

1 148.) Plaintiff filed a notice of appeal and following remand by the Ninth Circuit Court of Appeals,
2 this action proceeds against Defendant Smith for deliberate indifference in violation of the Eighth
3 Amendment. On March 13, 2013, the Court denied Plaintiff's motion for summary judgment. (ECF
4 No. 191.)

5 Currently before the Court is Defendant Smith's motion for summary judgment filed on
6 December 10, 2012, Plaintiff's opposition filed on December 26, 2012, and Defendant's reply on
7 January 7, 2013. (ECF Nos. 182, 184, 185.) Plaintiff also filed a declaration, addendum opposition
8 and opposition to Defendant's separate statement of facts on January 7, 2013. (ECF No. 186, 187,
9 188.) The motion is deemed submitted. Local Rule 230(l).

10 **II. Legal Standard for Summary Judgment**

11 Pursuant to [Federal Rule of Civil Procedure 56\(a\)](#) summary judgment is appropriate when the
12 movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
13 judgment as a matter of law. Summary judgment must be entered, "after adequate time for discovery
14 and upon motion, against a party who fails to make a showing sufficient to establish the existence of
15 an element essential to that party's case, and on which that party will bear the burden of proof at trial."
16 [Celotex Corp. v. Catrett, 477 U.S. 317, 322 \(1986\)](#). However, the court is to liberally construe the
17 filings and motions of pro se litigants. [Thomas v. Ponder, 611 F.3d 1144, 1150 \(9th Cir. 2010\)](#). The
18 "party seeking summary judgment always bears the initial responsibility of informing the district court
19 of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to
20 interrogatories, and admissions on file, together with the affidavits, if any, which it believes
21 demonstrate the absence of a genuine issue of material fact." [Celotex, 477 U.S. at 323](#) (internal
22 quotations and citations omitted).

23 If the moving party meets its initial responsibility, the burden then shifts to the opposing party
24 to establish that a genuine issue as to any material fact actually does exist. [Matsushita Elec. Indus. Co.](#)
25 [v. Zenith Radio Corp., 475 U.S. 574, 586 \(1986\)](#). In attempting to establish the existence of this
26 factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to
27 tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in
28

1 support of its contention that the dispute exists. [Fed. R. Civ. P. 56\(c\)](#); [Matsushita, 475 U.S. at 586](#)
2 [n.11](#).

3 The parties bear the burden of supporting their motions and oppositions with the papers they
4 wish the Court to consider and/or by specifically referencing any other portions of the record for
5 consideration. [Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 \(9th Cir. 2001\)](#).
6 The Court will not undertake to scour the record for triable issues of fact. [Simmons v. Navajo County,](#)
7 [Arizona, 609 F.3d 1011, 1017 \(9th Cir. 2010\)](#).

8 In arriving at these findings and recommendations, the Court carefully reviewed and
9 considered all arguments, points and authorities, declarations, exhibits, statements of undisputed facts
10 and responses thereto, objections, and other papers filed by the parties. Omission of reference to an
11 argument, document, paper, or objection is not to be construed to the effect that this Court did not
12 consider the argument, document, paper, or objection. This Court thoroughly reviewed and
13 considered the evidence it deemed admissible, material, and appropriate.

14 **A. Summary of Relevant Allegations in Second Amended Complaint**

15 Plaintiff originally injured his left knee on September 3, 2003. (Sec. Am. Compl. ¶ 3, ECF No.
16 144.) On May 4, 2004, Plaintiff was examined by Defendant Dennis C. Smith, M.D., who noted that
17 Plaintiff's left knee was swollen, that he was in pain and that he needed orthopedic treatment. On May
18 26, 2004, Defendant Smith partially granted Plaintiff's appeal stating that a referral had been made to
19 an orthopedic specialist and that Plaintiff should be seen within ninety days. Plaintiff's appeal was
20 eventually denied at the Director's Level. (*Id.* at ¶ 9.)

