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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

|                         |   |                              |
|-------------------------|---|------------------------------|
| Jeremy David Henderson, | ) | No. CV 09-0154-PHX-GMS (LOA) |
| Plaintiff,              | ) |                              |
| vs.                     | ) |                              |
| Joseph Arpaio, et al.   | ) | <b>ORDER</b>                 |
| Defendants.             | ) |                              |

Plaintiff Jeremy David Henderson filed this civil rights action under 42 U.S.C. § 1983 against City of Mesa Police Officers Frank Hermosillo and John LaFontaine; Joseph Arpaio, Maricopa County Sheriff; and Greg Basye, emergency room employee at Mountain Vista Hospital. (Doc. #12.) Basye, the only remaining Defendant, moves for summary judgment. (Doc. #38.) Although the Court issued a Notice pursuant to Rand v. Rowland, 154 F.3d 952, 962 (9th Cir. 1998) (*en banc*), advising Plaintiff of his obligation to respond, Plaintiff filed no response. (Doc. #40.) The motion is ready for ruling.

The Court will grant Defendant’s motion and terminate the case.

**I. Background**

Plaintiff’s claims arise out of his arrest on January 28, 2008, by Hermosillo and LaFontaine. The First Amended Complaint alleged that Hermosillo and LaFontaine used excessive force on Plaintiff during his arrest when they sent a K-9 to attack Plaintiff; that Arpaio was deliberately indifferent regarding alleged abuse by K-9 units; and that Basye was

1 deliberately indifferent in treating Plaintiff's injuries. (Doc. #12.) The Court ordered all  
2 Defendants to answer the First Amended Complaint. (Doc. #11.) The Court subsequently  
3 dismissed Arpaio and later dismissed Hermosillo and La Fontaine (Doc. ##27, 43.)

4 Bayse now moves for summary judgment on the grounds that (1) he is not a state actor  
5 and did not act under color of law, so there is no claim against him under 42 U.S.C. § 1983,  
6 and (2) he was not deliberately indifferent to Plaintiff's serious medical needs. (Doc. #38.)

## 7 **II. Legal Standards**

### 8 **A. Summary Judgment**

9 A court must grant summary judgment if the pleadings and supporting documents,  
10 viewed in the light most favorable to the non-moving party, "show that there is no genuine  
11 issue as to any material fact and that the movant is entitled to judgment as a matter of law."  
12 Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Under  
13 summary judgment practice, the moving party bears the initial responsibility of presenting  
14 the basis for its motion and identifying those portions of the record, together with affidavits,  
15 which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477  
16 U.S. at 323.

17 If the moving party meets its initial responsibility, the burden then shifts to the  
18 opposing party who must demonstrate the existence of a factual dispute and that the fact in  
19 contention is material, i.e., a fact that might affect the outcome of the suit under the  
20 governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and that the  
21 dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for  
22 the non-moving party. Id. at 250; see Triton Energy Corp. v. Square D. Co., 68 F.3d 1216,  
23 1221 (9th Cir. 1995). Rule 56(e) compels the non-moving party to "set out specific facts  
24 showing a genuine issue for trial" and not to "rely merely on allegations or denials in its own  
25 pleading." Fed. R. Civ. P. 56(e); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,  
26 475 U.S. 574, 586-87 (1986). The opposing party need not establish a material issue of fact  
27 conclusively in its favor; it is sufficient that "the claimed factual dispute be shown to require  
28 a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank

1 of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968). However, Rule 56(c) mandates  
2 the entry of summary judgment against a party who, after adequate time for discovery, fails  
3 to make a showing sufficient to establish the existence of an element essential to that party's  
4 case and on which the party will bear the burden of proof at trial. Celotex, 477 U.S. at 322-  
5 23.

6 When considering a summary judgment motion, the court examines the pleadings,  
7 depositions, answers to interrogatories, and admissions on file, together with the affidavits,  
8 if any. Fed. R. Civ. P. 56(c). At summary judgment, the judge's function is not to weigh the  
9 evidence and determine the truth but to determine whether there is a genuine issue for trial.  
10 Anderson, 477 U.S. at 249. The evidence of the non-movant is "to be believed, and all  
11 justifiable inferences are to be drawn in his favor." Id. at 255. But, if the evidence of the  
12 non-moving party is merely colorable or is not significantly probative, summary judgment  
13 may be granted. Id. at 249-50.

#### 14 **B. Claims Under 42 U.S.C. § 1983**

15 Section 1983 provides a cause of action against persons acting under color of state  
16 law who have violated rights guaranteed by the United States Constitution and federal law.  
17 42 U.S.C. § 1983; see also Buckley v. City of Redding, 66 F.3d 188, 190 (9th Cir. 1995).

