

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

KIM VELASQUEZ,

Plaintiff,

v.

ABRAHAM APPLETON, M.D., et al.,

Defendants.

CASE NO. 1:08-cv-00009-LJO-GSA PC

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DISMISSAL OF ACTION,  
WITH PREJUDICE, FOR FAILURE TO  
STATE A CLAIM

(Docs. 18 & 19)

/ OBJECTIONS DUE WITHIN THIRTY DAYS

**Findings and Recommendations Following Screening of Complaint**

Plaintiff Kim Velasquez is a state prisoner, proceeding *pro se* and in *forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed an amended complaint on March 3, 2008, and a supplement to the amended complaint on March 4, 2008.

**I. Screening Requirement**

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.

§ 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been

///

///

1 paid, the Court shall dismiss the case at any time if the Court determines that . . . the action or  
2 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §  
3 1915(e)(2)(B)(ii).

4 “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited  
5 exceptions,” none of which applies to section 1983 actions. Swierkiewicz v. Sorema N. A., 534  
6 U.S. 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain “a  
7 short and plain statement of the claim showing that the pleader is entitled to relief . . . .” Fed. R.  
8 Civ. P. 8(a). “Such a statement must simply give the defendant fair notice of what the plaintiff’s  
9 claim is and the grounds upon which it rests.” Swierkiewicz, *supra*, 534 U.S. at 512. A court  
10 may dismiss a complaint only if it is clear that no relief could be granted under any set of facts  
11 that could be proved consistent with the allegations. Id. at 514. ““The issue is not whether a  
12 plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support  
13 the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and  
14 unlikely but that is not the test.” Jackson v. Carey, 353 F.3d 750, 755 (9th Cir. 2003), *quoting*  
15 Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); *see also* Austin v. Terhune, 367 F.3d 1167, 1171  
16 (9th Cir. 2004) (“Pleadings need suffice only to put the opposing party on notice of the  
17 claim . . . .”), *quoting* Fontana v. Haskin, 262 F.3d 871, 977 (9th Cir. 2001). However, “the  
18 liberal pleading standard . . . applies only to a plaintiff’s factual allegations.” Neitzke v.  
19 Williams, 490 U.S. 319, 330 n. 9 (1989). “[A] liberal interpretation of a civil rights complaint  
20 may not supply essential elements of the claim that were not initially pled.” Bruns v. Nat’l  
21 Credit Union Admin., 122 F.3d 1251, 1257 (9th Cir. 1997), *quoting* Ivey v. Bd. of Regents, 673  
22 F.2d 266, 268 (9th Cir. 1982).

## 23 **II. Plaintiff’s Claim**

### 24 **A. Summary of Complaint**

25 On or about April 1, 2004, Plaintiff, then incarcerated at an unspecified institution of the  
26 California Department of Corrections, underwent surgery for total replacement of his left hip and  
27 removal of displaced screws. Defendant Abraham Appleton, M.D., performed the surgery,  
28 assisted by Defendants Artura Avila, P.A., and John Bilello, M.D. Thereafter, Plaintiff

1 contracted Hepatitis C, presumably from one of the eight units of blood transfused during the  
2 surgery. Plaintiff currently resides at Corcoran State Prison.

3 **C. Eighth Amendment Claim - Deliberate Indifference to Serious Medical**  
4 **Needs.**

5 Plaintiff contends that Defendants negligently and carelessly performed his hip  
6 replacement surgery, resulting in the unnecessary and wanton infliction of post-surgical pain and  
7 in Plaintiff's contracting Hepatitis C. Although the adverse effects of Plaintiff's surgery are  
8 unfortunate, they do not reach the level of a constitutional violation.