21 Plaintiff filed a second appeal on September 13, 2004, and also filed multiple requests for
22 medical services. (*Id.* at ¶ 9.) In October 2004, Plaintiff had a Tele-Med conference with an
23 orthopedic specialist, Dr. David G. Smith, who recommended surgery for Plaintiff's left knee. (*Id.* at ¶
24 11.) On February 10, 2005, the Court of Appeal for the Fifth Appellate District issued an order
25 directing defendants to file a supplemental brief informing the court of when Plaintiff's recommended
26 surgery would be performed. Plaintiff had surgery on March 15, 2005, that failed to correct his injury.
27 (*Id.* at ¶ 12.)

1 **B. Defendant's Statement of Undisputed Facts and Plaintiff's Disputes¹**

2 Issue 1 – Res Judicata

3 1. This is not the first time that Plaintiff has sued Dr. Smith for alleged deliberate
4 indifference regarding the care and treatment he received for his knee.

5 Plaintiff partially disputes this fact contending that he filed a suit against Dr. Smith for
6 negligent post-operative care.

7 2. Mr. Tyler previously filed the case of Elonza Jesse Tyler v. Dennis Smith, Eastern
8 District Case No. 1:06-cv-00092-SMS PC.

9 3. Dr. Smith prevailed by jury verdict and subsequent judgment.

10 4. The judgment was affirmed on appeal.

11 Issue 2 – Deliberate Indifference Claim

12 1. Mr. Tyler's knee injury was not urgent and it was not necessary that he be seen by an
13 orthopedic specialist on anything other than a routine basis.

14 Plaintiff disputes this statement and refers the Court to paragraphs in his declaration. The
15 Court cannot locate the reference or the relevant declaration. To the extent that Plaintiff is referring to
16 his declaration in support of his motion for summary judgment, the cited portions of his declaration
17 refer to Plaintiff's alleged pain from the injury, not an objectively supported need for an urgent
18 orthopedic consult. (ECF No. 174, ¶¶ 6-8.) The Court therefore treats this fact as undisputed.

19 2. Although it took approximately five months for Mr. Tyler to see an orthopedic
20 specialist, the delay was not unreasonable as it was a routine matter and there was no medical reason
21 for him to be seen any sooner.

22 Plaintiff disputes this fact. He contends that Dr. Smith failed to provide a follow-up
23 appointment within the 90 days that he believed was necessary. Plaintiff also contends that he waited
24 more than 120 days to be seen by the orthopedic specialist, which led to further unnecessary pain and

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26 ¹ In his initial opposition, Plaintiff generally objected to Defendant Smith's motion for summary judgment on the
27 grounds that it merely reiterated Defendant's arguments in opposition to Plaintiff's motion to dismiss. As such, Plaintiff
28 merely attached copies of Defendant's opposition and Plaintiff's reply. (ECF No. 184.) However, on January 7, 2013,
Plaintiff submitted an opposition to Defendant's separate statement of undisputed material facts. (ECF No. 188.) The
Court therefore relies on Defendant's separate statement and Plaintiff's January 7, 2013 filing for purposes of determining
undisputed material facts. (ECF Nos. 182-2, 188.)

1 injury. Plaintiff further contends that after October 2004, when the orthopedic specialist
2 recommended surgery, Defendant Smith failed to follow-up with that recommendation through March
3 2005.

4 3. In the interim, Mr. Tyler was being treated with pain medications and given a cane and
5 a wheelchair to assist with mobility.

6 Plaintiff partially disputes this statement. He contends that he was not issued a wheelchair
7 until he fell when his right knee could no longer support him limping on his left knee with only a cane.
8 Plaintiff refers the Court to exhibits attached to his motion for summary judgment, numbers 3-5.
9 Plaintiff's exhibits indicate that he was being treated with pain medications and provided
10 accommodations and a wheelchair to assist with mobility. (ECF No. 174, Ex. 3, pp. 45-46; Ex. 5, pp.
11 51-54.) The Court therefore treats this fact as undisputed.

