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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TROY MAGARRELL,

Plaintiff,

No. CIV S-04-2634 LKK DAD P

vs.

P. MANGIS, M.D., et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding through counsel with a civil rights action seeking relief under 42 U.S.C. § 1983. This matter is before the court on defendant Mangis’ motion for summary judgment brought pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff has filed an opposition to the motion, and defendant has filed a reply. On July 31, 2009, the undersigned heard oral arguments in this matter.

BACKGROUND

Plaintiff is proceeding on his original complaint against defendants Mangis and Roche.¹ Therein, he alleges as follows. On October 29, 2003, after three days of complaining of

¹ Defendant Dr. Mangis is represented by the Office of the Attorney General. Defendant Dr. Roche is represented by Stanzler Funderburk and Castellon, LLP. Counsel on behalf of defendant Roche has also filed a motion for summary judgment, which the court addresses in separate findings and recommendations.

1 pain due to kidney stones, plaintiff received a shot containing a pain killer at High Desert State
2 Prison's ("HDSP") Correctional Treatment Center. Plaintiff went to the yard clinic the next
3 morning for a follow-up visit with defendant Mangis. Plaintiff overheard the defendant comment
4 that all inmates are drug addicts and that plaintiff merely wanted a shot of dope. (Compl. at 3.)

5 At the clinic, plaintiff submitted a urine sample, which contained trace amounts of
6 blood. He also underwent a blood-sugar test. Plaintiff then met with Dr. Mangis who asked him
7 a series of questions, which allegedly had nothing to do with kidney stones. Plaintiff told Dr.
8 Mangis to look at his medical file to understand his history with kidney stones, but Dr. Mangis
9 responded by suggesting that plaintiff was only interested in drugs. Dr. Mangis also accused
10 plaintiff of adding blood to his urine sample. (Compl. at 3-4 & Ex. C.)

11 Dr. Mangis told plaintiff to lay down on the examining table and bring his knees
12 up and then squeezed plaintiff's left kidney area. Plaintiff tried to get away and yelled for him to
13 stop, but Dr. Mangis then squeezed plaintiff's right kidney area. When plaintiff broke away, Dr.
14 Mangis said "See you don't have kidney stones" and ordered correctional officers to take
15 plaintiff back to his cell. Plaintiff alleges that he had difficulty urinating thereafter and began
16 submitting sick-call slips. (Compl. at 4.)

17 On November 10, 2003, plaintiff saw Dr. Mangis a second time but the doctor
18 refused to open his medical file and instead touched plaintiff's back with his finger and
19 proclaimed him stone-free. According to plaintiff, his medical file contained 198 pages
20 documenting his history with kidney stones, dating as far back as 1992, when he was incarcerated
21 at the California Youth Authority. (Compl. at 4 & Ex. D.)

22 Plaintiff submitted an inmate appeal and explained that he had a kidney stone that
23 was stuck and was causing him pain and hindering his urine flow. He asked for a diagnostic test,
24 such as an x-ray or an ultrasound. He also asked to see Dr. Lajeunesse, a urologist familiar with
25 his case, to remove the kidney stone. Plaintiff did not receive a reply, so he re-submitted the
26 appeal on November 25, 2003. Again, he did not receive a reply, so he re-submitted the appeal

1 on December 10, 2003, and labeled it an “emergency appeal.” Defendant Dr. Roche, however,
2 refused to treat it as an emergency appeal. (Compl. at 5 & Ex. F.)

3 On January 16, 2004, plaintiff met with Dr. James regarding his inmate appeal.
4 Dr. James denied the appeal with Dr. Roche’s approval. Plaintiff then submitted additional sick-
5 call slips and sent his appeal to the next level. Subsequently, plaintiff showed Dr. James his
6 medical file, including a 2002 operative report by Dr. Lajeunesse stating that he would need to be
7 followed closely and that he had a significant risk for recurrence of his stricture. Dr. James then
8 agreed to send plaintiff to see Dr. Lajeunesse. (Compl. at 5 & Exs. F, G.)

9 In early May 2004, plaintiff passed a kidney stone. On May 10, 2004, he saw Dr.
10 Lajeunesse and provided her with the stone for analysis. He also told her about his seven
11 consecutive months of suffering pain. Dr. Lajeunesse told correctional officers to take plaintiff
12 across town to the emergency room to have an emergency CT scan. The scan showed that he had
13 four additional kidney stones, so Dr. Lajeunesse scheduled him for surgery. (Compl. at 6 & Exs.
14 H, I, J.)

15 On June 16, 2004, plaintiff was in extreme pain and could not urinate. He could
16 only drip blood from his penis. Correctional officers emergency transported him to Northern
17 Nevada Medical Center where he passed another kidney stone. On July 22, 2004, plaintiff saw
18 Dr. Lajeunesse, and she requested an “urgent” operation for him. (Compl. at 6-7 & Exs. K, L.)

19 On July 23, 2004, plaintiff was in extreme pain again and went to HDSP’s
20 Correctional Treatment Center. Plaintiff alleges that defendant Dr. Roche refused to treat him
21 and told the nurse to send him back to administrative segregation. Dr. Roche said “We already
22 know you have kidney stones. Your [sic] scheduled for surgery soon.” On August 3, 2004,
23 plaintiff underwent surgery. During the procedure, the doctor removed or treated eight kidney
24 stones. (Compl. at 7-8 & Ex. L.)

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1 Plaintiff claims that defendant Drs. Mangis and Roche have been deliberately
2 indifferent to his medical needs in violation of the Eighth Amendment. Plaintiff requests
3 declaratory relief, injunctive relief, and damages. (Compl. at 11-12.)