#### 18 **C. Deliberate Indifference to Serious Medical Needs**

19 A pretrial detainee's claim for unconstitutional treatment arises from the Due Process  
20 Clause. Bell v. Wolfish, 441 U.S. 520 (1979). The Due Process Clause requires a  
21 governmental authority to provide medical care to a person injured while being apprehended  
22 by the police, and police fulfill their constitutional obligation by seeing that an injured person  
23 is taken promptly to a hospital. City of Revere v. Mass. General Hosp., 463 U.S. 239, 244-45  
24 (1983). The due process rights of such a person are at least as great as the Eighth  
25 Amendment protections afforded to a convicted prisoner, which prohibit deliberate  
26 indifference to serious medical needs. Id. at 243-44 (citing Estelle v. Gamble, 429 U.S. 97,  
27 104 (1976)).

28 To prevail on a claim under the Eighth Amendment for prison medical care, a prisoner

1 must demonstrate “deliberate indifference to serious medical needs.” Jett v. Penner, 439 F.3d  
2 1091, 1096 (9th Cir. 2006) (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)). A plaintiff  
3 must show (1) a “serious medical need” by demonstrating that failure to treat the condition  
4 could result in further significant injury or the unnecessary and wanton infliction of pain and  
5 (2) the defendant’s response was deliberately indifferent. Jett, 439 F.3d at 1096 (citations  
6 omitted).

### 7 **III. Motion for Summary Judgment**

#### 8 **A. Parties’ Contentions**

##### 9 **1. Defendant**

10 In support of his motion, Defendant submits his Statement of Facts (Doc. #39,  
11 (DSOF)); Incident/Investigation Supplement Reports, dated January 29, 2008 (id., Exs. A-B);  
12 Mesa Fire Department EMS Encounter Form (id., Ex. C); Southwest Ambulance Form (id.,  
13 Ex. D); Plaintiff’s Mountain Vista Medical Center Records (id., Ex. E); Mesa Police  
14 Department Incident/Investigation Report (id., Ex. F); the Maricopa County Superior Court  
15 Sentence of Imprisonment for CR2008-106716 (id., Ex. G); and the affidavit of Stuart  
16 Richards (id., Ex. H).

17 Defendant submits evidence of the events leading up to Plaintiff’s arrest on the night  
18 of January 29, 2008. Because this evidence is undisputed and because the Court has already  
19 granted summary judgment to Officers Hermosillo and LaFontaine, the Court simply notes  
20 that it is undisputed that during the arrest, Plaintiff sustained bites from LaFontaine’s police  
21 dog.

22 Defendant’s evidence shows that once Plaintiff was under arrest, Mesa Fire  
23 Department EMS responded to the scene to address the dog bites. (DSOF ¶ 26, Exs. B, C.)  
24 The EMS personnel noted that Plaintiff had four puncture wounds to his left forearm  
25 consistent with dog bites. (Id. ¶ 27.) The two puncture wounds on Plaintiff’s upper anterior  
26 forearm had muscle tissue protruding from the wounds, and the two punctures wounds on the  
27 posterior side of his arm showed no tissue. (Id. ¶ 28.) Bleeding from all puncture wounds  
28 was controlled, and Plaintiff was taken to Mountain Vista Medical Center by Southwest

1 Ambulance for further care. (Id. ¶ 29.)

2 Defendant asserts that Plaintiff arrived at the Mountain Vista Medical Center  
3 Emergency Department (ED) at approximately 0315 and was seen at approximately 0320 by  
4 Defendant. (Id. ¶ 30.) Defendant contends that Plaintiff reported to the triage nurse that his  
5 immunizations were current. (Id. ¶¶ 31-34.) ED staff noted that Plaintiff’s skin was warm  
6 and dry, on admission, his pulse was 101, “100% pulse oximetry,” and blood pressure  
7 129/84, and Plaintiff was noted to be oriented x 4. (Id. ¶ 35.) Nursing staff noted “WNL”  
8 in the section of the assessment marked “EENT” for eyes, ears, nose and throat. Plaintiff  
9 reported a history of substance abuse, and use of tobacco and alcohol. (Id. ¶ 36.) No  
10 gastrointestinal or genitourinary complaints were noted. (Id. ¶ 37.) Other than Plaintiff’s  
11 report of pain in his left arm, no alteration in sensation is recorded in the ED records. (Id.  
12 ¶ 38.)

13 Defendant examined Plaintiff and noted a full range of motion in his left arm and  
14 multiple dog bites of varying depths and lengths; the two largest lacerations had muscle  
15 tissue sticking out. (Id. ¶¶ 39-40.) Defendant injected local anesthetic and cleaned the  
16 wounds with copious quantities of saline and Shur-cleanse and removed small bits of grass.  
17 (Id. ¶ 41.) He closed the three largest lacerations loosely with 4-0 prolene sutures and did  
18 a sterile cleanse of Plaintiff’s entire left arm; a nurse applied bacitracin dressings. (Id. ¶¶ 42-  
19 43.) Defendant advised Plaintiff about his injuries and the need to follow up with a doctor  
20 the next day. (Id. ¶ 44.) Defendant also prescribed an antibiotic, Augmentin, to prevent  
21 infection, and Percocet as needed for pain. (Id. ¶ 45.) Plaintiff was discharged from the ED  
22 at approximately 0355. (Id. ¶ 46.)

