IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

ORDER

Submitted: March 12, 2009
Decided: May 29, 2009

On State Defendants' Motion to Dismiss
GRANTED IN PART; DENIED IN PART

ORDER

Kenneth T. Deputy, Plaintiff, *Pro Se*

Catherine Damavandi, Esquire, Department of Justice, Wilmington, DE, Attorney for State Defendants

JOHNSTON, J.

By Order dated November 19, 2007, this Court reinstated, for further proceedings, plaintiff's claims alleging violations of his 8th and 14th Amendment rights. The Court further ruled:

> The remainder of plaintiff's claims are grounded in medical negligence. Plaintiff's medical negligence claims are barred by his failure to comply with 18 *Del. C.* § 6853 (Affidavit of Merit, expert medical testimony). Therefore Plaintiff's medical negligence claims are not reinstated in this action.

Defendants' Motion to Dismiss

Defendants subsequently filed a Motion to Dismiss and Supplement to State Defendants' Motion to Dismiss. In 2002, plaintiff had filed a complaint relating to a shoulder injury. That case was closed following decisions adverse to plaintiff. Defendants allege that the instant complaint involves the same injuries. Therefore, defendants have moved to dismiss on the basis of *res judicata* and because the complaint is frivolous, malicious and fails to state a claim upon which relief can be granted.

Specifically, defendants argue:

> 3. However, on June 23, 2003, Plaintiff claimed that on June 14, 2002, Dr. Huff told "Plaintiff [he] had torn rotator cuff in left shoulder." In a letter dated September 16, 2002 to then-Attorney General Jane Brady, Plaintiff wrote "the only solution concerning my torn tendon is it has to be surgically repaired." Ten days later, Plaintiff filed a document with the Court stating in ¶5 of page 4 that "surgery is mandatory, because the tendon

has detached itself from the bone, surgery is required to reattach tendon to the bone." Clearly, Plaintiff litigated the torn rotator cuff issue in the 2002 case. Not only do these documents support the State Defendants' motion for dismissal based on *res judicata*, but they also highlight that the two year statute of limitations on Plaintiff's alleged injuries would begin to run on June 14, 2002. For these reasons, Plaintiff's complaint should be dismissed with prejudice.

4. That notwithstanding, a review of Plaintiff's medical documentation reveals that Plaintiff cannot prove any set of facts that would entitle him to relief. Plaintiff was repeatedly examined by medical personnel from 2002 to 2008, and on each occasion the doctors ruled out ("R/O") that Plaintiff had a torn rotator cuff. This first occurred on June 14, 2002, when Dr. Huff wrote "R/O Tear of Rotator Cuff" in Plaintiff's medical records.

5. On December 1, 2006, Plaintiff was examined by Dr. Ott of Mid-Delaware imaging, who wrote in his Clinical Indication of Plaintiff "rule out rotator cuff tear." On April 1, 2008, Plaintiff was again examined, this time by Dr. Van Dusen of Mid-Delaware Imaging, who concluded that Plaintiff did not have a torn rotator cuff ("Rule out rotator cuff"). Therefore, Plaintiff's complaint must be dismissed, as there is no medical evidence of a torn rotator cuff injury.

Motion to Dismiss Standard

Deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment's prohibition against cruel and unusual punishment.[1] To state a claim for deliberate indifference, the prisoner must establish that prison officials

[1] *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)

were subjectively aware of a substantial risk of serious harm to the prisoner and failed to take reasonable measures to abate that risk.[2] Deliberate indifference can occur when prison officials deny, delay or intentionally interfere with medical treatment or it may be shown in the way in which prison officials provide medical care.[3] Prison authorities have "wide discretion" in the medical treatment afforded to prisoners[4] and medical negligence alone is insufficient to state a claim for a constitutional violation.[5] Nonetheless, courts have held that prison officials' delay in providing surgery, if it proves harmful to the prisoner, can amount to deliberate indifference.[6]

Conclusion

At this stage in the proceedings, considering the alleged facts in the light most favorable to the non-moving party, plaintiff has asserted a *prima facie* case on the issue of deliberate indifference. Thus, the complaint cannot be dismissed at this time.[7] It appears to the Court that this case may be susceptible of resolution

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[2] *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

[3] *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992).

[4] *Stiltner v. Rhay,* 371 F.3d 420, 421 (9th Cir. 1967).

[5] *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346 (3d Cir. 1987).

[6] *Shapley v. Nevada Bd. of State Prison Comm'rs,* 766 F.2d 404, 408 (9th Cir. 1985).

[7] Super. Ct. Civ. R. 12(b)(6).

through cross motions for summary judgment, on written submissions including documentary evidence and supporting affidavits.

THEREFORE, State Defendants' Motion to Dismiss is hereby DENIED as to plaintiff's 8th and 14th Amendment claims. Plaintiff's medical negligence claims, and any 8th and 14th Amendment claims dependent upon a finding of medical negligence, will not be considered, previously having been dismissed.

IT IS SO ORDERED.

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