United States District Court,
D. Kansas.
James Earl LINDSEY, Plaintiff,
v.
Scott BOWLIN, M.D., Defendant.
Civil Action No. 07-3067-SAC.

June 6, 2008.

Background: Federal prisoner incarcerated in private prison brought *Bivens* action against physician alleging violation of Fifth, Eighth, and Fourteenth Amendment rights. Physician moved to dismiss.

Holding: The District Court, Karen M. Vratil, J., held that no state law negligence cause of action was shown.

Motion denied.

West Headnotes

[1] Prisons 310 ⇐192

310 Prisons
310II Prisoners and Inmates
310II(C) Health and Medical Care
310k192 Particular Conditions and Treatments
310k192 k. In General. Most Cited Cases
(Formerly 310k17(2))

United States 393 ⇐50.10(3)

393 United States
393I Government in General
393k50 Liabilities of Officers or Agents for Negligence or Misconduct
393k50.10 Particular Acts or Claims
393k50.10(3) k. Criminal Law Enforcement and Investigation; Prisoners' Claims. Most Cited Cases
(Formerly 310k17(2))
No state law negligence action was shown for federal prisoner's injuries arising out of physician's failure to diagnose Hepatitis C and methicillin-resistant Staphylococcus aureus (MRSA), as would preclude federal prisoner's *Bivens* action against physician at private prison, alleging that failure to diagnose violated prisoner's Fifth, Eighth, and Fourteenth Amendment rights. U.S.C.A. Const.Amends. 5, 8, 14.

[2] United States 393 ⇐50.10(3)

393 United States
393I Government in General
393k50 Liabilities of Officers or Agents for Negligence or Misconduct
393k50.10 Particular Acts or Claims
393k50.10(3) k. Criminal Law Enforcement and Investigation; Prisoners' Claims. Most Cited Cases
A federal prisoner has no implied right of damages against an employee of a privately operated prison under *Bivens*, when state or federal law affords an alternate cause of action for the alleged injury.

[3] Civil Rights 78 ⇐1326(4)

78 Civil Rights
78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases and Contexts
78k1326(3) Private Persons or Corporations Jointly Acting
78k1326(4) k. In General. Most Cited Cases

Civil Rights 78 ⇐1326(5)

78 Civil Rights
78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases and Contexts
78k1326(3) Private Persons or Corporations Jointly Acting

78k13(5) k. ... with State Actor. Most Cited Cases

Civil Rights 78 ⇐1326(7)

78 Civil Rights
78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases and Contexts
78k1326(7) k. Public Service, License, or Regulation: Utilities and ... Most Cited Cases
Under § 1983, conduct is "fairly attributable" to the state if (1) the deprivation is caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state, and (2) the private party acted together with or obtained significant aid from state officials or ... in conduct otherwise chargeable to the state. 42 U.S.C.A. § 1983.

[4] Civil Rights 78 ⇐1326(3)

78 Civil Rights
78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases and Contexts
78k1326(3) k. Police and Other Officers: Prisons. Most Cited Cases
Federal prisoner bringing § 1983 ... against physician at private ... and private ... physician's receipt of license to practice medicine in state, claiming prisoner was injured by physician's failure to diagnose ... with Hepatitis C and methicillin-resistant Staphylococcus ... (MRSA), was required to allege that state ... of conduct created deprivation or that physician acted in concert with state officials or engaged in conduct otherwise chargeable to the state. 42 U.S.C.A. § 1983.

***1226** James Earl Lindsey, Tabas ... pro se.

Mark V. ... Mark ... Jr. ... born, PA, Overland Park, KS, ... for ...

MEMORANDUM ...

KATHRYN H. VRATIL, District Judge.

James E. Lindsey brings suit *pro se* against Scott Bowlin, M.D., for violation of constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff's claims arise from his incarceration in Leavenworth Detention Center, a private prison run by the Corrections Corporation of America ("CCA").[1] Specifically, plaintiff claims that during said incarceration, defendant, a physician for CCA, concealed or ... for failed to take reasonable steps to prevent the spread of methicillin-resistant Staphylococcus aureus ("MRSA") and Hepatitis C within the prison population, and failed to treat plaintiff for ... diseases. This matter comes before the Court on defendant's *Motion To Dismiss* (Doc. # 31) filed March 21, 2007.[2] Defendant asserts that plaintiff cannot bring an action for constitutional violations under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), against an employee of a privately operated prison. For the reasons stated below, the Court overrules defendant's motion.