9 "Deliberate indifference is a high legal standard." Toguchi v. Chung, 391 F.3d 1051,  
10 1060 (9th Cir. 2004). "Under this standard, the prison official must not only 'be aware of the  
11 facts from which the inference could be drawn that a substantial risk of serious harm exists,' but  
12 that person 'must also draw the inference.'" Id. at 1057, *quoting* Farmer v. Brennan, 511 U.S.  
13 825, 837 (1994). A prisoner's claim of inadequate medical care does not rise to the level of an  
14 Eighth Amendment violation unless (1) "the prison official deprived the prisoner of the 'minimal  
15 civilized measure of life's necessities,'" and (2) "the prison official 'acted with deliberate  
16 indifference in doing so.'" Toguchi, supra, 391 F.3d at 1057, *quoting* Hallett v. Morgan, 296  
17 F.3d 732, 744 (9th Cir. 2002) (*citation omitted*). A prison official does not act in a deliberately  
18 indifferent manner unless the official "knows of and disregards an excessive risk to inmate health  
19 or safety." Farmer, supra, 511 U.S. at 834. Deliberate indifference may be manifested "when  
20 prison officials deny, delay or intentionally interfere with medical treatment," or in the manner  
21 "in which prison physicians provide medical care." McGuckin v. Smith, 974 F.2d 1050, 1059  
22 (9th Cir. 1992), *overruled on other grounds*, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136  
23 (9th Cir. 1997) (*en banc*).

24 Plaintiff here alleges negligence against the defendant-doctors whose collective care of  
25 plaintiff resulted in post-surgical pain and his contracting Hepatitis C. "[A] complaint that a  
26 physician has been negligent in diagnosing or treating a medical condition does not state a valid  
27 claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not  
28 become a constitutional violation merely because the victim is a prisoner." Estelle v. Gamble,  
429 U.S. 97, 106 (1976). *See also* Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006); Toguchi,

1 *supra*, 391 F.3d at 1057, 1060 (stating that “[d]eliberate indifference is a high legal standard.”);  
2 Clement v. Gomez, 298 F.3d 898, 904-05 (9<sup>th</sup> Cir. 2002); Lopez v. Smith, 203 F.3d 1122, 1131  
3 (9<sup>th</sup> Cir. 2000) (en banc); Frost v. Agnos, 152 F.3d 1124, 1130 (9<sup>th</sup> Cir. 1998); Anderson v.  
4 County of Kern, 45 F.3d 1310, 1316 (9<sup>th</sup> Cir.), *amended*, 75 F.3d 448 (9<sup>th</sup> Cir.), *cert. denied*, 516  
5 U.S. 916 (1997)(en banc); McGuckin, *supra*, 974 F.2d at 1059; Hutchinson v. United States,  
6 838 F.2d 390, 394 (9<sup>th</sup> Cir. 1998); Toussaint v. McCarthy, 801 F.2d 1080, 1113 (9<sup>th</sup> Cir. 1986),  
7 *cert. denied*, 481 U.S. 1069 (1987), *abrogated on other grounds by Sandin v. Connor*, 515 U.S.  
8 472 (1995). Even gross negligence is insufficient to establish deliberate indifference to serious  
9 medical needs. See Toguchi, *supra*, 391 F.3d at 1060.

10 Plaintiff’s claims, which sound in medical malpractice, do not state an Eighth Amendment  
11 claim for deliberate indifference to serious medical need upon which relief can be granted.  
12 Accordingly, the case against the defendant-doctors should be dismissed.

13 **III. Conclusion and Recommendation**

14 Plaintiff’s complaint fails to state a claim upon which relief may be granted under federal  
15 law. Because amending the complaint will not cure the deficiency, the Court hereby recommends  
16 that this action be dismissed, with prejudice, for failure to state a claim.

17 These Findings and Recommendations will be submitted to the United States District  
18 Judge assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty (30)**  
19 **days** after being served with these Findings and Recommendations, Plaintiff may file written  
20 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s  
21 Findings and Recommendations.” Plaintiff is advised that, by failing to file objections within the  
22 specified time, he may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951  
23 F.2d 1153 (9<sup>th</sup> Cir. 1991).

24  
25  
26 IT IS SO ORDERED.

27 **Dated: July 23, 2009**

28 /s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE