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TAB 2

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United States District Court,
E.D. California.
Marcellus ATKINSON, Plaintiff,
v.
Dr. KOFOED, et al., Defendants.
No. CIV S-06-2652 RRB EFB P.

Feb. 22, 2008.

Marcellus Atkinson, Vacaville, CA, pro se.

Kevin William Reager, Office of the Attorney General, Sacramento, CA, for Defendants.

ORDER AND FINDINGS AND RECOMMENDATIONS

EDMUND F. BRENNAN, United States Magistrate Judge.

***1** Plaintiff is a prisoner without counsel suing for alleged civil rights violations. *See* 42 U.S.C. § 1983 . This action proceeds on the November 21, 2006, complaint which claims deliberate indifference to a serious medical need in violation of the Eighth Amendment. Specifically, plaintiff claims that defendant Dr. Kofoed knew plaintiff had fractured his right wrist and that it had not properly healed, but failed to treat this condition. Compl., at 3. The matter is now before on the sole defendant, Dr. Kofoed's motion for summary judgment. For the reasons explained below, the court finds that there is no genuine issue of material fact and that summary judgment must be granted.

I. Defendant's Objections to Plaintiff's Evidence

Plaintiff's opposition to the motion for summary judgment includes 15 exhibits, all of which purport to be medical and other records from his prison file. Defendant Kofoed requests the court to exclude these exhibits from consideration. In support of this request, he makes three arguments. First, he argues that plaintiff failed to produce or disclose these documents in response to Dr. Kofoed's discovery requests. Second, Dr. Kofoed argues that the documents are unauthenticated and constitute inadmissible hearsay. As explained below, with respect to his first objection, defendant failed to file a motion to compel the production of the documents to which he now objects. Furthermore, he relies on discovery rules that do not apply here. As to his arguments about hearsay and authentication, the court finds that Dr. Kofoed fails to support these objections with any argument that would justify exclusion of the records. Thus, the objections are overruled.

Defendant Kofoed's first objection is that since plaintiff failed to respond to a request for the production of documents, the court should sanction him by not permitting him to rely on any documents that were responsive to the requests. In support of his argument, Dr. Kofoed relies on Rule 37(c)(1) of the Federal Rules of Civil Procedure, which states the potential sanctions for the failure to comply with the initial disclosure requirements of Rule 26. The rule provides that:

> A party that without substantial justification fails to disclose information required by rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.

Fed.R.Civ.P. 37(c)(1). This action is exempt from the mandatory disclosures listed in Rule 26(a)(1) because plaintiff is a prisoner suing California officials about the conditions of his confinement. *See* Fed.R.Civ.P. 26(a)(1)(E)(iv). Rule 26(a)(2) governs automatic disclosure of information pertaining to expert testimony. Fed.R.Civ.P. 26(a)(2). There is no evidence that plaintiff has retained an expert

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from whom he intends to elicit evidence at trial. Rule 26(a)(3) governs pretrial disclosures, which, "[u]nless otherwise directed by the court," must be made no later than 30 days before trial. Fed.R.Civ.P. 26(a)(3). However, no trial date has been set in this action. Accordingly, Kofoed has not shown that plaintiff failed to make the disclosures required in any portion of Rule 26(a) that might apply to this action. Nor can Kofoed show that plaintiff has violated Rule 26(e). This portion of the rule requires a party who has made mandatory disclosures or has responded to a discovery request to "supplement or correct the disclosure or response to include information thereafter acquired," either if a court so orders or if certain circumstances described in subdivision (1) or (2). Fed.R.Civ.P. 26(e)(1), (2). As noted, plaintiff was not required to make any mandatory disclosures, and he therefore could not have failed to supplement them. Crucial here is the basis of defendant's objection, i.e., *that plaintiff did not respond to discovery requests.* Defendant has submitted evidence that on April 23, 2007, he served on plaintiff interrogatories and a request for production of documents. Def.'s Objs., Exs. A, B. While there is no evidence that plaintiff responded, neither is there any evidence that defendant attempted to meet and confer about plaintiff's failure to respond. *See* Fed.R.Civ.P. 37(a)(2)(B). The remedy when a party fails to respond to properly served, timely discovery requests and refuses to correct the omission through informal means is to file a motion to compel pursuant to Rule 37(a). The remedy when a party fails to comply with a discovery order resulting from a motion made under Rule 37(a) is to seek sanctions pursuant to Rule 37(b). Defendant Kofoed does not argue that he attempted informally to resolve the discovery dispute or that he sought and obtained an order compelling plaintiff to respond to discovery requests, which plaintiff then disobeyed. Instead, defendant Kofoed relies upon Rule 37(c), which as explained above, has no application here. Thus, the court finds that the defendant has not demonstrated any basis for excluding plaintiff's evidence based on a discovery violation.