4 **SUMMARY JUDGMENT STANDARDS UNDER RULE 56**

5 Summary judgment is appropriate when it is demonstrated that there exists “no
6 genuine issue as to any material fact and that the moving party is entitled to a judgment as a
7 matter of law.” Fed. R. Civ. P. 56(c).

8 Under summary judgment practice, the moving party
9 always bears the initial responsibility of informing the district court
10 of the basis for its motion, and identifying those portions of “the
11 pleadings, depositions, answers to interrogatories, and admissions
12 on file, together with the affidavits, if any,” which it believes
13 demonstrate the absence of a genuine issue of material fact.

14 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). “[W]here the
15 nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary
16 judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers
17 to interrogatories, and admissions on file.’” Id. Indeed, summary judgment should be entered,
18 after adequate time for discovery and upon motion, against a party who fails to make a showing
19 sufficient to establish the existence of an element essential to that party’s case, and on which that
20 party will bear the burden of proof at trial. See id. at 322. “[A] complete failure of proof
21 concerning an essential element of the nonmoving party’s case necessarily renders all other facts
22 immaterial.” Id. In such a circumstance, summary judgment should be granted, “so long as
23 whatever is before the district court demonstrates that the standard for entry of summary
24 judgment, as set forth in Rule 56(c), is satisfied.” Id. at 323.

25 If the moving party meets its initial responsibility, the burden then shifts to the
26 opposing party to establish that a genuine issue as to any material fact actually does exist. See
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to
establish the existence of this factual dispute, the opposing party may not rely upon the

1 allegations or denials of its pleadings but is required to tender evidence of specific facts in the
2 form of affidavits, and/or admissible discovery material, in support of its contention that the
3 dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party
4 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome
5 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
6 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.
7 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could
8 return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433,
9 1436 (9th Cir. 1987).

10 In the endeavor to establish the existence of a factual dispute, the opposing party
11 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
12 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
13 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary
14 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a
15 genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory
16 committee’s note on 1963 amendments).

17 In resolving the summary judgment motion, the court examines the pleadings,
18 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
19 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,
20 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the
21 court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.
22 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to
23 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen
24 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.
25 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply
26 show that there is some metaphysical doubt as to the material facts Where the record taken

1 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
2 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

3 **OTHER APPLICABLE LEGAL STANDARDS**

4 I. Civil Rights Act Pursuant to 42 U.S.C. § 1983

5 The Civil Rights Act under which this action was filed provides as follows:

6 Every person who, under color of [state law] . . . subjects, or causes
7 to be subjected, any citizen of the United States . . . to the
8 deprivation of any rights, privileges, or immunities secured by the
9 Constitution . . . shall be liable to the party injured in an action at
10 law, suit in equity, or other proper proceeding for redress.

11 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
12 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
13 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
14 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the
15 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
16 omits to perform an act which he is legally required to do that causes the deprivation of which
17 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

18 Moreover, supervisory personnel are generally not liable under § 1983 for the
19 actions of their employees under a theory of respondeat superior and, therefore, when a named
20 defendant holds a supervisory position, the causal link between him and the claimed
21 constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862
22 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory
23 allegations concerning the involvement of official personnel in civil rights violations are not
24 sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

25 II. The Eighth Amendment and Inadequate Medical Care

26 The unnecessary and wanton infliction of pain constitutes cruel and unusual
punishment prohibited by the Eighth Amendment. Whitley v. Albers, 475 U.S. 312, 319 (1986);
Ingraham v. Wright, 430 U.S. 651, 670 (1977); Estelle v. Gamble, 429 U.S. 97, 105-06 (1976).

1 In order to prevail on a claim of cruel and unusual punishment, a prisoner must allege and prove
2 that objectively he suffered a sufficiently serious deprivation and that subjectively prison officials
3 acted with deliberate indifference in allowing or causing the deprivation to occur. Wilson v.
4 Seiter, 501 U.S. 294, 298-99 (1991).

5 Where a prisoner’s Eighth Amendment claims arise in the context of medical
6 care, the prisoner must allege and prove “acts or omissions sufficiently harmful to evidence
7 deliberate indifference to serious medical needs.” Estelle, 429 U.S. at 106. An Eighth
8 Amendment medical claim has two elements: “the seriousness of the prisoner’s medical need
9 and the nature of the defendant’s response to that need.” McGuckin v. Smith, 974 F.2d 1050,
10 1059 (9th Cir. 1991), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133
11 (9th Cir. 1997) (en banc).

12 A medical need is serious “if the failure to treat the prisoner’s condition could
13 result in further significant injury or the ‘unnecessary and wanton infliction of pain.’”
14 McGuckin, 974 F.2d at 1059 (quoting Estelle v. Gamble, 429 U.S. at 104). Indications of a
15 serious medical need include “the presence of a medical condition that significantly affects an
16 individual’s daily activities.” Id. at 1059-60. By establishing the existence of a serious medical
17 need, a prisoner satisfies the objective requirement for proving an Eighth Amendment violation.
18 Farmer v. Brennan, 511 U.S. 825, 834 (1994).

19 If a prisoner establishes the existence of a serious medical need, he must then
20 show that prison officials responded to the serious medical need with deliberate indifference.
21 Farmer, 511 U.S. at 834. In general, deliberate indifference may be shown when prison officials
22 deny, delay, or intentionally interfere with medical treatment, or may be shown by the way in
23 which prison officials provide medical care. Hutchinson v. United States, 838 F.2d 390, 393-94
24 (9th Cir. 1988). Before it can be said that a prisoner’s civil rights have been abridged with regard
25 to medical care, however, “the indifference to his medical needs must be substantial. Mere
26 ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.”

