July 22, 2004**. Answering briefs and affidavits, if any, shall be filed on or before **August 5, 2004**. Reply briefs shall be filed on or before **August 16, 2004**.

Sue L. Robinson  
United States District Judge