***2** Defendant also argues that plaintiff's evidence should be excluded because plaintiff did not authenticate any of the documents and the documents contain inadmissible hearsay. Although this trend in objecting to every stitch of paper submitted in opposition to a summary judgment motion appears to be becoming all the rage, the practice is simply not helpful. Absent a specific and legitimate showing that a particular item of evidence is not admissible and its consideration is prejudicial, these scatter shot objections detract from, rather than support one's confidence in the motion. Plaintiff's evidence and defendant's objections cannot be divorced from the nature of this proceeding, i.e., summary judgment, in which defendant is the moving party. *See Burch v. Regents of the University of California,* 433 F.Supp.2d 1110, 1118-1124 (E.D.Cal.2006). The portion of the rule governing such a motion supported by affidavits and records provides that the affidavits "shall set forth such facts as would be admissible in evidence ...." Fed.R.Civ.P. 56(e). On summary judgment, the non-moving party's evidence need not be in a form that is admissible at trial. *See Burch,* 433 F.Supp.2d at 1119 (*citing Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Instead, a court is concerned with the admissibility of the contents of the evidence. *Id.* Thus, on summary judgment, "objections to the *form* in which the evidence is presented are particularly misguided where, as here, they target the non-moving party's evidence." *Burch,* 433 F.Supp.2d at 1119. Accordingly, as long as a party submits evidence which, regardless of its form, may be admissible at trial, it may be considered on summary judgment. *Id.* at 1120.

Turning to defendant Kofoed's objection that plaintiff's evidence lacks a proper foundation or authentication, defendant has not pressed a serious contention that the copies are anything other than what they purport to be; i.e. copies of documents produced from the prison's own records. In order properly to support or oppose summary judgment, the party relying on affidavits and records must lay a proper foundation. *Beyne v. Coleman Sec. Servs.,*

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Inc., 854 F.2d 1179, 1182 (9th Cir.1988). "[W]hether the authentication requirement should be applied to bar evidence when its authenticity is not actually disputed is, however, questionable." *Burch*, 433 F.Supp.2d at 1120. "[W]here the objecting party does not contest the authenticity of the evidence submitted, but nevertheless makes an evidentiary objection based on purely procedural grounds," then the court should consider the evidence. *Id.* In such a situation, it would appear equally probable that the documents are what they purport to be as it is that they are not. *See Id.*

Here, defendant does not actually contest the authenticity of the documents plaintiff has submitted. Defendant's general objection that plaintiff engaged in a "last minute attempt to 'sandbag' defendant with a plethora of new documents and information" is particularly suspect. Def.'s Objs., at 2. It is notable that all the documents plaintiff submits find their source in the prison system, either in plaintiff's files or elsewhere in the prison bureaucracy. Furthermore, several appear to be identical to two out of defendant's three exhibits. *Compare* Pl.'s Opp'n, Ex. 2, "Emergency Room Report," to Kofoed Decl., Ex. A, "Emergency Room Report;" Pl.'s Opp'n, Ex. 3 at 2, "First Level Appeal # CSP-S-05-03729" to Kofoed Decl., Ex. B, "First Level Appeal # CSP-S-05-03729." The court has compared the exhibits listed above and finds no discernable difference, and is confident in finding that plaintiff obtained them from either of two sources: (1) defendant through discovery; or (2) the same source from which defendant obtained his, i.e., the prison. Thus, if there were a valid basis for contesting their authenticity, defendant Kofoed could unearth and present it. But he has not.[FN1] Therefore, all of defendant's objections for lack of proper foundation and lack of authentication are overruled.

> FN1. The documents appear to come from the prison's own records. If the prison officials have a genuine concern that the plaintiff has taken those copies and altered or forged them in some way, defendant has presented no evidence of this. Moreover, the prison officials or defendant are free to produce the originals, or copies of the originals for comparison. They have not done so and, indeed, the exhibits produced by defendant tend to confirm the authenticity of plaintiff's copies. Defendant's authentication objection does not appear to be a sincere contention that the copies are not true and accurate reproductions of the documents in custody of the prison. Rather than assist in the process, defendant's objection in this context simply undermines the confidence one places in the overall reliability of the motion and its representations.