1 Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at
2 105-06). See also Toguchi v. Soon Hwang Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (“Mere
3 negligence in diagnosing or treating a medical condition, without more, does not violate a
4 prisoner’s Eighth Amendment rights.”); McGuckin, 974 F.2d at 1059 (same). Deliberate
5 indifference is “a state of mind more blameworthy than negligence” and “requires ‘more than
6 ordinary lack of due care for the prisoner’s interests or safety.’” Farmer, 511 U.S. at 835
7 (quoting Whitley, 475 U.S. at 319).

8 Delays in providing medical care may manifest deliberate indifference. Estelle,
9 429 U.S. at 104-05. To establish a claim of deliberate indifference arising from delay in
10 providing care, a plaintiff must show that the delay was harmful. See Berry v. Bunnell, 39 F.3d
11 1056, 1057 (9th Cir. 1994); McGuckin, 974 F.2d at 1059; Wood v. Housewright, 900 F.2d 1332,
12 1335 (9th Cir. 1990); Hunt v. Dental Dep’t, 865 F.2d 198, 200 (9th Cir. 1989); Shapley v.
13 Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985). In this regard, “[a]
14 prisoner need not show his harm was substantial; however, such would provide additional
15 support for the inmate’s claim that the defendant was deliberately indifferent to his needs.” Jett
16 v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). See also McGuckin, 974 F.2d at 1060.

17 Finally, mere differences of opinion between a prisoner and prison medical staff
18 as to the proper course of treatment for a medical condition do not give rise to a § 1983 claim.
19 Toguchi, 391 F.3d at 1058; Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996); Sanchez v.
20 Vild, 891 F.2d 240, 242 (9th Cir. 1989); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir.
21 1981).

22 **DEFENDANT MANGIS’ MOTION FOR SUMMARY JUDGMENT**

23 I. Defendant Dr. Mangis’ Statement of Undisputed Facts and Evidence

24 Defendant Mangis’ statement of undisputed facts is supported by citations to
25 plaintiff’s complaint as well as by citations to his own declaration signed under penalty of
26 perjury.

1 The evidence submitted by Dr. Mangis establishes the following. Defendant
2 Mangis has been practicing medicine for more than 30 years and was a contract doctor providing
3 services to patients housed at HDSP at the time of the events alleged in plaintiff's complaint. On
4 October 30, 2003, Dr. Mangis examined plaintiff for alleged pain related to a kidney stone. He
5 ordered medical personnel to take plaintiff's vital signs, get a urine sample from him, and
6 conduct a blood test. Plaintiff's vital signs were normal. In addition, plaintiff did not exhibit the
7 typical symptoms associated with passing a kidney stone, such as nausea, vomiting, sweating,
8 excruciating pain radiating to the groin, or lack of appetite. Based on plaintiff's test results and
9 Dr. Mangis' examination and observations, the defendant believed that plaintiff was greatly
10 exaggerating his symptoms. Plaintiff did not appear to have an infection. Nor did he appear to
11 be actively passing a kidney stone. Dr. Mangis prescribed plaintiff Tylenol for pain and
12 recommended that he be observed. He also advised plaintiff to "force liquids" or drink
13 additional fluids in case he needed to pass a kidney stone. (Def.'s SUDF 2-6, Mangis Decl. &
14 Attach.)

15 On November 10, 2003, Dr. Mangis examined plaintiff again for alleged pain
16 related to a kidney stone. He ordered medical personnel to take plaintiff's vital signs. He also
17 examined plaintiff's back and kidney area for signs of pain or infection. Plaintiff's vital signs
18 were normal. In addition, plaintiff was relaxed and was not in any acute pain or stress. Based on
19 plaintiff's test results and Dr. Mangis' examination and observations, the defendant believed that
20 plaintiff did not appear to have an infection. Nor did plaintiff appear to Dr. Mangis to be actively
21 passing a kidney stone. In Dr. Mangis' opinion, plaintiff was not in any distress and did not need
22 any further testing or care. Dr. Mangis also noted that plaintiff's medical records were replete
23 with examples of him showing up requesting pain medication under the guise of passing a kidney
24 stone when he had no objective symptoms. (Def.'s SUDF 7-13, Mangis Decl. & Attach.)

25 Dr. Mangis declares that he never refused to examine plaintiff nor did he refuse to
26 provide plaintiff with care or treatment. He tried to make an accurate evaluation of plaintiff's

1 condition and provide him with all reasonable and necessary care based on his observations and
2 examinations, and the results of objective testing. According to Dr. Mangis, he was never aware
3 of any serious risk of injury or harm to plaintiff and never intentionally or knowingly disregarded
4 any such risk to plaintiff. Dr. Mangis believed that plaintiff did not need any further care or
5 treatment on the dates that he saw him. Subsequent urine tests in December 2003 were normal
6 and purportedly confirmed that plaintiff was not passing a kidney stone and did not have an
7 infection or other medical condition requiring further care or treatment. (Def.'s SUDF 14-19,
8 Mangis Decl, Pl.'s Compl. Ex. F.)