[1] CCA is a private Maryland corporation which houses and detains federal pre-... arraignees and prisoners under contract with the United States Marshal's Service. *... Peoples v. CCA Det. Ctr.*, ... 2:05-CV-2004 WL 74317, at *1 (... Jan. 15, 2004) ("*Peoples I*"), *rev'd on other grounds, Peoples v. CCA Det. Ctrs.* ..., 431 F.3d 1087 (10th Cir.), *cert. denied*, ... U.S. 1056, 127 S.Ct. 964, 166 ... 821 (2006).

[2] Because defendant has already filed ... answer, it should normally make its motion under Rule 12(c), for judgment on the pleadings. *See Jacobsen ... Deseret Book ...*, 287 F.3d 936, 941 n. 2 (10th ... 2002). The same standard applies for ... Rule 12(b)(6) and 12(c) motions, however, ... In keeping with defendant's designation,

the Court refers to the p... 12(b)(6) motion to dismiss. *See id.*

...g. Standard

In ruling on a motion to dismiss ... to state a claim under Fed. R. Civ. P. 12(b)(6), the Court assumes as true all well p... facts in the complaint and views them in a li... favorable to plaintiff. *See Erickson v. Pa...* S. 89, 118, 110 S.Ct. 475, 107 L.Ed.2d ... (1989); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). Fed. R. Civ. P. 12(b)(6) does not require detailed factual allegations, but the complaint must set forth the grounds of plaintiff's entitlement to relief through more than labels, conclusions, and a formulaic*1227 recitation of the elements of a cause of action. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007). In other words, plaintiff must allege facts sufficient to state a claim which is plausible-rather than merely conceivable-on its face. *See id.* Plaintiff bears the burden to frame a complaint with enough factual matter (taken as true) to suggest" that he is entitled to relief." *Id.* at 1965. The Court makes all reasonable inferences in favor of plaintiff. *See Zinermon v. Burch*, 494 U.S. 113, 118, 110 S.Ct. 975; *see also Gonzalez v. Reno*, 325 F.3d 1228, 1233 (11th Cir.2003); *HMC Outdoor Worlds, Inc. v. Sec'y, U.S. Dep't of Labor*, 284 F.3d 1204, 1210 (11th Cir.2002). The Court, however, need not accept ... legal conclusions. *See Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir.2007). In reviewing the sufficiency of ... plaint, the issue is not whether plaintiff will prevail but whether he is entitled to ... to support his claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Although plaintiff must merely state each element of his claims, he must provide factual allegations for each element. *See id.* which ... Because plaintiff proceeds *pro se*, the Court construes his complaint liberally and ... to a less rigid standard than formal pleadings drafted by attorneys. *See id.* The Court, however, does not assume the role of advocate for a *pro se* litigant. *See id.*

Facts

Plaintiff alleges the following facts, which the Court accepts as true for purposes of ruling on defendants' motion:

Plaintiff was an inmate at Federal Correctional Institution ... Alabama. *Complaint* (Doc. # 1) [illegible] 3-07 at 1-3. From November of 2004 ... January 16, 2005, plaintiff was incarcerated in ... Leavenworth Detention Center ("LDC"), a private prison run by CCA.[1] *Id.* at 1-3. Defendant is a physician who works for CCA. *Id.* at 1.

[1] The complaint contains inconsistent ... numbering. For purposes of this order, the Court refers to page numbers designated by the electronic court filing system.

[2] The complaint does not allege when plaintiff began his incarceration at LDC, but it appears that he was incarcerated there from at least November of 2004.

On ... October 29, 2004, defendant examined plaintiff complaining nausea, fever and an extremely painful ... on his right upper scrotum. *Id.* at 2. Defendant advised that plaintiff had an ingrown hair, prescribed Doxycycline and asked him to return in ... weeks. *Id.* During the following week, plaintiff ... he would himself without bandaging ...