***3** Defendant also objects on hearsay grounds. This objection is overruled for two reasons. The first is the form of the objection. The second is the nature of the non-moving party's burden on summary judgment. Defendant's objections are *pro forma* in that he objects to entire documents, not particular statements in the context of a particular material factual dispute. An objection based on hearsay inherently is bound to the context in which the allegedly objectionable evidence is offered. *See Burch*, 433 F.Supp.2d at 1122 ("even seemingly appropriate objections based on hearsay and failures to authenticate/lay a foundation are difficult to address away from the dynamics of trial.") Insofar as a letter or record may on its face constitute hearsay, the particular statements upon which plaintiff relies may very well either be admissible nonetheless or may not be hearsay, depending on the purpose for which plaintiff offers the statement. "The court is not inclined to comb through these documents, identify potential hearsay, and determine if an exception applies-all without guidance from the parties." *Id.* at 1124. Thus, to prevail on a hearsay objection, defendant Kofoed must object to particular statements in the context of a material factual dispute and explain the objection. His failure to do so is sufficient basis for overruling the objection and it hereby is overruled.

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With respect to the nature of this proceeding, "the court cannot ignore the fact that a non-movant in a summary judgment setting is not attempting to prove its case, but instead seeks only to demonstrate that a question of fact remains for trial." *Burch,* 433 F.Supp.2d at 1121. The court thus "treat[s] the opposing party's papers more indulgently than the moving party's papers." *Id.* (*citing Lew v. Kona Hosp.*, 754 F.2d 1420, 1423 (9th Cir.1985)). While a court need not ignore the evidentiary ramifications of a declaration based nearly entirely on hearsay, *see id.* at 1121 (noting that the Ninth Circuit does not uniformly apply the principle of indulgence), it is noteworthy that plaintiff proceeds without counsel. Furthermore, he does not rely on evidence which on its face presents evidentiary obstacles which would prove insurmountable at trial. *See Id.* at 1122 (noting that, at trial, "when a party raises valid evidentiary objections, the opposing party will have an opportunity to present the evidence in an alternative and admissible form."). Insofar as there may be valid hearsay objections, they are better left for trial, if there is to be one. At a minimum, the objection should be precisely explained in the context of a specific factual dispute so that a meaningful hearsay analysis can be had.

For these reasons, the defendant's objections to the plaintiff's evidence submitted in opposition to this motion are overruled.

II. Facts[FN2]

> FN2. Unless otherwise noted, the facts contained herein are undisputed.

At all times relevant to this action, plaintiff was a prisoner confined at California State Prison, Solano ("CSP-Solano"). Def.'s Stmt. of Undisp. Facts ("SUF") 1. Defendant Dr. Kofoed was a physician who worked for the California Department of Corrections and Rehabilitation, and was assigned to consult on cases at CSP-Solano. SUF 2.

***4** Over the time period relevant to this action, plaintiff has complained to prison officials of various hand and wrist injuries, old and new. X-rays of May 3, 2005 revealed that plaintiff had an old fracture to the tip of his left finger, which had healed well. Pl.'s Opp'n, Ex. 5. These images also showed that plaintiff had an "old fracture with nonunion" in his left hand. *Id.* Plaintiff went to the medical clinic on June 9, 2005, complaining he had suffered pain in his left wrist for about three months. Pl.'s Opp'n, at 6. He reported that he was unable to rotate it. *Id.* B. Naku, who is not a defendant, recommended use of a splint on his left thumb and made an "urgent" request for plaintiff to see an orthopedic specialist. *Id.* On June 14, 2005, the request for plaintiff to see an orthopedic specialist was approved. *Id.* It is not clear who examined plaintiff in response to this request, but there is a notation that says plaintiff was "Seen ongoing October 31, 2005." Pl.'s Opp'n, Ex. 6. On July 8, 2005, B. Naku made another urgent request for plaintiff to be seen by an orthopedic specialist, specifically Dr. Kofoed. Pl.'s Opp'n, Ex. 7. This request was granted July 14, 2005, and on July 19, 2005, Dr. Kofoed saw plaintiff and administered a cortisone shot. Def.'s Mot. for Summ. J., Ex. 1, Decl. of Kofoed ("Kofoed Decl."), Ex. B; Pl.'s Opp'n, Ex. 3. Plaintiff returned to the medical clinic on August 10, 2005, with complaints of left wrist pain. Pl.'s Opp'n, Ex. 8. Dr. Naku noted that plaintiff's wrist was tender. *Id.*

