

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

KENNETH T. DEPUTY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	C.A. No. 12C-05-163-MMJ
DR. J. CONLAN	)	
	)	
	)	
Defendant.	)	

Submitted: August 20, 2013  
Decided: June 5, 2014

**MEMORANDUM OPINION**

On Plaintiff's Motion for Summary Judgment  
**DENIED**

Kenneth T. Deputy, *Pro Se*, Plaintiff

Scott G. Wilcox, Esquire, Whiteford, Taylor & Preston, LLC, Wilmington,  
Delaware, Attorney for the Defendant.

**JOHNSTON, J.**

## **FACTUAL & PROCEDURAL CONTEXT**

Plaintiff Kenneth T. Deputy is an inmate at the Delaware Correctional Center (“DCC”) in Smyrna, Delaware. Plaintiff alleges that he initially injured his shoulder in October 2001, while playing basketball in prison. In March 2005, Plaintiff sought relief from shoulder pain with Correctional Medical Services (“CMS”). Over the next several years, CMS provided Plaintiff with treatment that he alleges was inadequate. CMS treated Plaintiff with anti-inflammatory medication and a cortisone shot. Until 2010, CMS refused Plaintiff’s requests for shoulder surgery. On May 18, 2012, Plaintiff brought this action against Dr. James W. Conlan, DCC Health Administrator. Plaintiff claims that Defendant violated his rights under the 8th and 14th Amendments to the United States Constitution by acting with deliberate indifference towards his injury.

## The 2007 Lawsuit

On January 18, 2007, Plaintiff brought suit against Dr. Conlan, DCC Health Administrator, and Thomas Carroll, DCC Warden. Plaintiff claimed that he received inadequate care and Defendants acted with “deliberate indifference” toward his injury.<sup>1</sup>

On March 3, 2007, the Superior Court dismissed the case, finding that the complaint was legally frivolous and that Plaintiff failed to file an Affidavit of Merit, as required by 18 *Del. C.* §6853. Plaintiff appealed. On October 22, 2007, the Delaware Supreme Court remanded the case to address the Plaintiff’s 8th and 14th Amendment claims. On remand, the Superior Court reinstated the Plaintiff’s 8th and 14th Amendment claims. On August 21, 2009, Plaintiff filed a Motion for Summary Judgment.

On September 23, 2010, the Court issued an opinion denying Plaintiff’s Motion. To succeed with a deliberate indifference claim, Plaintiff had to show: (1) from an objective standpoint, his medical need was sufficiently serious;<sup>2</sup> and (2) the prison official had the culpable state of mind of “deliberate indifference” toward the Plaintiff’s health.<sup>3</sup> A medical need is sufficiently serious if a physician diagnoses it as a requiring treatment, or the injury is so obvious that a layperson

<sup>1</sup> *Deputy v. Conlan*, C.A. No. 07C-01-202 MMJ.

<sup>2</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

<sup>3</sup> *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 297.

could identify it as requiring medical attention.<sup>4</sup> “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.”<sup>5</sup> 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.<sup>6</sup>

The Court found that Plaintiff’s injury was sufficiently serious as a matter of law. It is undisputed that a physician diagnosed Plaintiff’s injury as requiring treatment.<sup>7</sup> 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 the non-moving party, it appeared that Conlan and Carroll believed that surgery was elective based on Dr. DuShuttle’s October 21, 2009 letter. Further, the Court found genuine issues of material fact existed as to the 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 contended that CMS’s medical treatment — the x-ray, MRIs, ibuprofen, and

<sup>4</sup> *Hyson v. Corr. Med. Servs.*, 2004 WL 769362, at \*3 (D. Del.); *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987).

<sup>5</sup> *Farmer*, 511 U.S. at 837.

<sup>6</sup> *Diaz v. Carroll*, 570 F. Supp.2d 571, 578 (D. Del. 2008) (citing *Harrison v. Barley*, 219 F.3d 132, 138-40 (2d Cir. 2000); see also *Stilner v. Rhay*, 371 F.3d 420, 421 (9th Cir. 1967) (Prison officials have “wide discretion” in providing medical treatment to inmates.).