12 4. Mr. Tyler was also given other accommodations such as a lower bunk for his
13 convenience.

14 5. As for any alleged delay, Dr. Smith was not responsible for making medical
15 appointments.

16 Although Plaintiff disputes this statement, he does not cite any evidence demonstrating that Dr.
17 Smith was responsible for making medical appointments. Instead, Plaintiff refers the Court to his
18 motion for summary judgment, ECF No. 174 at p. 14, lines 1-14. The Court has reviewed this portion
19 of Plaintiff's motion and the exhibits cited therein. These exhibits demonstrate that in May 2004 Dr.
20 Smith submitted a referral for Plaintiff to be seen by an orthopedist for evaluation of his knee. (ECF
21 No. 174, Exs. 2-6.) In September 2004, Dr. Smith noted that Plaintiff was scheduled for an orthopedic
22 evaluation via telemedicine in October 2004, and Plaintiff was evaluated at that time. (ECF No. 174,
23 Exs. 6, 9.) There is no indication that Dr. Smith was directly responsible for making medical
24 appointments or that he had any control over how long it would take for Plaintiff to receive an
25 orthopedic consult appointment or surgery, and Plaintiff's own exhibits suggest that he was not, and
26 the delay was attributable to the loss of a surgical contract. (ECF No. 174, Ex. 11, p. 2.) The Court
27 therefore treats this fact as undisputed.

1 6. Dr. Smith could have ordered that Mr. Tyler be sent immediately to a hospital for
2 treatment had Dr. Smith believed his condition was urgent.

3 7. In Dr. Smith’s professional medical opinion, Mr. Tyler was not in need of urgent care
4 and sending him out on an urgent or emergency basis would not have been reasonable or necessary.

5 Plaintiff disputes this statement by reference to cited portions of his motion for summary
6 judgment, his complaint, and Exhibit 14 attached to his motion for summary judgment. (ECF No.
7 188, p. 2.) The Court has reviewed the cited portions of Plaintiff’s motion and complaint, along with
8 Exhibit 14, but does not find evidence of a contrary opinion, i.e. that Plaintiff was in need of urgent
9 surgery or a consult. Rather, the references relate to Plaintiff’s allegations that Defendant Smith
10 excessively delayed orthopedic specialist consultation and surgery and denied him access to the
11 orthopedist despite Plaintiff’s complaints of pain. Plaintiff’s Exhibit 14, which is a telemedicine
12 consultation conducted by Dr. David G. Smith on February 18, 2005, does not indicate that Plaintiff
13 required emergency or immediate surgery. (ECF No. 174, p. 110.) The Court therefore treats this
14 fact as undisputed.

15 **III. Plaintiff’s Eighth Amendment Claim**

16 Liability under [section 1983](#) exists where a defendant “acted under the color of law” and
17 deprived the plaintiff “of a right secured by the Constitution or laws of the United States.” [Jensen v.](#)
18 [Lane County, 222 F.3d 570, 574 \(9th Cir. 2000\)](#). In order to be held liable, the defendant must have
19 personally participated in the deprivation of the plaintiff’s rights. [Ashcroft v. Iqbal, 556 U.S. 662,](#)
20 [677, 129 S. Ct. 1937, 1949](#) (2009); [Jones v. Williams, 297 F.3d 930, 934 \(9th Cir. 2002\)](#).