On October 1, 2005, plaintiff reported to the prison medical clinic complaining of severe pain to his right wrist. *Id.*, Ex. 1. He explained that he had fallen while playing football. *Id.* Prison medical staff examined him, finding that his right wrist was swollen, he had difficulty moving his right wrist, and he was "in obvious pain." *Id.* He was taken to the emergency room at Queen of the Valley Hospital. *Id.;* Kofoed Decl., Ex. A. The treating physician there, Dr. Smith, ordered x-rays, leading to a diagnostic impression of, "Distal radius fracture, intraarticular, nondisplaced." Kofoed Decl., Ex. A. Dr. Smith also prescribed pain medication, splinted plaintiff's arm and gave him a sling. *Id* . The physician also ordered copies of the x-rays for plaintiff's

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prison physicians, and recommended an orthopedic follow-up examination and a consultation for applying a cast to plaintiff's wrist. *Id.* Plaintiff's prison medical records show that he returned to CSP-Solano with the x-rays, splint and a report of his diagnosis. Pl.'s Opp'n, Ex. 1.

The parties agree about the treatment Dr. Kofoed provided to plaintiff for the injury plaintiff sustained on October 1, 2005. Kofoed Decl., Ex. B; Pl.'s Opp'n, Ex. 3. The day after the injury, on October 2, 2005, Dr. Kofoed prescribed Motrin and Tylenol # 3. Kofoed Decl., Ex. B; Pl.'s Opp'n, Ex. 3. Two days later, on October 4, Dr. Kofoed ordered a cast be applied to plaintiff's wrist the following week. *Id.* This was done, and Dr. Kofoed saw plaintiff for a follow-up appointment on October 29, 2005, and replaced the cast because plaintiff complained the original was too tight. *Id.* X-rays of November 8, 2005, showed that the fracture had not completely healed. *Id.* A physical therapist saw plaintiff on December 6, 2005, but it is unclear whether Dr. Kofoed recommended this evaluation. *Id.* Thereafter, Dr. Rohrer, who is not a defendant, referred plaintiff back to Queen of the Valley Hospital. *Id.*

***5** Dr. Rohrer ordered additional x-rays of plaintiff's right wrist. Pl.'s Opp'n, Ex. 4. The report states that the images were taken on February 3, 2005. Since plaintiff did not injure his right wrist until after this date, and the report states that it was dictated on February 20, 2006, it appears that February 3, 2005, is a typographical error. The radiologist found that the "fracture of the distal radius has healed." Pl.'s Opp'n, Ex. 4. However, "[t]he ulnar styloid still has a small chip adjacent to it" which was "ununited." Pl.'s Opp'n, Ex. 5.

On April 16, 2006, plaintiff returned to Queen of the Valley Hospital with complaints of ongoing right wrist pain and a sensation of numbness and pins and needles "in the ulnar side of the right hand." Pl.'s Opp'n, Ex. 11. Plaintiff told the treating physician, Dr. Shifflet, that while in his teens, plaintiff's right wrist was cut deeply enough to cut tendons, nerves and blood vessels. *Id.* Dr. Shifflet noted that before October 2005, plaintiff fractured his left wrist, for which prison officials had treated him. *Id.* He found that plaintiff suffered ulnar neuropathy in his right wrist and hand, but the fracture was healing. *Id.* He also had "possible nonunion" of an old fracture in his right hand. *Id.* Finally, plaintiff had "nonunion" of an old fracture in his left wrist. *Id.* Dr. Shifflet recommended that plaintiff see a physician who specializes in hands. *Id.*

On April 27, 2006, plaintiff requested medical attention for pain in both hands and asked about seeing a hand specialist. Pl.'s Opp'n, Ex. 12. A nurse examined plaintiff, found he had no swelling but did have decreased range of movement, grip, and strength in both hands. *Id.* The nurse referred plaintiff to a physician for a followup referral to a clinic outside the prison. *Id.* On September 2006, plaintiff complained that he still had not seen a specialist. Pl.'s Opp'n, Ex. 14. Prison officials told him that the surgeon to whom he had been referred had "terminated his services," and a new appointment with a different specialist had to be scheduled. *Id.*

Wholly absent from the record is any evidence about how long it ordinarily takes for a distal fracture to heal, whether plaintiff's healing process was unusually long and whether plaintiff had any medical condition, took any medications or engaged in any lifestyle habit that might prolong the healing process.