9 II. Defendant Mangis' Arguments

10 Defense counsel argues that Dr. Mangis is entitled to summary judgment in his
11 favor on plaintiff's Eighth Amendment claims because there is no evidence that the defendant
12 was deliberately indifferent to plaintiff's medical needs. For purposes of this motion, Dr. Mangis
13 concedes that a significant infection or the active passing a kidney stone is a serious medical
14 condition. However, here, counsel argues that Dr. Mangis honestly did not believe that plaintiff
15 had an infection or was actively passing a kidney stone. Moreover, counsel contends that, even if
16 the Dr. Mangis was wrong in this regard and failed to order or conduct every possible medical
17 test, his conduct amounts to nothing more than negligence or medical malpractice and does not
18 rise to the level of deliberate indifference. Counsel also contends that plaintiff's belief that he
19 should have received other diagnostic tests is a mere difference of opinion between a prisoner
20 and prison medical staff as to the proper course of medical treatment. In any event, counsel
21 argues, plaintiff received additional diagnostic tests one month later that confirmed that he did
22 not have an infection, was not passing a kidney stone and did not need further treatment. (Def.'s
23 Mem. of P. & A. at 6-7.)

24 III. Plaintiff's Opposition

25 Plaintiff's opposition to defendant's motion for summary judgment is supported
26 by a response to defendant Mangis' statement of undisputed facts and a separate statement of

1 disputed facts. It is also supported by citations to plaintiff's deposition transcript, plaintiff's
2 medical records, and defendant Mangis' deposition transcript.

3 Counsel for plaintiff argues that there is a disputed issue of material fact as to
4 whether defendant Mangis was deliberately indifferent to plaintiff's serious medical needs. By
5 way of background, counsel explains that plaintiff has had a long history of kidney stones, having
6 suffered approximately 40 kidney and urinary tract stones since 1991. Plaintiff has been
7 hospitalized and has undergone surgery for the stones on several occasions. On October 29,
8 2003, plaintiff went to HDSP's emergency room complaining of left flank pain that radiated to
9 the left side of his abdomen. Plaintiff received pain medication and subsequently a ducat to go to
10 the yard clinic the next day. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 3-4, 6 & Pl.'s Dep. at
11 10-25, 43-45.)

12 On October 30, 2003, plaintiff went to the yard clinic and submitted a urine
13 sample to the nurse that contained trace amounts of blood. He also completed a blood sugar
14 finger-stick test. When plaintiff saw Dr. Mangis, the defendant refused to open plaintiff's
15 medical file and accused him of drug-seeking. Dr. Mangis squeezed plaintiff's left side and
16 proclaimed him stone free without further testing. Dr. Mangis squeezed plaintiff so hard that it
17 caused him excruciating pain. Plaintiff was unable to urinate for 18 hours after this medical visit.
18 (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 6 & Pl.'s Dep. at 54-67.)

19 Between October 30, 2003, and November 10, 2003, plaintiff submitted an
20 estimated five or six sick-call slips. On November 10, 2003, he saw Dr. Mangis a second time.
21 Again, Dr. Mangis labeled plaintiff a drug-seeker and did not conduct any tests or diagnose
22 plaintiff's recurrence of kidney stones. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 6 & Pl.'s
23 Dep. at 71, 73-84.)

24 On November 10, 2003, plaintiff began filing inmate appeals regarding his kidney
25 stones and Dr. Mangis' alleged conduct. On May 10, 2004, plaintiff saw his outside urologist,
26 Dr. Lajeunesse, and on the same day she ordered a CT scan. The scan revealed that plaintiff had

1 three kidney stones in his right kidney and one kidney stone in his left kidney. On August 3,
2 2004, plaintiff underwent surgery to remove or treat the kidney stones thereby relieving him of
3 his pain. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 6-8 & Exs. F, G.)

4 Counsel argues that defendant Mangis allowed plaintiff to suffer unnecessarily
5 from extreme kidney stone pain for seven months until a urologist removed his kidney stones on
6 August 3, 2004. Dr. Mangis admits that he was aware that plaintiff had a history of kidney
7 stones. However, during plaintiff's first visit with him, Dr. Mangis refused to look at plaintiff's
8 medical chart. In addition, despite the fact that plaintiff complained of severe pain and had
9 visited the emergency room the night before for the same pain, Dr. Mangis failed to order any
10 diagnostic tests to determine whether plaintiff was suffering from a recurrence of kidney stones.
11 Instead, he labeled plaintiff a drug-seeker and proclaimed him stone-free. Similarly, during
12 plaintiff's second visit, Dr. Mangis failed to perform a urine test or conduct a manual exam.
13 According to the defendant's own progress note, he had already concluded that plaintiff was
14 merely seeking pain medication. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 10-11.)

15 Counsel argues that, by completely disregarding plaintiff's extensive history of
16 kidney stones, and by failing to diagnose and treat plaintiff's recurrence of kidney stones, Dr.
17 Mangis knew of and disregarded the risks to plaintiff's health, including the severe pain plaintiff
18 would continue to suffer. Dr. Mangis knew that kidney stone pain could be severe and that
19 plaintiff complained of pain and had blood in his urine, both of which Dr. Mangis acknowledges
20 are consistent with a kidney stone. Moreover, counsel notes that appropriate diagnostic tests,
21 specifically, a KUB (kidney, ureter, bladder) X-ray, were available at the prison and would have
22 detected the presence of kidney stones. However, Dr. Mangis simply concluded that plaintiff
23 was a drug-seeker. That plaintiff did not receive any diagnostic study to determine whether he
24 was suffering from a recurrence of kidney stones represents an unreasonable delay and denial of
25 necessary medical treatment. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 9-11.)