<sup>7</sup> See, e.g., *Hyson*, 2004 WL 769362, at \*3.

cortisone shot — afforded no relief. The Court held that Plaintiff failed to demonstrate that the Court overlooked a controlling precedent or legal principle, or misapprehended the law or facts in a manner which would affect the outcome of the decision. The Court denied Plaintiff's Motion for Reargument of the Court's September 23, 2010 Decision Denying Plaintiff's Motion for Summary Judgment.

Between 2007 and 2011, Plaintiff filed numerous motions, including: a motion to compel; two motions for discovery; two motions for summary judgment; a motion for recusal; two motions for reargument; a motion for transcripts; and four motions for appointment of counsel. Additionally, Plaintiff filed two appeals and two petitions for writ of mandamus to the Delaware Supreme Court.

On February 7, 2011, Dr. Conlan filed a Motion to Dismiss. By Order dated August 15, 2011, the Court granted Dr. Conlan's Motion, and dismissed all claims, without prejudice, against Dr. Conlan pursuant to Superior Court Civil Procedure Rule 4(j).<sup>8</sup>

### **The 2012 Lawsuit**

On May 18, 2012, Plaintiff filed the Complaint in this action against Dr. J. Conlan. The allegations in this action are virtually identical to those in the 2007

<sup>8</sup> Service was not made timely, and the Court noted that good cause did not appear to extend the time for service of process.

lawsuit. Plaintiff's 8th and 14th Amendment claims in this 2012 lawsuit were brought by Plaintiff in his 2007 lawsuit.

Dr. Conlan filed a Motion to Dismiss based on the statute of limitations. On August 6, 2013, the Court issued an opinion denying the motion. The Court found that the 2012 Constitutional violation claims relate back to the 2007 Complaint and are not barred from this action.

Plaintiff is seeking:

Monetary damages in the amount of \$100,000.00 dollars from defendant for compensation and punitive damages for violations and deprivations of his 8th and 14th amendment rights as well as violations of state tort laws under title 11 §6536. All of which has resulted in unnecessary and unwarranted infliction of pain and needless suffering. Deliberate indifference to serious medical needs, which if adequately administered as recommended by his surgeon would have ended Plaintiff's suffering. Instead defendant deliberately and intentionally failed and refused to provide adequate medical care in a timely fashion.

On August 20, 2013, Plaintiff filed a Motion for Summary Judgment.

Plaintiff requests that the Court decide only one issue, as a matter of law. That issue is whether the prison official had the culpable state of mind of "deliberate indifference" toward the Plaintiff's health.

In Plaintiff's 2007 lawsuit, the Court issued an opinion on September 23, 2010, denying Plaintiff's August 21, 2009 Motion for Summary Judgment. The Court found that Plaintiff had met the first requirement of a deliberate indifference

claim.<sup>9</sup> However, the Court found Plaintiff failed to meet the second requirement that the prison official had the culpable state of mind of “deliberate indifference” toward the Plaintiff’s health.<sup>10</sup>

## **ANALYSIS**

### **Summary Judgment Standard**

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.<sup>11</sup> All facts are viewed in a light most favorable to the non-moving party.<sup>12</sup> Summary judgment may not be granted if the record indicates that a material fact is in dispute or if there is a need to clarify the application of law to the specific circumstances.<sup>13</sup> When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.<sup>14</sup>

### **Plaintiff’s Argument**

Plaintiff contends that the treatment that he received from CMS was ineffective, citing 50 to 100 grievances, complaints, letters, and appeals that he filed over the course of a four-year period. Plaintiff asserts in his Motion for Summary Judgment that “patently ineffective gestures purportedly directed

<sup>9</sup> *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 298.

<sup>10</sup> *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 297.

<sup>11</sup> Super. Ct. Civ. R. 56(c).

<sup>12</sup> *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. Ct. 1989).

<sup>13</sup> Super. Ct. Civ. R. 56(c).

<sup>14</sup> *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

towards remedying objectively unconstitutional conditions do not prove a lack of deliberate indifference, they demonstrate it.”<sup>15</sup> Plaintiff also contends that ingestion of ineffective drugs placed him in further substantial harm by Defendants.