21 A prisoner’s claim of inadequate medical care does not constitute cruel and unusual
22 punishment unless the mistreatment rises to the level of “deliberate indifference to serious medical
23 needs.” [Jett v. Penner, 439 F.3d 1091, 1096 \(9th Cir. 2006\)](#) (quoting [Estelle v. Gamble, 429 U.S. 97,](#)
24 [104 \(1976\)](#)). The “deliberate indifference” standard involves an objective and a subjective prong.
25 First, the alleged deprivation must be, in objective terms, “sufficiently serious.” [Farmer v. Brennan,](#)
26 [511 U.S. 825, 834 \(1994\)](#) (citing [Wilson v. Seiter, 501 U.S. 294, 298 \(1991\)](#)). Second, the prison
27 official must act with a “sufficiently culpable state of mind,” which entails more than mere negligence,
28 but less than conduct undertaken for the very purpose of causing harm. [Farmer, 511 U.S. at 834-35.](#)

1 The two part test for deliberate indifference requires the plaintiff to show (1) “a ‘serious
2 medical need’ by demonstrating that failure to treat a prisoner’s condition could result in further
3 significant injury or the ‘unnecessary and wanton infliction of pain,’” and (2) “the defendant’s
4 response to the need was deliberately indifferent.” [Jett, 439 F.3d at 1096](#). A prison official does not
5 act in a deliberately indifferent manner unless the official “knows of and disregards an excessive risk
6 to inmate health or safety.” [Farmer, 511 U.S. at 837](#). “Deliberate indifference is a high legal
7 standard,” [Simmons, 609 F.3d at 1019](#); [Toguchi v. Chung, 391 F.3d 1051, 1060 \(9th Cir. 2004\)](#), and is
8 shown where there was “a purposeful act or failure to respond to a prisoner’s pain or possible medical
9 need” and the indifference caused harm, [Jett, 439 F.3d at 1096](#).

10 In applying this standard, the Ninth Circuit has held that before it can be said that a prisoner's
11 civil rights have been abridged, "the indifference to his medical needs must be substantial. Mere
12 ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.”
13 [Broughton v. Cutter Laboratories, 622 F.2d 458, 460 \(9th Cir. 1980\)](#), citing [Estelle, 429 U.S. at 105](#)
14 [06](#). “[A] complaint that a physician has been negligent in diagnosing or treating a medical condition
15 does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical
16 malpractice does not become a constitutional violation merely because the victim is a prisoner.”
17 [Estelle, 429 U.S. at 106](#); see also [Anderson v. County of Kern, 45 F.3d 1310, 1316 \(9th Cir. 1995\)](#).
18 Even gross negligence is insufficient to establish deliberate indifference to serious medical needs. See
19 [Wood v. Housewright, 900 F.2d 1332, 1334 \(9th Cir. 1990\)](#). Additionally, a prisoner’s mere
20 disagreement with diagnosis or treatment does not support a claim of deliberate indifference. [Sanchez](#)
21 [v. Vild, 891 F.2d 240, 242 \(9th Cir. 1989\)](#).

22 **C. Discussion**

23 1. Res Judicata

24 Defendant Smith contends that Plaintiff’s claim for deliberate indifference is barred by res
25 judicata. The Court previously determined that the instant action is not barred by res judicata. (ECF
26 Nos. 189, 191.) Defendant Smith did not object to that determination and the Court finds no basis to
27 depart from its prior decision. See, e.g., [United States v. Cuddy, 147 F.3d 1111, 1114 \(9th Cir. 1998\)](#)

1 (law of the case doctrine provides that the court is generally precluded from reconsidering an issue that
2 has already been decided by the same court, or a higher court in the identical case).

3 2. Deliberate Indifference

4 Defendant Smith asserts that there is a lack of sufficient evidence to establish that he was
5 deliberately indifferent to Plaintiff's medical needs or to establish a triable issue of fact. The Court
6 agrees.