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1 IV. Defendant Mangis' Reply

2 In reply, defense counsel reiterates that plaintiff's vital signs were normal during
3 his first visit in October 2003. Dr. Mangis would have expected that someone suffering from
4 excruciating pain from a kidney stone would have an elevated pulse and blood pressure or would
5 exhibit symptoms such as nausea, vomiting, sweating, excruciating pain to the groin, or lack of
6 appetite. In addition, according to the defendant, trace amounts of blood in a urine test is not
7 uncommon in someone like plaintiff who has had prior operations. Finally, Dr. Mangis
8 conducted a physical examination of plaintiff's flank areas, and they were "negative for any
9 objective evidence of tenderness or tenseness." In Dr. Mangis' opinion, there were no objective
10 findings consistent with kidney stones and no reason to order further testing. (Def.'s Reply at 2-
11 3, 5-6.)

12 Defense counsel also argues that Dr. Mangis did not simply look at plaintiff and
13 declare him stone-free during his second visit in November 2003. Even plaintiff admits in his
14 complaint that Dr. Mangis at least felt his back. In addition, plaintiff's medical records indicate
15 that his vital signs were normal and that plaintiff was relaxed and not in acute stress. Counsel
16 acknowledges that the court may not make credibility determinations on a motion for summary
17 judgment, but counsel contends that the opposing party may not create a triable issue of fact by
18 contradicting his own verified complaint and exhibits. (Def.'s Reply at 6.)

19 Defense counsel notes that plaintiff has not offered any medical expert or
20 competent testimony that any further testing, care, or treatment was necessary for plaintiff.
21 Moreover, counsel contends that plaintiff's lay opinion is insufficient to create a triable issue of
22 fact regarding Dr. Mangis' state of mind or the validity of Dr. Mangis' medical opinions. At
23 most, plaintiff disagrees with Dr. Mangis' assessments and believes that he should have done
24 more. However, such a disagreement is insufficient to state a claim for deliberate indifference.
25 Moreover, counsel contends that even if Dr. Mangis was wrong in his medical opinions, at most,

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1 he was negligent in failing to order further testing and such negligence is insufficient to support a
2 claim for deliberate indifference. (Def.'s Reply at 6.)

3 Finally, defense counsel reiterates that plaintiff underwent additional objective
4 tests one month after his contacts with Dr. Mangis. Specifically, on December 15, 2003,
5 plaintiff's urinalysis was normal. His urine dip test was also normal with no signs blood or
6 bleeding. His own doctor determined that there was no evidence that he had any kidney stones or
7 a bladder infection, so there was no urgent need for further investigation. (Def.'s Reply at 6-7.)

8 ANALYSIS

9 I. Plaintiff's Serious Medical Needs

10 The undersigned concludes that based upon the evidence presented by the parties
11 in connection with the pending motion that a reasonable juror could conclude that plaintiff's
12 recurring kidney stones and related pain constitute objective, serious medical needs. See
13 McGuckin, 974 F.2d at 1059-60 ("The existence of an injury that a reasonable doctor or patient
14 would find important and worthy of comment or treatment; the presence of a medical condition
15 that significantly affects an individual's daily activities; or the existence of chronic and
16 substantial pain are examples of indications that a prisoner has a 'serious' need for medical
17 treatment."); see also Canell v. Bradshaw, 840 F. Supp. 1382, 1393 (D. Or. 1993) (the Eighth
18 Amendment duty to provide medical care applies "to medical conditions that may result in pain
19 and suffering which serve no legitimate penological purpose."). Specifically, plaintiff's long and
20 largely undisputed medical history demonstrates that a failure to treat him could result in "further
21 significant injury" and the "unnecessary and wanton infliction of pain." See, e.g., McGuckin,
22 974 F.2d at 1059. Accordingly, defendant Mangis' motion for summary judgment hinges on
23 whether, based upon the evidence before the court, a rationale jury could conclude that the
24 defendant responded to plaintiff's serious medical needs with deliberate indifference. Farmer,
25 511 U.S. at 834; Estelle, 429 U.S. at 106.

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1 II. Defendant Mangis' Response to Plaintiff's Serious Medical Needs

2 The court finds that defendant Mangis has borne his initial responsibility of
3 demonstrating that there is no genuine issue of material fact with respect to the adequacy of the
4 medical care provided to plaintiff. Defendant's evidence demonstrates that he met with plaintiff
5 on two occasions. On October 30, 2003, Dr. Mangis met with plaintiff for alleged pain related to
6 a kidney stone. According to plaintiff's medical records, plaintiff's vital signs were normal. In
7 addition, plaintiff did not present the typical symptoms associated with passing a kidney stone,
8 such as nausea, vomiting, sweating, excruciating pain radiating to the groin, or lack of appetite.
9 Nor did plaintiff confirm such symptoms when defendant Mangis asked about them specifically.
10 Dr. Mangis observed that plaintiff's descriptions of pain and discomfort did not fit the classical
11 picture of a patient passing a kidney stone. Dr. Mangis' examination of plaintiff was also
12 negative for any objective tenderness or tenseness. Based on plaintiff's test results and
13 defendant's examination and observations, he believed that plaintiff did not appear to have an
14 infection or to be actively passing a kidney stone. Dr. Mangis prescribed plaintiff Tylenol for
15 pain and recommended that plaintiff be observed. He also advised plaintiff to "force liquids" or
16 drink additional fluids in case he needed to pass a kidney stone. (Mangis Decl. & Attach.)