On ... November 2004, medical staff performed a ... plaintiff's wound. *Id.* Plaintiff told the doctor that he had never seen a two-inch bump for ... which caused nausea and fever and ... much pus." *Id.* The doctor assured ... that it was only an ingrown hair. *Id.* During ... however, plaintiff knew several inmates

who had similar abscesses on [illegible] of their bodies. *Id.* CCA [illegible] staff [illegible] inmates that the abscesses were caused [illegible] or insect bites. *Id.*

FN5. Plaintiff does not [illegible] whether [illegible] saw defendant or another [illegible] physician.

On December [illegible], 2004, CCA [illegible] staff received culture results [illegible] plaintiff's wound was not an ingrown hair [illegible] MRSA, a potentially deadly [illegible] special medication.*1228 [illegible] plaintiff [illegible] that he had MRSA [illegible] MRSA. *Id.* Defendant did not [illegible] plaintiff that MRSA has a capacity [illegible] when absorbed in the [illegible] seek immediate medical attention [illegible] recurrence. *Id.* Because defendant did [illegible] plaintiff for MRSA, plaintiff [illegible] carrier [illegible] disease. *Id.* at 2. As a result, [illegible] subjected to a substantial [illegible] serious [illegible] associated infections [illegible] which plaintiff [illegible] tal organ failure [illegible] damage. *Id.* at 4.

FN6. [illegible] medical staff [illegible] on December [illegible] 2004 [illegible] court [illegible] December [illegible] with [illegible] however [illegible] decision.

On January [illegible], 2005, [illegible] informed plaintiff that he had [illegible] prior [illegible] performed [illegible] Hepatitis C. *Id.* [illegible]

[illegible] barber equipment and weightlifting equipment [illegible] which were used by inmates with suspected [illegible] and spider bites who had Hepatitis C. *Id.* Defendant did not treat plaintiff for Hepatitis C. [illegible] plaintiff has suffered irreparable liver [illegible] a shorter life expectancy and a substantial [illegible] of sudden death. *Id.* at 5. Also, [illegible] reduce and must abstain from sexual [illegible]

On July 23, 2004, plaintiff was medically cleared to work in the kitchen at [illegible] at 5.

[illegible] 2005, plaintiff left CCA. *Id.* at 3. [illegible] plaintiff believed that the bump on his [illegible] ingrown hair. *Id.* Plaintiff did not [illegible] MRSA. *Id.*

[illegible] 2005, while in the transfer center in [illegible] plaintiff noticed an abscess on his right knee. *Id.* Plaintiff initially ignored it, thinking that it was [illegible] ingrown hair. *Id.* Plaintiff eventually sought [illegible] however, due to swelling [illegible] pain. *Id.* A culture revealed that it [illegible]

[illegible] plaintiff contracted MRSA, defendant [illegible] concealed that a MRSA epidemic and [illegible] occurring throughout the LDC inmate population. *Id.* at 5. As plaintiff's healthcare provider, [illegible] had a duty to conform to a reasonable [illegible] of care to assure plaintiff's health and safety. *Id.* Defendant breached that duty by concealing the outbreak. *Id.* Defendant could have prevented [illegible] transmission of MRSA by [illegible] precautionary measures such as isolating [illegible] inmates and/or posting warnings regarding [illegible] transmission, risk factors, prevention [illegible] of MRSA. *Id.* Defendant should have [illegible] regarding disinfection and decontamination [illegible] potentially contaminated surfaces, [illegible] clothing. *Id.* Such measures would [illegible] plaintiff a full and fair opportunity to [illegible] chances of contracting the disease [illegible] because defendant did not exercise reason-

able care to stop it[illegible] A few months [illegible] their [illegible] inmate population [illegible] this [illegible] and suffered constant [illegible] infection [illegible] caused excruciating pain [illegible] shameful [illegible] embarrassing scars on his scrotum [illegible] buttocks [illegible] back [illegible] thighs. *Id.*

***1229** Defendant [illegible] at [illegible] carried [illegible] that [illegible] and [illegible] should have [illegible] such [illegible] in [illegible] inmates among [illegible] affected [illegible] specifically, defendant [illegible] Davis [illegible] charge, [illegible] or [illegible] with [illegible] tained [illegible] MRSA [illegible] [illegible] ultaneously [illegible] infected [illegible] with [illegible] diseases. *Id.* Defendant failed [illegible] reasonable care [illegible] [illegible] spreading with [illegible] [illegible] proximately caused plaintiff [illegible] [illegible] disease. *Id.*

Analysis

Plaintiff [illegible] [illegible] constitutional [illegible] [illegible] and [illegible] [illegible] failing to prevent [illegible] spread of [illegible] is [illegible] among the [illegible] [illegible] treat plaintiff [illegible] [illegible] dismiss, argues [illegible] action against [illegible] employees of [illegible] prison.