7 Plaintiff does not contend that Defendant Smith refused to provide Plaintiff with care or
8 treatment. Rather, the crux of Plaintiff's argument is that he had to endure unnecessary pain due to
9 delays in orthopedic treatment and that Defendant Smith failed to ensure that he was seen sooner by an
10 orthopedic specialist and had surgery. (ECF No. 188, p. 2) Prison officials may exhibit deliberate
11 indifference by delaying necessary medical treatment. [Wilhelm v. Rotman, 680 F.3d 1113, 1122 \(9th](#)
12 [Cir. 2012\)](#). However, the undisputed evidence demonstrates that Defendant Smith did not make
13 medical appointments. (UMF Issue 2, at 5.) Defendant Smith's declaration also states that the alleged
14 delay was beyond his control as he had no authority to schedule appointments or to require that
15 Plaintiff be seen on anything other than a routine basis. (ECF No. 182-1, ¶ 7.) Plaintiff has presented
16 no evidence to show that Defendant Smith was responsible for ensuring that Plaintiff was scheduled to
17 be seen by an orthopedic specialist or to ensure that he received surgery. In other words, there is no
18 evidence that Defendant Smith had any control over how long it would take for Plaintiff to receive an
19 orthopedic consult appointment or surgery. Plaintiff's mere allegations and conjecture to the contrary
20 are insufficient to create factual dispute for purposes of summary judgment. [Nelson v. Pima Cmty.](#)
21 [Coll., 83 F.3d 1075, 1081-82 \(9th Cir. 1996\)](#).

22 Further, Defendant Smith contends that Plaintiff was not in need of urgent or emergency care,
23 and is of the opinion that Plaintiff did not suffer any harm as result of any purported delay. (ECF No.
24 182-1, ¶¶ 5-8.) Plaintiff presents no evidence indicating that Defendant Smith knew that Plaintiff's
25 knee was in need of emergency care or that there was a substantial risk of serious harm if Plaintiff did
26 not see an orthopedic specialist or have surgery immediately. Indeed, the orthopedic consult in
27 October 2004 did not suggest that Plaintiff required immediate surgery for his condition. (ECF No.
28 182-1, Ex. D, p. 36.) That Plaintiff complained of pain and that his right knee would no longer

1 support him is not sufficient to establish that he required an immediate consultation or emergency
2 surgery. At best, Plaintiff's assertions amount to a difference of opinion with Defendant Smith
3 regarding the appropriate course of treatment for Plaintiff's pain and other subjective reports, which
4 does not support a [section 1983](#) claim. See *Toguchi*, 391 F.3d at 1059-60 (a mere difference of
5 medical opinion is insufficient, as a matter of law, to establish deliberate indifference).

6 To the extent that Plaintiff relies on the arguments and exhibits cited in his motion for
7 summary judgment to argue that Defendant Smith failed to provide him with appropriate medical
8 treatment, the Court previously determined that Plaintiff had not provided sufficient evidence to
9 establish that Defendant Smith engaged in a purposeful act or otherwise failed to respond to Plaintiff's
10 pain and medical needs. (ECF No. 189, 191.)

11 In sum, there is no dispute that there was a delay in Plaintiff receiving an orthopedic
12 consultation and surgery. However, Plaintiff has not presented evidence to support the inference that
13 the delay in receiving his orthopedic consult or surgery was because of Defendant Smith's deliberate
14 indifference to Plaintiff's serious medical needs.

15 **IV. Conclusion and Recommendation**

16 For the reasons discussed above, the Court HEREBY RECOMMENDS that Defendant Smith's
17 motion for summary judgment be GRANTED.

18 These Findings and Recommendations will be submitted to the United States District Judge
19 assigned to the case, pursuant to the provisions of [Title 28 U.S.C. § 636\(b\)\(1\)](#). Within thirty (30) days
20 after being served with these Findings and Recommendations, the parties may file written objections
21 with the court. The document should be captioned "Objections to Magistrate Judge's Findings and
22 Recommendations." The parties are advised that failure to file objections within the specified time
23 may waive the right to appeal the District Court's order. [Martinez v. Ylst, 951 F.2d 1153 \(9th Cir.](#)
24 [1991\)](#).

25 IT IS SO ORDERED.

26 Dated: August 1, 2013

27 /s/ Barbara A. McAuliffe
28 UNITED STATES MAGISTRATE JUDGE