17 On November 10, 2003, Dr. Mangis met with plaintiff a second time for alleged
18 pain related to a kidney stone. According to plaintiff's medical records, plaintiff's vital signs
19 were normal, he was relaxed and in no acute or active distress. Dr. Mangis saw no sign that
20 plaintiff was actively passing a kidney stone. Dr. Mangis recorded in his progress note that
21 plaintiff had a history of "incessant medication line visits," and was "medication seeking, likely
22 pain or muscle relaxant type, on ruse of having active kidney stone." Dr. Mangis informed
23 plaintiff that if he did have a kidney stone but it was not active or moving forward through the
24 ureter, it would be unlikely to cause him pain or obstruction. (Mangis Decl. & Attach.)

25 Plaintiff's subsequent urine tests in December 2003 were normal and indicated
26 that he was not passing a kidney stone and did not have an infection or other medical condition

1 requiring further care or treatment. (Pl.'s Compl. Ex. F.) Given this evidence, the burden shifts
2 to plaintiff to establish the existence of a genuine issue of material fact with respect to his
3 deliberate indifference claim.

4 The court finds that a reasonable juror could conclude that Dr. Mangis responded
5 to plaintiff's serious medical needs with deliberate indifference. Farmer, 511 U.S. at 834;
6 Estelle, 429 U.S. at 106. In so concluding, the court has considered plaintiff's opposition to the
7 pending motion for summary judgment, his sworn deposition testimony, and his verified
8 complaint. On defendant Mangis' motion for summary judgment, the court is required to believe
9 plaintiff's evidence and draw all reasonable inferences from the facts before the court in
10 plaintiff's favor. Drawing all reasonable inferences in plaintiff's favor, the court finds that
11 plaintiff has submitted sufficient evidence to create a genuine issue of material fact precluding
12 summary judgment in favor of defendant Mangis.

13 Defense counsel argues that Dr. Mangis was never aware of any serious risk of
14 injury or harm to plaintiff and never intentionally or knowingly disregarded any serious risk of
15 injury or harm to plaintiff. However, this court cannot grant defendant's motion for summary
16 judgment simply based on his assertion as to his own state of mind. As the Ninth Circuit recently
17 has explained:

18 Proof of "subjective awareness" is not limited to the purported
19 recollections of the individuals involved. "Whether an official had
20 the requisite knowledge of a substantial risk is a question of fact
21 subject to demonstration in the usual ways, including inference
22 from circumstantial evidence." Indeed, in certain circumstances,
23 "a factfinder may conclude that [an] official knew of a substantial
24 risk from the very fact that the risk was obvious. . . ."

25 * * *

26 "[Q]uestions involving a person's state of mind are generally
27 factual issues inappropriate for resolution by summary judgment."
28 We, of course, "may not make credibility determinations or weigh
29 conflicting evidence." (internal citations omitted)

30 Conn v. City of Reno, ___ F.3d ___, ___, 2009 WL 2195338 at *7 & *9 (9th Cir. July 24, 2009).

1 In this case, plaintiff has a long and largely undisputed medical history of
2 recurring kidney stones. Plaintiff's evidence establishes that, as early as June 1991, he was
3 hospitalized overnight for kidney stone related pain. In the two years that followed, plaintiff was
4 hospitalized on several other occasions for the same reason. At times, plaintiff experienced
5 bleeding, blood in his urine, and pain. In February 1993, plaintiff underwent his first surgery for
6 kidney stones. In the ensuing years through 1998, plaintiff was hospitalized on several more
7 occasions and passed at least two kidney stones. From 1998 through early 2002, plaintiff did not
8 have any active kidney stones. However, in May 2002, plaintiff underwent his second surgery
9 for kidney stones. Dr. Lajeunesse performed the surgery and explained in her operative report
10 that "[plaintiff] is at significant risk for recurrence of his stricture and will need to be followed
11 closely and may require intermittent dilatations." In December 2002, HDSP's Dr. Weaver
12 treated plaintiff for kidney stones again. Up to that point, each time plaintiff received medical
13 care for kidney stones and kidney stone related pain, he received pain medication, including
14 Toradol or Morphine. (Pl.'s Dep. at 11-17, 21, 24 & Compl. Ex. G.)

15 Dr. Mangis acknowledges that he was aware of plaintiff's medical history with
16 respect to his kidney stones. Dr. Mangis also acknowledges that he was aware that on October
17 29, 2003, plaintiff visited the emergency room complaining about kidney stones and kidney stone
18 related pain. Finally, Dr. Mangis acknowledges that on October 30, 2003, and November 10,
19 2003, plaintiff visited the yard clinic and complained about the same kidney stones and kidney
20 stone related pain to him. (Compl. Ex. B. & Def.'s Dep. at 72.) Under these circumstances, a
21 reasonable juror could conclude that plaintiff's medical needs were so obvious that Dr. Mangis
22 should have been aware of the substantial risk of injury or harm to plaintiff.

23 Defense counsel argues that, even if the defendant failed to order appropriate
24 diagnostic tests, his failure amounts to nothing more than mere negligence or medical
25 malpractice. Moreover, counsel contends, plaintiff's belief that he should have received other
26 diagnostic tests is a mere difference of opinion. Defense counsel is correct that "[m]ere

1 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action."
2 Broughton, 622 F.2d at 460. Likewise, a mere difference of opinion between a prisoner and
3 prison medical staff does not give rise to a § 1983 claim. Toguchi, 391 F.3d at 1058; Jackson, 90
4 F.3d at 332; see also Fleming v. Lefevre, 423 F. Supp. 2d 1064, 1070 (C.D. Cal. 2006)
5 ("Plaintiff's own opinion as to the appropriate course of care does not create a triable issue of
6 fact because he has not shown that he has any medical training or expertise upon which to base
7 such an opinion.").

