

submit copies of MRI records relating to scans taken of his lumbar spine in January 2009. He states that prior MRI records of which he was previously aware pertained only to his cervical spine, and that he only became aware on June 22, 2009 of the existence of the lumbar spine films, which he claims show that his "lumbar spine is very bad." He states that it will take him up to 60 days to obtain copies of the actual Reports/results on paper, and properly submit them "for supplementation of the records of evidence of the permanent injury's [sic] caused by the denied surgery."

It appears that the records referred to by the plaintiff are pertinent, if not central to his claim of denied medical care.

Therefore, by separate Order, the plaintiff's motion DE#190, for leave to supplement the record with the newly discovered MRI results, has been granted. The Order requires that on or before September 1, 2009, the plaintiff must serve complete copies of his new filing(s) upon the opposing parties (defendants) through their counsel of record, at the same time that he submits the records to the Court as a supplement to the record, for purposes of supporting his own motion for summary judgment, as well as opposing the defendants' cross motions for summary judgment.

It is apparent that plaintiff's supplementation of the record will likely necessitate supplementation by the defendants of their Responses (DE#s 103, 106, 110) in opposition to plaintiff's summary judgment motion (DE#98), and/or supplementation of the defendants' own cross motions for summary judgment (DE#s 140, 160, 172).

Under the rules, a supplemental response by defendants, in opposition to plaintiff's summary judgment motion, would be followed by a supplemental reply from the plaintiff. Similarly, any supplemental argument by the plaintiff founded on submission of the new MRI evidence, in opposition to defendants' summary judgment motions, would be followed by a supplemental reply from defendants.

Under these circumstances, the opposing summary judgment motions by the plaintiff (DE#98) and the defendants (DE#s 140, 160,

172) should not be allowed to languish on the docket. Rather, it appears that they should be dismissed, without prejudice.

Upon submission to the Court of the new MRI evidence by the plaintiff, and provision of copies of the same to the defendants, the parties should be allowed to renew their prior motions for summary judgment, with addition of any arguments that they deem appropriate after review of the new MRI evidence.

Unless they should choose to do so, the parties should not need to physically refile their prior motions for summary judgment and exhibits with the court. They can, instead, submit notices of intent to renew the prior motions, incorporating their prior filings by reference, and then separately submit any supplemental argument that they deem necessary in regard to the newly found evidence consisting of results from the MRI scans taken of plaintiff's lumbar spine in January 2009.

In sum, it is recommended that: 1) the plaintiff's and defendants' pending motions for summary judgment (DE#s 98, 140, 160, and 172) be dismissed without prejudice to renew, after the plaintiff supplements the record with lumbar spine MRI results on or before September 1, 2009; and 2) the plaintiff and defendants be allowed to refile their prior motions for summary judgment, by filing notices of renewal, incorporating their prior motions and exhibits by reference if they choose; and 3) that with regard to such new medical evidence as the plaintiff may submit based on his January 2009 lumbar spine MRI scans, the parties (defendants and plaintiff) be permitted to submit supplemental arguments in addition to renewal of their prior summary judgment motions.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: July 1st, 2009.



UNITED STATES MAGISTRATE JUDGE

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The Honorable Ursula Ungaro,
United States District Judge