Plaintiff argues that deliberate indifference may be established by showing grossly inadequate care, as well as the decision to take an easier, but less efficacious course of treatment.<sup>16</sup> Plaintiff asserts that Defendant’s course of treatment was unreasonable; and that the DCC took an easier, cheaper, and ineffective course of treatment for four years — ibuprofen and a single cortisone shot — which afforded him no relief. Plaintiff asserts that Defendant did not keep Plaintiff’s follow-up appointments to the external orthopaedic surgeon’s office, did not keep Plaintiff’s physical therapy appointments, and allowed Plaintiff’s MRI to expire past one year.

Plaintiff contends that an ineffective course of treatment over a four-year “and running” time span is clearly unreasonable. Plaintiff asserts that the possibility of deliberate indifference caused an easier and less efficacious treatment to be chosen consciously by the doctor.<sup>17</sup> Plaintiff claims that the Defendant’s

<sup>15</sup> *Coleman v. Wilson*, 912 F. Supp. 1282, 1319 (E.D. Cal. 1995).

<sup>16</sup> *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999); *see Steele v. Shah*, 87 F.3d 1266, 1269 -70 (11th Cir. 1996); *Waldrop v. Evans*, 871 F.2d 1030, 1035 (11th Cir. 1989).

<sup>17</sup> *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974).



administration of “useless drugs and ineffective practices” for four years establishes his claim for punitive damages for “motive, evil intent.”

### **Defendant’s Argument**

Defendant argues that he followed a “better course of treatment” by giving the Plaintiff cortisone shots and pain medication to combat the pain for the Plaintiff’s injury. Defendant also argues that the facts as the Plaintiff states them are not true. However, Defendant contends that even if the facts as Plaintiff presents them were true, Plaintiff has failed to present evidence that his shoulder injury is a serious medical condition or that Defendant was deliberately indifferent to Plaintiff’s injury. Defendant claims that the evidence amounts to a disagreement with the course of treatment chosen and not deliberate indifference. Defendant asserts that a prisoner does not have the right to chose a specific form of medical treatment, as long as the treatment provided is reasonable.<sup>18</sup>

### **Genuine Issues of Material Fact**

“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 must also draw the inference.<sup>19</sup> Choosing a treatment plan

<sup>18</sup> *Harrison v. Barkley*, 219 F.3d 132, 138-40 (2d. Cir. 2000).

<sup>19</sup> *Farmer*, 511 U.S. at 837.

different from that requested by an inmate, however, does not amount to deliberate indifference, provided that the treatment plan is reasonable.<sup>20</sup>

The facts must be viewed in the light most favorable to the non-moving party. Although Defendant Conlan initially denied Plaintiff surgery, Defendant produced evidence that Plaintiff otherwise was provided with adequate medical care, including, but not limited to: x-rays, ibuprofen, MRIs, and a cortisone shot. Defendant asserts that he continued to treat and reassess Plaintiff for the pain associated with his frayed rotator cuff. In Plaintiff's Reply Brief in support of his Motion for Summary Judgment, Plaintiff stated that "surgery on his left shoulder was completed December 2010."

The Court finds that genuine issues of material fact exist, at least as to: the reasonableness of medical treatment provided to plaintiff; and whether Defendant had the culpable state of mind of deliberate indifference toward Plaintiff's health.

### **CONCLUSION**

The Court determined in its September 23, 2010 Memorandum Opinion that Plaintiff's injury is "sufficiently serious" as a matter of law. However, Plaintiff is not entitled to judgment as a matter of law that Defendant had the culpable state of

<sup>20</sup> *Diaz*, 570 F. Supp. 2d at 578 (citing *Harrison v. Barley*, 219 F.3d 132, 138-40 (2d Cir. 2000)); *see also Stilner v. Rhay*, 371 F.3d 420, 421 (9th Cir. 1967) (Prison officials have "wide discretion" in providing medical treatment to inmates.).

mind of deliberate indifference toward Plaintiff's health. Genuine issues of material fact exist, precluding summary judgment.

**THEREFORE**, Plaintiff's Motion for Summary Judgment is hereby  
**DENIED.\***

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston

\* The Court has exercised its discretion, and denied Defendant's request for oral argument.