In *Peoples* [illegible] [illegible] 2004 [illegible] 2004 [illegible] would [illegible] CCA [illegible] remedy available [illegible] **6-7 [illegible] ity against. Finding [illegible] state [illegible] does not have [illegible] years or [illegible] a private [illegible] [illegible] *Peoples III* "), 422 F.3d 1090, [illegible] (10th Cir.2005).[illegible] On rehearing en [illegible] the Tenth Circuit equally divided on [illegible] to actions against employ- [illegible] operated prison. *See Peoples* [illegible] *Peoples II* "), 449 F.3d 1097, [illegible] (2006).[illegible] On this issue, the en [illegible] ed the panel opinion and remanded [illegible] further proceedings. On remand of [illegible] Court issued an order to show cause [illegible] not dismiss the case for failure to [illegible] Rule 12(b)(6). *See Order To* [illegible] 41) filed October 5, 2006 in [illegible] 129. Plaintiff did not respond and the [illegible] to [illegible]. See *Order* (Doc. # 42) [illegible] 30, 2006 in Case No. 03-3129. [illegible] upon it.

In *Peoples I*, this Court concluded [illegible] lacked subject matter jurisdiction [illegible] claims. *See* [illegible] at *7. In a related [illegible] judge of this Court found that [illegible] subject matter jurisdiction, but that [illegible] did not state a claim upon which [illegible] could be granted. *See Peoples v.* [illegible] *of Am.* (*Peoples II* "), 2004 [illegible] 22286, *7, 02-2298-MLB (March 26, [illegible] In dicta, that case noted that it was [illegible] plaintiff could maintain a *Bivens* [illegible] against individual CCA employees, especially when alternative state remedies [illegible] available, but it did not decide [illegible] Instead, it assumed the availability of a *Bivens* action and held that plaintiff had not alleged sufficient facts to support [illegible] claims. *See id.* at **4-7.

The panel majority concluded that [illegible] could have jurisdiction over such [illegible] but that plaintiff did not state a [illegible] such relief could be granted. *See* [illegible]

The en banc court stated unanimously [illegible] district courts have subject [illegible] jurisdiction over such claims.[illegible]

[illegible] 2009 [illegible] Thomson Reuters. No Claim to Orig. U.S. Gov. Works.

Although [illegible] sue, two circ[illegible] vens liability [illegible] operated prison [illegible] remedies. For [illegible] *See also* [illegible] (11th Cir.2001) [illegible] 295-97 [illegible] S.Ct. [illegible] cases, the courts [illegible] plaintiff [illegible] available, the [illegible] vens liability [illegible] prison [illegible] 295-96. This [illegible] 1971 to 1980. [illegible] implied cause [illegible] directly under the [illegible] U.S. 3[illegible] eral officials [illegible] Amendment [illegible] 228, 99 S.Ct. [illegible] action against [illegible] violation[illegible] 1468. [illegible] federal [illegible] ation[illegible] refused to [illegible] money [illegible] tion. [illegible]

[illegible]

In *Corr[illegible]* 534 [illegible] (2001), the [illegible] tion to imply [illegible] cumstances. [illegible] Correctional [illegible] private [illegible]

[illegible] the Bureau of Prisons, for [illegible] violations. The Supreme Court [illegible] extended *Bivens* to claims against private [illegible] 60, 122 S.Ct. 515.[FN1] In so [illegible] Supreme Court noted that it was [illegible] to extend *Bivens* except "to [illegible] otherwise nonexistent cause of action [illegible] federal officers alleged to have acted unconstitutionally or to provide a cause of action for [illegible] asked *same alternative remedy* for [illegible] individual officer's unconstitutional [illegible] *See id.* at 70, 122 S.Ct. 515 [illegible] (2d Cir.2002). The Supreme Court emphasized that the plaintiff had alternative remedies [illegible] found that the Supreme Court's three [illegible] factor test [illegible] foreclosed an extension in that [illegible] 534 U.S. 61, 122 S.Ct. 515.