8 However, the evidence before the court indicates that this case may involve much
9 more than mere negligence or medical malpractice and more than a mere difference of medical
10 opinion over the appropriate course of treatment. See, e.g., Estelle, 429 U.S. at 104-05 (holding
11 that deliberate indifference may manifest "by prison doctors in their response to the prisoner's
12 needs or by prison guards in intentionally denying or delaying access to medical care or
13 intentionally interfering with the treatment once prescribed"); Lopez v. Smith, 203 F.3d 1122,
14 1132 (9th Cir. 2000) (holding that a prisoner may establish deliberate indifference by showing
15 that a prison official intentionally interfered with his medical treatment); Wakefield v.
16 Thompson, 177 F.3d 1160, 1165 & n.6 (9th Cir. 1999) (holding that "a prison official acts with
17 deliberate indifference when he ignores the instructions of the prisoner's treating physician or
18 surgeon.").

19 On October 29, 2003, after three days of complaining by plaintiff of pain due to
20 kidney stones, a correctional officer drove plaintiff from administrative segregation to HDSP's
21 Correctional Treatment Center. According to plaintiff, correctional officers had previously
22 refused to send him to see medical personnel, so he held his dinner tray until the sergeant in
23 charge promised to bring him to the Correctional Treatment Center. Once at the Center, plaintiff
24 complained of kidney pain and demanded to see a doctor. Plaintiff received 30 mg of Toradol
25 and Tylenol and subsequently received a ducat to visit the yard clinic the following day. (Pl.'s
26 Dep. at 37-38, 44-45, Compl. Ex. A.)

1 On October 30, 2003, plaintiff went to the yard clinic. According to plaintiff's
2 sworn deposition testimony, before he even had a chance to see Dr. Mangis he overheard the
3 doctor tell Medical Technical Assistant ("MTA") Barton that all inmates were "dope phenes
4 (sic)" and only looking for medication. MTA Barton then gave plaintiff a cup for a urine sample.
5 Plaintiff provided MTA Barton with a urine sample, which contained trace amounts of blood.
6 MTA Barton also performed a blood-sugar test on plaintiff. (Pl.'s Dep. at 48-52, 65-66.)

7 Correctional officers next brought plaintiff into the examining room where Dr.
8 Mangis proceeded to ask him about the hospitals at which he has received treatment for his
9 kidney stones. Plaintiff told him that he was having difficulty remembering and speaking
10 because he was in pain and that Dr. Mangis could find all of the dates and information he was
11 looking for in plaintiff's medical file in front of him. Dr. Mangis, however, refused to review
12 plaintiff's medical file and instead began punching himself in the head, saying he was having
13 audio-reception difficulties. Emphasizing each word, he said, "No, I want to know what
14 hospitals you have been in." (Pl.'s Dep. at 53-59.) Dr. Mangis then asked plaintiff to describe
15 his pain. Plaintiff explained that his pain was moving from front to back and back to front in a
16 wrap-around fashion. He explained to Dr. Mangis that a kidney stone was causing his pain, but
17 the doctor responded, "Well, I don't believe you have kidney stones." Plaintiff asked Dr. Mangis
18 to explain why he had blood in his urine sample, and the defendant responded by accusing him of
19 putting blood in the sample. (Pl.'s Dep. at 59.)

20 Dr. Mangis told plaintiff to lay on the examining table and squeezed his left
21 kidney area. Plaintiff yelled "what are you doing," and the defendant squeezed plaintiff's right
22 kidney area. Plaintiff broke away from the defendant because he was "digging in as hard as he
23 could" and hurting him. Dr. Mangis then ordered correctional officers to take plaintiff out of the
24 room. After the visit, plaintiff was in pain and curled up on his bed. He could not urinate until
25 the middle of the night. Plaintiff then submitted an estimated five or six sick-call slips to Nurse
26 Daniels and explained that he was in pain on a daily basis. (Pl.'s Dep. at 59-63.)

1 On November 10, 2003, plaintiff went to the yard clinic again. A nurse took his
2 blood pressure and temperature and weighed him. When Dr. Mangis saw plaintiff, he
3 commented “Oh, you again.” He then told plaintiff to stand up. Dr. Mangis touched plaintiff’s
4 side and proclaimed that he was stone-free. He then instructed correctional officers to take
5 plaintiff out of the clinic. Dr. Mangis never looked at plaintiff’s medical file, and he never gave
6 plaintiff an opportunity to convey any of his subjective symptoms to him. According to Dr.
7 Mangis’ own progress note, he did not evaluate plaintiff’s flank or conduct a urine test because
8 “patient’s history proceeds him as one looks at multiple progress notes in chart.” Dr. Mangis
9 believed that plaintiff was “medication seeking, likely pain or muscle relaxant type, on ruse of
10 having active kidney stone.” (Pl.’s Dep. at 73, 76-82, Compl. Ex. E.)

11 Thus, notwithstanding plaintiff’s long and largely undisputed medical history with
12 recurring kidney stones, on October 30, 2003, and November 10, 2003, defendant Mangis
13 refused to review plaintiff’s medical file or thoroughly examine him. He also failed to order any
14 diagnostic tests to determine whether plaintiff was suffering from a recurrence of kidney stones
15 even though the defendant acknowledges that such tests, specifically a KUB X-ray, were
16 available at the prison. (Def.’s Dep. at 103-104.) Finally, Dr. Mangis rejected plaintiff’s urine
17 sample, accusing him of adding blood to it, and refused to address plaintiff’s pain. According to
18 Dr. Mangis’ progress note, he believed that plaintiff was “medication seeking.” Given this
19 evidence, a reasonable juror could conclude that defendant Mangis responded to plaintiff’s
20 serious medical needs with deliberate indifference.

