

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DANNY R. GARCIA,  
Plaintiff,  
v.  
DR. KALISHER, et al.,  
Defendants.

Case No. [15-cv-00045-JD](#)

**ORDER GRANTING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

Re: Dkt. No. 21

Danny Garcia is a state prisoner proceeding pro se in this civil rights action under 42 U.S.C. § 1983. Garcia alleges that defendants were deliberately indifferent to his serious medical needs by failing to properly diagnose a lump on his thigh as cancerous, failing to properly treat the cancer, and not properly treating him for a head wound suffered in a fight. Defendants Dr. Kalisher, Nurse Mandich, and Nurse Gerkey have moved for summary judgment. Garcia filed an opposition, defendants filed a reply. The motion is granted.

**BACKGROUND**

This action proceeds on the amended complaint. Docket No. 6. Garcia alleges that Kalisher did not properly diagnose and treat his condition as cancer on the initial examination; she did not properly treat an infection on Garcia's abdomen from his daily injections of anticoagulant medications; she did not properly maintain Garcia's porta-catheter that was implanted by his oncologist; and she did not timely remove from Garcia's head medical staples that were put into place after an altercation with another prisoner.

Garcia alleges that Mandich told him the lump on his thigh was a hernia and that he did not need to see a doctor, and on another date, Mandich refused to administer an injection because

another nurse was treating Garcia.

Garcia alleges that Gerkey would not have Garcia transported to the hospital on an unspecified date, and on another day, when Gerkey was administering an injection, Gerkey applied an alcohol swab with too much force and would not allow another nurse to provide the injection.

The facts for this motion are largely undisputed. Garcia was incarcerated at Correctional Training Facility (“CTF”) during the relevant time. Am. Compl. at 2. Kalisher is a physician and surgeon and is a primary care provider at CTF. Motion for Summary Judgment (“MSJ”), Kalisher Decl. ¶ 1. Mandich is a registered nurse at CTF. Mandich Decl. ¶ 1. Gerkey is a registered nurse formerly at CTF. Gerkey Decl. ¶ 1.

**Dr. Kalisher**

Kalisher first became aware of Garcia’s thigh pain on February 4, 2014, during an examination. Kalisher Decl. ¶ 6. Garcia presented with a four-month history of right groin swelling and pain. *Id.* He was being treated with Naproxen and Tylenol. He stated that he had a mass that was enlarging. *Id.* His urination and bowel movements were regular and fine, but his right groin hurt if he strained or squeezed. *Id.* Kalisher noted that the mass did not feel like a node because it had no distinct margins, and it did not appear to be a hernia. *Id.* Garcia’s rectal and genitourinary exam was negative. *Id.* Kalisher requested an Ultrasound of Garcia’s right groin. *Id.* An Ultrasound was performed on February 24, 2014. *Id.* ¶ 7.

Kalisher next saw Garcia on March 19, 2014, and reviewed the Ultrasound report, which indicated a right groin mass approximately two to three inches and suggestive of a hematoma, while a soft tissue mass was less likely. *Id.* Kalisher noted there did not appear to be any prior trauma. *Id.* Garcia’s lab work revealed that his erythrocyte sedimentation rate (ESR) was elevated at 38, with mild anemia H/H (hemoglobin and hematocrit) and elevated platelets at 427,000. *Id.* This indicated a slight abnormality with the blood test. *Id.* Kalisher requested an MRI, which was approved on March 27, 2014. *Id.* ¶¶ 7, 8.

On April 12, 2014, Garcia was taken to Twin Cities Community Hospital for a right pelvic mass CT-guided biopsy. *Id.* ¶ 10. A report issued on April 14, 2014, revealed that the findings

1 were suspicious for neoplasm (abnormal tissue growth) such as sarcoma. *Id.* ¶ 11.