III. Standards

Summary judgment pursuant to Fed.R.Civ.P. 56(a) avoids unnecessary trials in cases with no disputed material facts. *See Northwest Motorcycle Ass'n v. United States Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir.1994). At issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52,

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106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Rule 56 serves to screen the latter cases from those which actually require resolution of genuine disputes over facts material to the outcome of the case; e.g., issues that can only be determined through presentation of testimony and evidence at trial such as credibility determinations of conflicting testimony over dispositive facts.

> ***6** In three recent cases, the Supreme Court, by clarifying what the non-moving party must do to withstand a motion for summary judgment, has increased the utility of summary judgment. First, the Court has made clear that if the non-moving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis added). Finally, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). No longer can it be argued that *any disagreement* about a material issue of fact precludes the use of summary judgment.

California Arch. Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir.), *cert. denied*, 484 U.S. 1006 (1988) (parallel citations omitted) (emphasis added). In short, there is no "genuine issue as to material fact," if the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Grimes v. City and Country of San Francisco*, 951 F.2d 236, 239 (9th Cir.1991) (quoting *Celotex*, 477 U.S. at 322).

Thus, to overcome summary judgement an opposing party must show a dispute that is both genuine, and involving a fact that makes a difference in the outcome. [FN3] Two steps are necessary. First, according to the substantive law, the court must determine what facts are material. Second, in light of the appropriate standard of proof, the court must determine whether material factual disputes require resolution at trial. *Id.*, at 248.

> FN3. On January 10, 2007, the court informed plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir.1998) (en banc), *cert. denied*, 527 U.S. 1035, 119 S.Ct. 2392, 144 L.Ed.2d 793 (1999), and *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir.1988).

When the opposing party has the burden of proof on a dispositive issue at trial, the moving party need not produce evidence which negates the opponent's claim. *See e.g., Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). The moving party need only point to matters which demonstrate the absence of a genuine material factual issue. *See Celotex v. Cattret*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

If the moving party meets its burden, the burden shifts to the opposing party to establish genuine material factual issues. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 586.[FN4] The opposing party must demonstrate that the disputed facts are material, i.e., facts that might affect the outcome of the suit under the governing law, *see Anderson*, 477 U.S. at 248; *T.W. Elec. Serv., Inc. v. Pacific Elec. Con-*

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tractors Ass'n, 809 F.2d 626, 630 (9th Cir.1987), and that disputes are genuine, i.e., the parties' differing versions of the truth require resolution at trial, *see T.W. Elec.,* 809 F.2d at 631. There can be no genuine issue as to any material fact where there is a complete failure of proof as to an essential element of the nonmoving party's case because all other facts are thereby rendered immaterial. *Celotex,* 477 U.S. at 323. The opposing party may not rest upon the pleadings' mere allegations or denials, but must present evidence of specific disputed facts. *See Anderson,* 477 U.S. at 248.[FN5] Conclusory statements cannot defeat a properly supported summary judgment motion. *See Scott v. Rosenberg,* 702 F.2d 1263, 1271-72 (9th Cir.1983).

FN4. The nonmoving party with the burden of proof "must establish each element of his claim with significant probative evidence tending to support the complaint." *Barnett v. Centoni,* 31 F.3d 813, 815 (9th Cir.1994) (internal quotations omitted). A complete failure of proof on an essential element of the nonmoving party's case renders all other facts immaterial, and entitles the moving party to summary judgment. *Celotex,* 477 U.S. at 322.

FN5. A verified complaint may be used as an affidavit in opposition to the motion. *Schroeder v. McDonald,* 55 F.3d 454, 460 (9th Cir.1995); *McElyea v. Babbitt,* 833 F.2d 196, 197-98 (9th Cir.1987) (per curiam).

***7** The court does not determine witness credibility. It believes the opposing party's evidence, and draws inferences most favorably for the opposing party. *See Anderson,* 477 U.S. at 249, 255. Inferences, however, are not drawn out of "thin air," and the proponent must adduce evidence of a factual predicate from which to draw inferences. *American Int'l Group, Inc. v. American Int'l Bank,* 926 F.2d 829, 836 (9th Cir.1991) (Kozinski, J., dissenting) (citing *Celotex,* 477 U.S. at 322).