23 After his treatment was concluded, Plaintiff was discharged, and officers transported  
24 him to the Mesa City Jail where he was booked. (Id. ¶ 47.)

## 25 **2. Plaintiff**

26 As noted, Plaintiff did not respond to the motion. Because a verified complaint may  
27 be used as an affidavit opposing summary judgment if it is based on personal knowledge and  
28 sets forth specific facts admissible in evidence, the Court will consider the allegations set

1 forth in Plaintiff's First Amended Complaint. Schroeder v. McDonald, 55 F.3d 454, 460 (9th  
2 Cir. 1995). In his First Amended Complaint, Plaintiff alleged that Defendant looked at  
3 Plaintiff's arm and provided inadequate medical care by only stitching the injuries and that  
4 Plaintiff was going into shock and should have been admitted for observation and treatment.  
5 (Doc. #12 at 4-4A.) He alleged that Defendant placed his life in danger "through circulatory  
6 collapse." (Id. at 4-A.) Plaintiff asserted that he was taken back to the jail with no medical  
7 treatment or observation and that he was later transported to Maricopa County Medical  
8 Center for emergency medical treatment. (Id.) He remained there for four weeks and had  
9 two surgeries. (Id. at 4-B.) He claims that he now suffers from atrophy of his arm, nerve and  
10 muscle damage, and disfigurement. (Id.)

### 11 **C. Analysis**

12 The Court will grant summary judgment to Defendant. The Court assumes that  
13 Plaintiff's bite wounds constituted a serious medical need, but Defendant submits evidence  
14 that he did not act with deliberate indifference to Plaintiff's bite wounds. Plaintiff fails to  
15 rebut Defendant's evidence and show a material dispute of fact on this issue.

16 Defendant submits undisputed evidence that he examined Plaintiff, that Plaintiff's  
17 vital signs were determined, and that Defendant cleaned and sutured the wounds on  
18 Plaintiff's arms. Plaintiff asserts in his First Amended Complaint that Defendant provided  
19 "inadequate" medical care; but mere claims of "indifference," "negligence," or "medical  
20 malpractice" do not support a claim under § 1983. Broughton v. Cutter Laboratories, 622  
21 F.2d 458, 460 (9th Cir. 1980). Inadequate treatment due to malpractice or even gross  
22 negligence does not constitute an Eighth Amendment violation. Wood v. Housewright, 900  
23 F.2d 1332, 1334 (9th Cir. 1990). And differences in judgment between an inmate and prison  
24 medical personnel regarding an appropriate medical diagnosis or treatment are not enough  
25 to establish a deliberate-indifference claim. Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir.  
26 1996).

27 Summary judgment is appropriate when a party fails to make a showing sufficient to  
28 establish the existence of an element essential to his case and on which he would have the

1 burden of proof at trial. Celotex Corp., 477 U.S. at 322-23. Plaintiff has the burden of proof  
2 on standard of care—he must provide competent evidence that Defendant’s treatment fell  
3 below the standard of care—and expert medical testimony is generally required to establish  
4 standard of care. See Gorney v. Meaney, 150 P.3d 799, 802 (Ariz. App. 2 Div. 2007) (the  
5 “factual basis” and “breach of duty” provisions of Ariz. Rev. Stat. § 12-2603 require a  
6 plaintiff’s expert to state the factual basis of plaintiff’s claim and list those acts the expert  
7 determined fell below the standard of care). It was incumbent upon Plaintiff to provide an  
8 affidavit or deposition of an expert to establish standard of care. See Hutchinson v. United  
9 States, 838 F.2d 390, 393 (9th Cir. 1988) (granting summary judgment against a plaintiff  
10 who relied only on her own allegations and conclusory statements that defendants had been  
11 negligent and who failed to provide affidavits or depositions of experts). This Plaintiff failed  
12 to do.

13 The Court will grant summary judgment as to Bayse. In addition, because no claims  
14 or Defendants remain, the Court will terminate the case.

15 **IT IS ORDERED:**

16 (1) The reference to the Magistrate Judge is withdrawn as Defendant Bayse’s Motion  
17 for Summary Judgment (Doc. #38).

18 (2) Defendant Bayse’s Motion for Summary Judgment (Doc. #38) is **granted**, and  
19 the claims against him are **dismissed with prejudice**.

20 (3) The case is terminated, and the Clerk of Court must enter judgment accordingly.

21 DATED this 30th day of June, 2010.

22  
23   
24 \_\_\_\_\_  
25 G. Murray Snow  
26 United States District Judge  
27  
28