2 On May 2, 2014, Garcia was admitted to Salinas Valley Memorial Hospital (“SVMH”) for  
3 curative-intent chemotherapy. *Id.* ¶ 12. A CT of his abdomen and pelvis showed multiple  
4 adjacent enlarged right inguinal lymph nodes. *Id.* An MRI of his pelvis showed that the neoplasm  
5 was suspicious for sarcoma. *Id.* His assessment was diffuse large B-cell lymphoma. *Id.* Garcia  
6 did not demonstrate any “B” symptoms and it appeared that he was at the early stage of the  
7 disease. *Id.*

8 Garcia was discharged on May 5, 2014, and returned to CTF. *Id.* ¶ 13. A discharge report  
9 from SVMH noted that Garcia tolerated his chemotherapy well, and his lower extremity pain and  
10 swelling improved after the start of chemotherapy. *Id.* A bone marrow biopsy revealed no  
11 involvement of his lymphoma. *Id.* Garcia was scheduled for follow-up care at Natividad Medical  
12 Center Specialty Clinic (“NMCSC”) on May 16, 2014, and chemotherapy would continue every  
13 three weeks at SVMH. *Id.* He would continue taking the anticoagulant medication. *Id.* ¶ 14.

14 Kalisher saw Garcia next on June 4, 2014, for a complaint of a swollen red bump on his  
15 right abdomen. *Id.* ¶ 15. Kalisher noted that Garcia’s last chemotherapy session was on May 31,  
16 2014. *Id.* Kalisher believed the lump on the abdomen was an abscess from anticoagulant  
17 medication injections. *Id.* Kalisher started Garcia on antibiotics twice a day and referred him for  
18 a follow-up in six to seven days. *Id.* Garcia returned from his oncology follow-up care and met  
19 with Kalisher on July 11, 2014. *Id.* ¶ 17. He stated that he had no concerns about his treatment.  
20 *Id.*

21 Garcia requested treatment on August 12, 2014, for a recurrent infection on his abdomen  
22 due to the injections. *Id.* ¶ 18. Kalisher examined him and found bruising but no signs of  
23 infection. *Id.* She treated him again on August 20, 2014, and noted that Garcia had completed his  
24 chemotherapy treatment two days earlier. *Id.* Kalisher started him on Neupogen, an adjuvant  
25 medication to maintain white blood cell count during chemotherapy. *Id.* Kalisher also observed  
26 that the swollen area on Garcia’s abdomen was getting smaller and less tender. *Id.* ¶ 19.

27 Kalisher examined Garcia on December 9, 2014, following the completion of his radiation  
28 therapy at SVMH. *Id.* ¶ 20. The pathology from his colonoscopy was negative. *Id.* Kalisher

1 noted that it was time to remove Garcia's porta-catheter because he no longer needed an access  
2 line for chemotherapy, and removal was recommended by his oncologist. *Id.* The porta-catheter  
3 was being maintained by nursing staff by being flushed every last Monday of the month. *Id.*  
4 Plaintiff did not say anything to Kalisher about any maintenance issues with the porta-catheter. *Id.*  
5 Kalisher submitted a request for the porta-catheter to be removed. *Id.* The porta-catheter was  
6 removed on February 27, 2015, at Twin Cities Community Hospital without any complications.  
7 *Id.* ¶ 22.

8 Kalisher examined Garcia on April 2, 2015, and he presented with no complaints regarding  
9 the removal of the porta-catheter. *Id.* ¶ 23. The incision had healed well, and there was no  
10 drainage, redness, or tenderness. *Id.* On June 2, 2015, Garcia had medical staples removed from  
11 his right upper forehead. *Id.* The staples had been applied after he had been in a fight a few  
12 months earlier. *Id.* The removal of the staples was performed by a nurse, and Kalisher reviewed  
13 and approved the removal. *Id.* The staples were removed with no complications. *Id.* ¶ 24.

14 **Nurse Mandich**

15 On June 7, 2014, Garcia arrived at the CTF medical unit to receive his daily anticoagulant  
16 injection as part of his cancer treatment. Mandich Decl. ¶ 7. Mandich did not administer the  
17 injection because Nurse Gerkey was to provide the injection. *Id.* Garcia wanted Mandich to  
18 administer the injection, but Mandich informed Garcia that she was unavailable, that Gerkey was  
19 to administer the injection, and that Garcia could not pick which nurse was to provide his  
20 treatment. *Id.* Plaintiff refused the injection. *Id.* Garcia disputes this version of the incident.  
21 Garcia states that he never refused the injection; he only wanted someone else to administer the  
22 injection. Opposition at 5. Garcia states that Mandich was not with another inmate. *Id.*

23 On July 9, 2014, Garcia arrived at the medical unit to receive an enoxaparin injection.  
24 Mandich Decl. ¶ 8. He wanted to administer the injection himself. Mandich informed Garcia that  
25 a subcutaneous enoxaparin injection had to be administered by health care staff. *Id.* Plaintiff  
26 refused the injection. *Id.*

27 On December 1, 2014, Mandich provided Garcia a nursing assessment after his return from  
28 a scheduled chemotherapy session. *Id.* ¶ 9. There were no issues, and Garcia returned to his cell.

1 *Id.*

2 On March 29, 2015, Mandich treated Garcia for a head wound sustained in a fight. *Id.* ¶  
3 11. The on-duty doctor treated the wound with medical staples. *Id.* Mandich noted that the  
4 wound was cleaned and irrigated, the staples were placed, and an antibiotic ointment was applied.  
5 *Id.* All the treatment was provided without complication and Garcia returned to his cell. *Id.*

6 **Nurse Gerkey**

7 On June 7, 2014, as stated above, Garcia arrived at the medical unit for his anticoagulant  
8 injection. Gerkey Decl. ¶ 8. The injection is administered in the abdominal area with the patient  
9 in a supine position on a gurney to prevent accidental falls. Gerkey was to administer the  
10 injection. *Id.*

11 Gerkey states that Garcia did not want to lie down for the injection. *Id.* Gerkey informed  
12 Garcia that if he did not cooperate he would not receive the injection and Gerkey would complete  
13 a refusal of treatment form. *Id.* Plaintiff refused to cooperate, and Gerkey informed him that by  
14 refusing the injection there was a risk of blood clot, stroke, or even death. *Id.*

15 Garcia disputes this version of the incident. Garcia states that he never refused the  
16 injection; he only wanted someone else to administer the injection. Opposition at 5.

17 Gerkey interacted with Garcia on one other occasion prior to June 7, 2014. Gerkey Decl. ¶  
18 9. Garcia walked into the medical unit and demanded to go to the hospital due to the lump on his  
19 thigh. *Id.* Gerkey conducted a visual assessment and observed that the lump was not a medical  
20 emergency. Garcia again demanded to go the hospital and stated he would go “man down.” *Id.*  
21 Gerkey told Garcia that if he went “man down” for a nonemergency condition, the behavior would  
22 be documented as a rules violation. Garcia then left the medical unit. *Id.* Neither party has stated  
23 the date this occurred.

24 **DISCUSSION**

25 Summary judgment is proper where the pleadings, discovery, and affidavits show there is  
26 “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of  
27 law.” *See* Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case.  
28 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is

genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See id.*

A court shall grant summary judgment “against a party who 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[,] . . . since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Id.* The burden then shifts to the nonmoving party to “go beyond the pleadings and by [his] own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *See id.* at 324 (citing Fed. R. Civ. P. 56(e) (amended 2010)).

For purposes of summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party; if the evidence produced by the moving party conflicts with evidence produced by the nonmoving party, the court must assume the truth of the evidence submitted by the nonmoving party. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999). The Court’s function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

Deliberate indifference to serious medical needs violates the Eighth Amendment’s proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A determination of “deliberate indifference” involves an examination of two elements: the seriousness of the prisoner’s medical need and the nature of the defendant’s response to that need. *Id.* at 1059.

A serious medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the “unnecessary and wanton infliction of pain.” *Id.* The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or

1 treatment, the presence of a medical condition that significantly affects an individual's daily  
2 activities, or the existence of chronic and substantial pain are examples of indications that a  
3 prisoner has a serious need for medical treatment. *Id.* at 1059-60.

4 A prison official is deliberately indifferent if he or she knows that a prisoner faces a  
5 substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate  
6 it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must not only "be aware of  
7 facts from which the inference could be drawn that a substantial risk of serious harm exists," but  
8 "must also draw the inference." *Id.* If a prison official should have been aware of the risk, but did  
9 not actually know, the official has not violated the Eighth Amendment, no matter how severe the  
10 risk. *Gibson v. County of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002). "A difference of opinion  
11 between a prisoner-patient and prison medical authorities regarding treatment does not give rise to  
12 a § 1983 claim." *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). In addition "mere  
13 delay of surgery, without more, is insufficient to state a claim of deliberate medical indifference. .  
14 . . [Prisoner] would have . . . no claim for deliberate medical indifference unless the denial was  
15 harmful." *Shapley v. Nev. Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985).

16 Viewing the evidence in the light most favorable to Garcia, all defendants are entitled to  
17 summary judgment. Garcia does not refute the majority of defendants' factual assertions. He  
18 states that defendants' facts are not accurate, but provides no evidence to support this statement  
19 other than saying he set forth his facts and arguments in the amended complaint. Even after  
20 reviewing the amended complaint and Garcia's assertions, he has not shown that defendants were  
21 deliberately indifferent to his serious medical needs.

22 It is undisputed that Dr. Kalisher first examined Garcia on February 4, 2014, and ordered  
23 an Ultrasound. When the Ultrasound results were ready, Kalisher reviewed his blood work and  
24 ordered an MRI. Garcia was then taken to Twin Cities Hospital and later to Salinas Valley  
25 Memorial Hospital for a biopsy and chemotherapy, all within a few months of Kalisher's first  
26 examination of Garcia. Garcia fails to show that Kalisher was deliberately indifferent. She  
27 provided him with a great deal of medical care beginning from her first examination. Garcia  
28 argues that his medical condition could have been avoided if Kalisher had provided better care.

1 He provides no evidence to support this assertion and has failed to identify specific facts showing  
2 that there is a genuine issue for trial. Garcia cannot meet the high standard for his claim of  
3 deliberate indifference regarding the cancer diagnosis. His difference of opinion regarding the  
4 treatment is insufficient. *Franklin*, 662 F.2d at 1344.

5 Kalisher is also entitled to summary judgment for Garcia's claims that she was deliberately  
6 indifferent in treating his abdominal infection, not properly maintaining the porta-catheter, and not  
7 timely removing the head staples. When Garcia reported a swollen red bump on his abdomen on  
8 June 4, 2014, Kalisher started him on antibiotics twice a day. Garcia did not report any concerns  
9 about his treatment when he saw Kalisher on July 11, 2014, and on August 12, 2014, when he  
10 returned to the medical unit for treatment, Kalisher saw no sign of infection. By August 20, 2014,  
11 the swollen area on Garcia's abdomen was getting smaller and less tender.

12 Garcia alleges that Kalisher failed to properly maintain the porta-catheter. Other than  
13 presenting this conclusory allegation he presents no evidence or even allegations that there were  
14 any complications from the porta-catheter. The porta-catheter was maintained by CTF nursing  
15 staff and was removed at Twin Cities Community Hospital on February 27, 2015. On April 2,  
16 2015, Kalisher noted that Garcia had no complaints about the porta-catheter or its removal, the  
17 incision had healed well, and there was no drainage, redness, or tenderness. There was no serious  
18 medical need related to the porta-catheter and no deliberate indifference on behalf of Kalisher.

19 Kalisher is also entitled to summary judgment on the claim that she violated the Eighth  
20 Amendment with respect to the removal of the staples from Garcia's head. It is undisputed that  
21 another doctor applied the staples after Garcia had been in a fight with another inmate. Kalisher's  
22 only involvement with the medical staples was overseeing their removal on June 2, 2015. Garcia  
23 argues that she waited too long to have them removed and that he was therefore at risk for  
24 infection. He makes no allegations that the staples caused any infection or that even if there was a  
25 delay in removing the staples it was due to Kalisher. In addition, mere delay of treatment without  
26 more is insufficient to demonstrate deliberate medical indifference. *See Shapley*, 766 F.2d at 407.  
27 Garcia's conclusory allegations with no support are insufficient to defeat summary judgment. *See*  
28 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) ("Conclusory, speculative



1 testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat  
2 summary judgment.”)

3 Summary judgment is also granted to nurses Mandich and Gerkey. Garcia only presents  
4 general allegations that Mandich failed to diagnose the cancer, and general allegations are  
5 insufficient at the summary judgment stage. *See Soremekun*, 509 F.3d at 984. It is undisputed that  
6 Kalisher diagnosed the cancer, which was in an early stage, and then quickly proceeded to provide  
7 treatment. He makes no allegations that the radiation and chemotherapy were unsuccessful and  
8 that if they were it was due to any delay in treatment caused by Mandich’s failure to diagnose.  
9 Nor has Garcia demonstrated a genuine issue for trial when Mandich did not administer an  
10 injection because Nurse Gerkey was there to provide the injection. Mandich was not denying  
11 lifesaving medication, as Garcia argues, because another nurse was available and prepared to  
12 provide the injection. Even if Mandich was rude to Garcia, that does not present a constitutional  
13 violation. Summary judgment is also granted to Mandich with respect to the claim that she  
14 refused to allow Garcia to administer the injection to himself on a different occasion.

15 Gerkey is entitled to summary judgment regarding Garcia’s claim that he wanted another  
16 nurse to provide an injection. Garcia has not met his burden in showing that there is a genuine  
17 issue for trial. In the amended complaint Garcia also states that he tried for four to five months to  
18 see a doctor before seeing Kalisher. He describes an incident when he went to the medical unit to  
19 seek treatment because his leg had swelled, but Gerkey told him it was not serious and that he  
20 would not be sent to the hospital. Am. Compl. at 6. Garcia does not state when this occurred, but  
21 he also states that he was eventually examined by a different nurse and then sent to the hospital for  
22 an Ultrasound and an MRI. *Id.* It would appear this incident happened shortly before February or  
23 March 2014. It is undisputed that Garcia received comprehensive treatment for the cancer once it  
24 was discovered. Garcia has not presented sufficient evidence or allegations that Gerkey’s failure  
25 to recognize the severity of Garcia’s medical problem on one occasion arises to deliberate  
26 indifference. It is undisputed that Garcia arrived at the clinic with swelling. Gerkey, a nurse, was  
27 not deliberately indifferent for not knowing that the swelling was caused by cancer, especially  
28 when soon after Garcia received a cancer diagnosis followed by comprehensive cancer treatment.

1 Garcia's conclusory allegations of delayed diagnosis and treatment are insufficient to show  
2 deliberate indifference. See *Shapley* at 407; *Soremekun* at 984.

3 **CONCLUSION**

4 1. Defendants' motion for summary judgment (Docket No. 21) is **GRANTED**.

5 2. The Clerk shall terminate all pending motions, enter judgment, and close the file.

6 **IT IS SO ORDERED.**

7 Dated: April 7, 2016

8  
9  
10   
11 \_\_\_\_\_  
12 JAMES DONATO  
13 United States District Judge  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DANNY R. GARCIA,  
Plaintiff,

v.

DR. KALISHER, et al.,  
Defendants.

Case No. [15-cv-00045-JD](#)

**CERTIFICATE OF SERVICE**


I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 7, 2016, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Danny R. Garcia ID: V-30568  
California Training Facility North Rainier "A" 112 low  
P.O. Box 705  
Soledad, CA 93960

Dated: April 7, 2016

Susan Y. Soong  
Clerk, United States District Court

By:   
LISA R. CLARK, Deputy Clerk to the  
Honorable JAMES DONATO