If reasonable minds could differ on material facts at issue, summary judgment is inappropriate. *See Warren v. City of Carlsbad,* 58 F.3d 439, 441 (9th Cir.1995). On the other hand, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita,* 475 U.S. at 587 (citation omitted). In that case, the court must grant summary judgment.

With these standards in mind, it is important to note that plaintiff bears the burden of proof at trial over the issue raised on this motion, i.e., whether the defendant acted with deliberate indifference to the plaintiff's safety. Equally critical is that "deliberate indifference" is an essential element of plaintiff's cause of action. Therefore, to withstand defendant's motion, plaintiff may not rest on the mere allegations or denials of his pleadings. He must demonstrate a genuine issue for trial, *Valandingham v. Bojorquez,* 866 F.2d 1135, 1142 (9th Cir.1989), and he must do so with evidence upon which a fair-minded jury "could return a verdict for [him] on the evidence presented." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248, 252.

"As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248. Here, plaintiff's action arises under 42 U.S.C. Section 1983 and the Eighth Amendment. To prevail at trial, he must prove that the defendant deprived him of his Eighth Amendment rights while acting under color of state law. To prove an Eighth Amendment violation, plaintiff must show by a preponderance of competent evidence that the defendant knew that plaintiff suffered from a serious medical need and was deliberately indifferent to it. *Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). As discussed below, plaintiff has failed to establish a genuine dispute for trial over this material issue.

IV. Analysis

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Plaintiff's only claim is that defendant Kofoed knew plaintiff had fractured his right wrist, knew that it was not healing properly, and failed to take any measures to treat plaintiff for this condition. Defendant Kofoed contends that there is no genuine issue about whether he was deliberately indifferent to plaintiff's condition, asserting that he provided adequate care to plaintiff. Def.'s Mot. for Summ. J., Ex. 1, Decl. of Kofoed ("Kofoed Decl."), at ¶ 4. It is undisputed that plaintiff fractured his right wrist on October 1, 2005. Def.'s Stmt. of Undisp. Facts ("SUF") 4. It also is undisputed that prison medical staff sent him to an emergency room outside the prison, where plaintiff's wrist was x-rayed. SUF 5. The treating physician prescribed medication, applied a splint and gave plaintiff a sling. SUF 6. Evidence submitted by both parties shows that plaintiff saw Dr. Kofoed three times for this injury. SUF 7, 9, 10. The first time was on October 2, 3005, when defendant Kofoed prescribed anti-inflammatory and pain-killing medications. SUF 7. The second time was on October 4, 2005, when Dr. Kofoed ordered a cast for plaintiff's wrist. Then, four weeks after the cast was applied, Dr. Kofoed examined plaintiff, who complained that the cast was too tight. Dr. Kofoed ordered that cast removed and a new cast applied. X-rays taken on November 8, 2005, showed that plaintiff's wrist still had not healed, and a doctor who is not a defendant here referred plaintiff back to Queen of the Valley Hospital. From this evidence, it is readily apparent that Dr. Kofoed was not ignoring or indifferent to plaintiff's medical needs during this period

***8** There is no evidence that Dr. Kofoed examined or treated plaintiff thereafter, or was under any obligation to do so. Other physicians and medical staff had taken responsibility for plaintiff's care with respect to his wrist injury. There is no evidence that the treatment Dr. Kofoed provided was constitutionally inadequate or that he ever refused to provide care when he was responsible for doing so. Plaintiff has not produced evidence upon which a reasonable jury could rely to render a verdict for plaintiff that Dr. Kofoed was deliberately indifferent to his medical condition. Accordingly, the motion for summary judgment must be granted.

IV. Conclusion

For the reasons explained above, the court finds that defendant's objections to plaintiff's evidence in opposition to the motion for summary judgment are wholly frivolous and must be overruled. However, plaintiff has failed to demonstrate that there is a genuine dispute about whether Dr. Kofoed was deliberately indifferent to his serious medical needs, i.e., the fracture in plaintiff's right wrist.

Accordingly, it hereby is ORDERED that defendant's objections to plaintiff's evidence on summary judgment are overruled.

Further, it is RECOMMENDED that:

1. Defendant's September 20, 2007, motion for summary judgment be granted and that judgment be entered in his favor; and

2. The Clerk be directed to close the case.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir.1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.1991).

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