21 Finally, defense counsel argues that plaintiff underwent additional tests in
22 December 2003 that demonstrated that he did not have an infection, was not passing a kidney
23 stone, and did not need further treatment. In support of the argument, defense counsel relies on
24 defendant Roche’s response to plaintiff’s inmate appeal. Therein, Dr. Roche adopted Dr. James’
25 findings, which were based on an interview he had with plaintiff. In this regard, defendant
26 Roche wrote:

1 Dr. James reviewed your medical history and noted that you have
2 had renal versus urethral stones in the past. On 12/15/03 your
3 urinalysis showed a specific gravity of 1.025 and on 1/16/04 it was
4 1.015, which are within normal range. Your urine dip test showed
no blood or white blood cells present. He states that there is no
current evidence that you have kidney stones or a bladder infection.
Based on this there is no urgent need for further investigation.

5 (Compl. Ex. F.)

6 The court finds that defendant Roche's response to plaintiff's inmate appeal raises
7 more questions than it resolves. For example, it is not at all clear from defense counsel's
8 argument or the evidence presented that a normal urinalysis and a lack of blood in plaintiff's
9 urine sample in December 2003 indicates that plaintiff did not have a recurrence of kidney stones
10 or kidney stone related pain in October and November 2003, when he saw Dr. Mangis. In fact, in
11 contrast to his December 2003 urine sample, it is undisputed that blood appeared in plaintiff's
12 October 2003 urine sample.

13 In addition, although Dr. James' findings indicated that plaintiff did not need
14 additional diagnostic tests or medical treatment because his urinalysis was normal and his urine
15 dip test showed no blood or white blood cells present, less than two months later Dr. James
16 himself recommended that plaintiff be seen by Dr. Lajeunesse for his condition. Dr. James did
17 not appear to base his subsequent recommendation on a new urinalysis or a diagnostic test. In
18 fact, plaintiff's urinalysis at the time of Dr. James' subsequent recommendation was also
19 negative for trace amounts of blood. Rather, Dr. James appears to have based his subsequent
20 referral on a review of plaintiff's existing medical records, specifically, Dr. Lajeunesse's opinion
21 that plaintiff was at significant risk for recurrence of his stricture, would need to be followed
22 closely, and might require intermittent dilatations. (Pl.'s Dep. at 90-92 & Compl. Ex. G.)

23 Moreover, although defendant Roche issued the written response to plaintiff's
24 inmate appeal, Dr. Roche himself now appears to dismiss the presence of blood in urine or lack
25 of blood in urine as evidence of a kidney stone. Thus, at his deposition, Dr. Roche testified that:

26 ////

1 a number of people walk around with kidney stones that are totally
2 asymptomatic, and so having – having blood in your urine is not a
3 diagnosis of a kidney stone. Not having blood in your urine is not
4 a diagnosis of a kidney stone.

5 (Def. Roche Dep. at 46.)

6 Finally, the evidence before the court establishes that in May 2004, plaintiff
7 passed a kidney stone. On May 10, 2004, plaintiff saw Dr. Lajeunesse and provided her with a
8 kidney stone for analysis. She ordered a CT scan on the same day, which revealed that plaintiff
9 had three kidney stones in his right kidney and one kidney stone in his left kidney. On June 16,
10 2004, Dr. Lajeunesse performed a procedure enabling plaintiff to pass another kidney stone and
11 admitted him to Northern Nevada Medical Center for pain control. On August 3, 2004, plaintiff
12 underwent surgery, and Dr. Lajeunesse removed and treated multiple kidney stones. (Compl.
13 Exs. I-M.) Given this evidence, regardless of what diagnostic tests performed on plaintiff in
14 December of 2003 may or may not have shown, a reasonable juror could conclude that defendant
15 Mangis was deliberately indifferent to plaintiff’s serious medical needs.

16 Accordingly, the court concludes that defendant Mangis is not entitled to
17 summary judgment on plaintiff’s Eighth Amendment inadequate medical care claims.²

18 CONCLUSION

19 IT IS HEREBY RECOMMENDED that defendant Mangis’ June 5, 2009
20 amended motion for summary judgment (Doc. No. 74) be denied.

21 These findings and recommendations are submitted to the United States District
22 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty

23 ² Defense counsel has filed formal objections to plaintiff’s exhibits in support of his
24 opposition to defendant’s motion for summary judgment. Those exhibits include excerpts from
25 plaintiff’s deposition and defendants’ deposition, copies of plaintiff’s inmate appeal and prison
26 officials responses thereto, and copies of plaintiff’s medical records. Defense counsel argues,
inter alia, that the exhibits lack identification, foundation, and proper authentication. The
objections are overruled. See Fraser v. Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003) (“At
the summary judgment stage, we do not focus on the admissibility of the evidence’s form. We
focus instead on the admissibility of its contents.”).

1 days after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
4 shall be served and filed within ten days after service of the objections. The parties are advised
5 that failure to file objections within the specified time may waive the right to appeal the District
6 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

7 DATED: August 19, 2009.

8
9 
10 _____
11 DALE A. DROZD
12 UNITED STATES MAGISTRATE JUDGE

11 DAD:9
12 maga2634.57Mangis