IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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| KENNETH DEPUTY, | ) | |
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| Plaintiff, | ) | C.A. No. 07C-01-202 MMJ |
| | ) | |
| v. | ) | |
| | ) | |
| DR. CONLON, JAMES WELCH and THOMAS CARROLL, | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

Submitted: January 28, 2011
Decided: March 14, 2011

**MEMORANDUM OPINION**

On Plaintiff's Motion for Reargument
**DENIED**

Kenneth T. Deputy, *Pro Se*, Plaintiff

Catherine Damavandi, Esquire, Department of Justice, Wilmington, Delaware, Attorney for Defendants.

**JOHNSTON, J.**

## FACTUAL AND PROCEDURAL CONTEXT

In October 2001, plaintiff Kenneth Deputy, a Delaware Correctional Center ("DCC") inmate, injured his left shoulder while playing basketball. For the next several years, Correctional Medical Services ("CMS") treated or contracted outside treatment for plaintiff.

- Two months after plaintiff's injury, CMS administered x-rays that revealed no fracture or dislocation. A CMS physician diagnosed plaintiff with a "probable strain," prescribed ibuprofen, recommended therapeutic exercises, and advised plaintiff to cease strenuous physical activity. Nonetheless, plaintiff regularly played basketball and did push-ups.
- On October 30, 2002, Kent General Hospital Diagnostic Imaging Department administered an MRI, revealing no abnormality.
- On March 25, 2005, Mid-Delaware Imaging administered an MRI, diagnosing plaintiff with tendonitis and a partial tendon tear.
- On May 26, 2006, Dr. R. P. DuShuttle, a board certified orthopaedic surgeon not employed by CMS, ordered an "R/O" (rule out) MRI as to the existence of a complete tear. The results revealed a partial tear, and thus, a complete tear was ruled out.

On October 21, 2009, Dr. DuShuttle advised, by letter, that, because plaintiff did not suffer a complete tear, surgery is an "elective" procedure. Plaintiff claims, however, that Dr. DuShuttle "explained . . . that he would have to have surgery or live with the pain . . . failure to have surgery done could result in complete rupture of rotator [sic] and pain medications would not combat pain." Plaintiff alleges that he "agreed to have the surgery, which the doctor recommended." Plaintiff petitioned CMS to authorize the surgery to no avail. CMS has administered cortisone injections in plaintiff's shoulder.

On January 18, 2007, plaintiff brought suit against defendants, DCC officials, claiming that he received inadequate care and defendants acted with "deliberate indifference" towards his injury. On August 21, 2009, plaintiff filed a motion for summary judgment.

On September 23, 2010, the Court issued its opinion denying plaintiff's motion. To succeed with a deliberate indifference claim, plaintiff had to show: (1) from an objective standpoint, his medical need is sufficiently serious;[1] and (2) the prison official had the culpable state of mind of "deliberate indifference" towards the plaintiff's health.[2] A medical

[1] *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).
[2] *Farmer*, 511 U.S. at 834; Wilson, 501 U.S. at 297.

need is sufficiently serious if a physician diagnoses it as requiring treatment, or the injury is so obvious that a layperson could identify it as requiring medical attention.[3] "Deliberate indifference" requires that a prison 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."[4] Choosing a treatment plan other than what has been requested by an inmate, however, does not amount to deliberate indifference, provided that the treatment plan is reasonable.[5]

The Court found that plaintiff's injury is sufficiently serious as a matter of law. It is undisputed that a physician diagnosed plaintiff's injury as requiring treatment.[6] However, the Court found that genuine issues of material fact regarding whether defendants acted with "deliberate indifference" precluded summary judgment. Viewing the facts in the light most favorable to defendants, it appeared that they believed that surgery was elective based on Dr. DuShuttle's October 21, 2009 letter. Further, the Court found that genuine issues of material fact exist as to the

[3] *Hyson v. Correctional Med. Serv.'s*, 2004 WL 769362, at *3 (D. Del.); *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987).
[4] *Farmer*, 511 U.S. at 837.
[5] *Diaz v. Carroll*, 570 F.Supp.2d 571, 578 (D. Del. 2008) (citing *Harrison v. Barkley*, 219 F.3d 132, 138-40 (2d Cir. 2000)); *see also Stiltner v. Rhay*, 371 F.3d 420, 421 (9th Cir. 1967) (Prison officials have "wide discretion" in providing medical treatment to inmates.).
[6] *See, e.g., Hyson v. Correctional Med. Serv.'s*, 2004 WL 769362, at *3 (D. Del.).

reasonableness of plaintiff's medical treatment. The Court denied plaintiff's Motion for Summary Judgment.

On September 30, 2010, plaintiff filed a Motion for Reargument. Plaintiff contends that CMS's medical treatment—the x-ray, MRIs, ibuprofen, and cortisone shot—afforded no relief. Plaintiff asserts that he received a *single* cortisone injection. The Court, however, in its opinion, stated that CMS administered more than one. Accordingly, plaintiff argues, the Court misapprehended the law and the facts, and his motion for reargument should be granted.[7]

## DISCUSSION

### *Standard of Review*

On a motion for reargument, "the only issue is whether the court overlooked something that would have changed the outcome of the underlying decision."[8] The Court generally will deny the motion unless a party demonstrates that the Court has overlooked a controlling precedent or principle of law, or unless the Court has misapprehended the law or facts in

[7] Plaintiff also argues that the Court erred by noting that on December 17, 2008, defendants moved to dismiss plaintiff's claims as factually and legally frivolous. Plaintiff contends that defendants moved to dismiss his claims based on res *judicata*. The Court finds that its characterization of defendants' December 17, 2008 motion to dismiss has no bearing on plaintiff's August 21, 2009 motion for summary judgment. In fact, the Court denied that motion to dismiss as to plaintiff's "deliberate indifference" claim, allowing plaintiff to presently pursue the claim.

[8] *McElroy v. Shell Petroleum, Inc.*, 618 A.2d 91, 91 (Del. 1992).

a manner that affects the outcome of the decision.[9] A motion for reargument is not intended to rehash the arguments that already have been decided by the Court.[10]

***Analysis***

The Court did not overlook plaintiff's assertions that CMS's medical treatment afforded him no relief. The Court considered that CMS administered x-rays, MRIs, ibuprofen, and cortisone shots. The Court found that genuine issues of material fact existed as to whether defendants provided reasonable medical treatment, precluding summary judgment.

As to the number of cortisone injections plaintiff received, in his motion for summary judgment, plaintiff explained that CMS "began to inject [his] torn rotator cuff with steroid cortisone *cocktails*" (emphasis added). Plaintiff now asserts that CMS administered a single cortisone injection. The Court finds that it did not misapprehend or overlook the facts as they were presented. Assuming, *arguendo*, that plaintiff received one cortisone injection, it does not affect the outcome of the decision. Genuine issues of material fact remain. The Court cannot find that plaintiff's medical treatment was unreasonable as a matter of law if, as plaintiff now asserts, CMS administered one cortisone injection.

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[9] *Cummings v. Jimmy's Grille, Inc.*, 2000 WL 1211167, at *2 (Del. Super.)
[10] *McElroy*, 618 A.2d at 91.

## CONCLUSION

Plaintiff has failed to demonstrate that the Court overlooked a controlling precedent or legal principle, or misapprehended the law or facts in a manner that would affect the outcome of the decision.

**THEREFORE**, Plaintiff's Motion for Reargument of the Court's September 23, 2010 Decision Denying Plaintiff's Motion for Summary Judgment is hereby **DENIED.**

**IT IS SO ORDERED**.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston