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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANCISCO CASTANEDA,
Plaintiff,
v.
THE UNITED STATES OF
AMERICA, ~~CALIFORNIA~~, ~~GEORGE~~
MOLINAR, in his individual
capacity, ~~CHRIS HENNEFORD~~,
in his individual capacity,
~~JEFF BRINKLEY~~, in his
individual capacity, ~~GENE~~
~~MIGLIACCIO~~, in his
individual capacity, ~~TIMOTHY~~
~~SHACK~~, M.D., in his
individual capacity, ~~ESTHER~~
~~HUI~~, M.D., in her individual
capacity, ~~STEPHEN GONSALVES~~,
in his individual capacity,
~~CLAUDIA MAZUR~~, in her
individual capacity, ~~DANIEL~~
~~HUNTING~~, M.D. ,
Defendants.

Case No. CV 07-07241 DDP (JCx)
**ORDER DENYING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

[Motion filed on 8/11/2010]

Presently before the court is Defendant Robert Mekemson ("Dr. Mekemson") and Susan Pasha ("Nurse Pasha")'s Motion for Summary Judgment.¹ After reviewing the parties' moving papers and hearing

¹ This order refers to Dr. Mekemson and Nurse Pasha, the
(continued...)

1 argument, the court denies the motion and adopts the following
2 order.

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4 **I. Background**

5 The facts of this case, involving allegations of
6 constitutional violations under the Eighth Amendment, are known to
7 the parties and are more fully described in this court's previous
8 orders. Accordingly, the court will only explain the facts here as
9 necessary.

10 In December 2005, Francisco Castaneda ("Castaneda") was
11 incarcerated at the North Kern State Prison. During a medical
12 screening on December 8, 2005, Dr. Andrew Leong found a lesion on
13 Castaneda's penis. Dr. Leong recommended that Castaneda see a
14 urologist and obtain a circumcision. On December 27, Dr. Leong
15 observed discolorations on Castaneda's penis, a constriction of the
16 foreskin, and a foul smell. Dr. Leong filled out a "Physician
17 Request for Services form." On the form, Dr. Leong wrote "rule out
18 squamous cell [carcinoma]" and requested that Castaneda consult
19 with a urologist. Dr. Leong requested the consultation "ASAP - 1 -
20 2 weeks" and marked the request as "Routine."

21 Roughly two weeks later, on January 11, 2006, Dr. Mekemson, in
22 his capacity as Chief Medical Officer of the North Kern State
23 Prison, reviewed Dr. Leong's request. Dr. Mekemson observed that
24 Castaneda was scheduled to be transferred to a different facility
25 the following day, January 12. Dr. Mekemson believed that

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28 ¹(...continued)
moving parties here, collectively as "Defendants."

1 Castaneda would receive a medical screening at the new facility,
2 and therefore denied the request for a urology consultation.

3 Nurse Pasha examined Castaneda on February 7, 2006. Nurse
4 Pasha observed a raised, white-yellow lesion on Castaneda's penis.
5 Nurse Pasha filled out a Physician Request for Services Form. On
6 the form, Nurse Pasha wrote, "Rule out squamous cell [carcinoma]."
7 Nurse Pasha requested a urology consultation, marked the request
8 "Urgent," and noted that Castaneda should make a follow-up visit in
9 one month. One month later, on March 7, Castaneda had not yet
10 received a urology consultation. Nurse Pasha again planned to
11 follow up after one month. Castaneda was scheduled for a urology
12 consultation on March 29, 2006, but was released into federal
13 custody on March 26, 2006, three days before his urology
14 appointment. Castaneda died of aggressive penile cancer in
15 February 2008.

16 Plaintiffs allege that Dr. Mekemson and Nurse Pasha were
17 deliberately indifferent to Castaneda's medical needs, in violation
18 of the Eighth Amendment. Plaintiffs also bring a wrongful death
19 claim under California State Law. Dr. Mekemson and Nurse Pasha now
20 move for summary judgment.

21 **II. Legal Standard**

22 A motion for summary judgment must be granted when "the
23 pleadings, depositions, answers to interrogatories, and admissions
24 on file, together with the affidavits, if any, show that there is
25 no genuine issue as to any material fact and that the moving party
26 is entitled to a judgment as a matter of law." Fed. R. Civ. P.
27 56(c). A party seeking summary judgment bears the initial burden
28 of informing the court of the basis for its motion and of

1 identifying those portions of the pleadings and discovery responses
2 that demonstrate the absence of a genuine issue of material fact.
3 See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

4 Where the moving party will have the burden of proof on an
5 issue at trial, the movant must affirmatively demonstrate that no
6 reasonable trier of fact could find other than for the moving
7 party. On an issue as to which the nonmoving party will have the
8 burden of proof, however, the movant can prevail merely by pointing
9 out that there is an absence of evidence to support the nonmoving
10 party's case. See id. If the moving party meets its initial
11 burden, the non-moving party must set forth, by affidavit or as
12 otherwise provided in Rule 56, "specific facts showing that
13 there is a genuine issue for trial." Anderson v. Liberty Lobby,
14 Inc., 477 U.S. 242, 250 (1986).

15 It is not the Court's task "to scour the record in search of a
16 genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275,
17 1278 (9th Cir. 1996). Counsel have an obligation to lay out their
18 support clearly. Carmen v. San Francisco Sch. Dist., 237 F.3d 1026,
19 1031 (9th Cir. 2001). The Court "need not examine the entire file
20 for evidence establishing a genuine issue of fact, where the
21 evidence is not set forth in the opposition papers with adequate
22 references so that it could conveniently be found." Id.

23 **III. Discussion**

24 *A. 8th Amendment Claim*

25 "[D]eliberate indifference to serious medical needs of
26 prisoners constitutes the unnecessary and wanton infliction of pain
27 proscribed by the Eighth Amendment." Estelle v. Gamble, 429 U.S.
28 97, 104 (1976) (internal quotation and citation omitted). Mere

1 malpractice, however, is not enough to constitute an Eighth
2 Amendment violation. "In order to state a cognizable claim, a
3 prisoner must allege acts or omissions sufficiently harmful to
4 evidence deliberate indifference to serious medical needs." Id. at
5 106. A plaintiff alleging deliberate indifference must show a
6 "serious medical need, indifference to that need, and harm caused
7 by that indifference." Conn v. City of Reno, 591 F.3d 1081, 1095
8 (9th Cir. 2010). Indifference requires that defendants were
9 subjectively aware of a serious medical need and "purposefully
10 acted or failed to adequately respond" to that need. Id. at 1095-
11 96.

12 Defendants argue that their conduct does not, as a matter of
13 law, give rise to a claim of deliberate indifference. This court,
14 however, must construe the facts in the light most favorable to the
15 plaintiff. The evidence, so construed, is adequate to support an
16 8th Amendment claim.

17 The parties do not dispute that Castaneda had a serious
18 medical need. There is evidence that Defendants were subjectively
19 aware of that need. Dr. Mekemson knew that Castaneda had a penile
20 lesion and constriction of the foreskin, that cancer was a possible
21 cause of those symptoms, and that Castaneda needed a urology
22 consultation "ASAP." Whether Dr. Mekemson's denial of treatment,
23 based on his assumption that Castaneda would be screened at another
24 facility, was an "adequate" response to Castaneda's medical need is
25 a question best resolved at trial.

26 There is also evidence that Nurse Pasha was aware of
27 Castaneda's need. She not only was aware of Dr. Leong's earlier
28 assessment, but also made a similar assessment herself, in which

1 she raised the possibility of cancer and suggested an "Urgent"
2 urology consultation. Plaintiffs have presented evidence that
3 Nurse Pasha was required to ensure that Castaneda received the
4 needed treatment, and that she failed to do so. Whether such
5 failure was innocent, negligent, or deliberately indifferent is not
6 an appropriate question for summary judgment.

7 The court also rejects Defendants' claims, abandoned in their
8 reply materials, to qualified immunity. It is well-established
9 that deliberate indifference to a prisoner's serious medical needs
10 constitutes cruel and unusual punishment and violates the 8th
11 Amendment. See, e.g., Estelle, 429 U.S. at 104, Doty v. County of
12 Lassen, 37 F.3d 540, 546 (9th Cir. 1994) ("To establish
13 unconstitutional treatment of a medical condition . . . a prisoner
14 must show deliberate indifference to a 'serious' medical need.").

15 *B. Wrongful Death Claim*

16 1. Causation

17 Defendants point to expert testimony that Castaneda would have
18 died of penile cancer regardless of Defendants' actions. Thus,
19 Defendants argue, Plaintiffs have not satisfied the causation
20 requirement of a wrongful death claim. This argument ignores the
21 Declaration of Dr. Robert Kessler in Opposition to Defendants
22 Mekemson and Pasha's Motion for Summary Judgment. Dr. Kessler
23 states that, but for Dr. Mekemson and Nurse Pasha's actions and
24 failures to act, Castaneda would not have died of penile cancer.
25 Defendants have objected to Dr. Kessler's declaration on grounds
26 that Dr. Kessler did not provide sufficient reasoning to support
27 his opinion.

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1 This court, however, granted Defendants' earlier motion to
2 continue oral argument in this matter, and explicitly granted
3 Defendants permission to depose Dr. Kessler. Defendants have not
4 filed any further objections to Dr. Kessler's declaration, amended
5 their memoranda, or filed supplemental declarations in response to
6 Dr. Kessler's statements. Defendants' objections to Dr. Kessler's
7 statements are therefore overruled. "When a defendant moves for
8 summary judgment and supports his motion with expert declarations
9 that his conduct fell within the community standard of care, he is
10 entitled to summary judgment unless the plaintiff comes forward
11 with conflicting expert evidence." Hutchinson v. United States,
12 838 F.2d 390, 392 (9th Cir. 1988) (emphasis added). Here, the
13 conflict between expert opinions shall be resolved by the finder of
14 fact at trial.

15 2. Subject Matter Jurisdiction

16 This court also rejects Defendants' contention that this court
17 lacks subject matter jurisdiction over Plaintiffs' wrongful death
18 claim. Before a plaintiff can bring an action against a public
19 employee for injury resulting from an act or omission in the scope
20 of public employment, the plaintiff must first file a complaint
21 against the employing public entity. Olden v. Hatchell, 154
22 Cal.App.3d 1032, 1034, 201 Cal.Rptr. 715 (Ct. App. 1984) (citing
23 Cal. Gov't Code §§ 911.2, 945.4, 950, 950.2.) Defendants
24 acknowledge that Castaneda filed the requisite government claim,
25 but argue that Plaintiffs, his heirs, failed to do so within the
26 required time period. As the trial court observed during state
27 proceedings against the public entity, however, the State deterred
28 Plaintiffs from timely filing a claim. The State did not object to

1 amended pleadings adding the heirs as Plaintiffs, and engaged in
2 extensive mediation with Plaintiff-heirs subsequent to Castaneda's
3 death. Defendants are estopped from asserting that Castaneda's
4 heirs failed to timely file a government claim.

5 Defendants argue that this court is without power to apply
6 equitable principles because this court lacks subject matter
7 jurisdiction in the first instance. This argument is misplaced.
8 California Government Code § 946.6 allows courts, in some
9 instances, to grant plaintiffs permission to file late government
10 claims. See Hom v. Chico Unified Sch. Dist., 245 Cal.App.3d 225,
11 338-39, 61 Cal. Rptr 920 (Ct. App. 1967). To obtain judicial
12 permission to file a late claim, a plaintiff must show, among other
13 things, that the claim was made within one year of the accrual of
14 the cause of action. Cal. Gov't Code § 946.6(c). This one-year
15 limit "is a jurisdictional prerequisite to a claim relief
16 petition." Santee v. Santa Clara Office of Educ., 220 Cal.App.3d
17 702, 713, 269 Cal.Rptr. 605 (Ct. App. 1990) (emphasis added).

18 Plaintiffs have not, however, requested judicial leave to file
19 a late claim under Cal. Gov't Code § 946.6. Whether this court has
20 the power to grant such relief is of no moment. California
21 Government Code § 946.6 does not use the word "jurisdiction."
22 Courts are "reluctant to read limitations on jurisdiction into a
23 statutory scheme that does not clearly divest a court of
24 jurisdiction." Adkinson v. Comm'r of Internal Revenue, 592 F.3d
25 1050, 1055 (9th Cir. 2010) (citing Union Pacific R.R. v. Bhd. of
26 Locomotive Eng'r and Trainmen Gen. Comm. of Adjustment, Cent.
27 Region, 130 S.Ct. 584, 596 (2009) (Cautioning that not all
28 mandatory prescriptions are jurisdictional)). This court therefore

1 rejects Defendants' argument that limitations on the court's
2 ability to grant Plaintiffs leave to file a late government claim
3 has the broader effect of depriving the court of subject matter
4 jurisdiction in the first instance.

5 **IV. Conclusion**

6 For the reasons set forth above, the court DENIES the Motion
7 for Summary Judgment.

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IT IS SO ORDERED.

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Dated: January 7, 2011

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DEAN D. PREGERSON

United States District Judge

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