Malesko did not address whether [illegible] could bring a *Bivens* claim against [illegible] employee of CSC.

[illegible] *Malesko*, *Alba* and *Holly*, and for reasons [illegible] the majority opinion, this [illegible] federal prisoner has no implied [illegible] against an employee of a privately [illegible] federal law affords an [illegible] for the alleged injury. *See* [illegible] 2d at 1096-103. Thus, to demonstrate [illegible] plaintiff has stated a claim upon [illegible] may be granted the Court must determine [illegible] law provides an alternative [illegible] plaintiff's alleged injuries.[FN2] *See id.*

[illegible] Court finds that if plaintiff [illegible] state a claim for violation of his [illegible] rights, he could not proceed [illegible] and it would be immaterial [illegible] state law affords an alternate remedy. [illegible] defendants' motion does not address [illegible] plaintiff has sufficiently stated a [illegible] constitutional deprivation. At [illegible] it appears that plaintiff may [illegible] claim for violation of the Eighth

[illegible] obtained significant aid [illegible] officials are engaged in conduct [illegible] chargeable to the state. *See id.* [illegible] plaintiff does not allege that state [illegible] conduct created the deprivation or [illegible] defendant acted in concert with state [illegible] is engaged in conduct otherwise [illegible] to the state. Accordingly, his [illegible] does not state a claim for relief [illegible] section 1983. *Cf. Comiskey v. JFD* [illegible] 989 F.2d 1007, 1010-11 (8th [illegible] (bar not state actor merely be- [illegible] dates issued if liquor license); *Tunca* [illegible] *ex rel. Hess*, 344 F.2d 411, 413 [illegible] (28) (hospital not state actor [illegible] license regulated by state); *Willis* [illegible] *v. Woodfin*, No. 1:07-cv-0949, [illegible] 3702, at *35 (M.D.Pa. March 5, [illegible] attorney not state actor merely be- [illegible] retained by state).

***1231** [illegible] state [illegible] *and* [illegible] 35) filed [illegible] analysis [illegible] ant has [illegible] law cases [illegible] ies, the Court will [illegible] this time.

IT IS THEREFORE ORDERED that defendant's [illegible] (Doc. # 34) filed March 21, [illegible] is OVERRULED.

[illegible]

United States District
D. Kansas.
Junior Clayton MENTER, Plaintiff,
v.
Stacey APPLEBEE, et al., Defendants.
No. 04-3054-MLB.

June 27, 2008

David A. Rameden, Zach Chaffe , Shook, Hardy & Bacon L. P., Kansas , MO, for Plaintiff.

Joshua D. Mast, Michael P. Cro w, Clothier & Associates, Leavenworth, KS, f defendants.

***MEMORANDUM AN* ***

JAMES P. O'HARA, U.S. Magistr Judge

I. Introduction

***1** This is a prisoner civil rights c e plaintiff Junior Clayton Menter, asserts c elated to his treatment while he was incarc at the Corrections Corporation of Americ A") Detention Center in Leavenworth, s pecifically, plaintiff alleges he is subjected ot of the neglect and indifferen e of CC employees, defendants Stacey Applebee, Dr. oslin, Frederick Lawrence, Rhonda Allen ay Davis (collectively, the "individual c ndants"). The case is now before the court e individual CCA defendants' supplemental t to dismiss **(doc. 45)** and CCA's motion to plaintiff's amended complaint (doc. 79). O 9, 2008, by consent of all parties, the two t s currently before the court were assigned f ion from Hon. Monti L. Belot, U.S. District Judge, to the undersigned U.S. Magistrate James P. O'Hara (see doc. 87). As discussed below, these motions have been fully briefed, and the court is ready to rule.

II. Background

A detailed review of this case's complex procedural history is necessary to understand the legal issues currently before the court. On February 13, 2004, plaintiff filed this case pro se against the United States of America, the United States Marshal for the District of Kansas, and the United States Attorney General (collectively, the "federal defendants"), and also against CCA and the individual CCA defendants (doc. 1). In his complaint, plaintiff asserted a claim under *Bivens v. Six Unknown Named Agents of Federal of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), for violations of his Fifth Amendment right to due process and his Eighth Amendment right to be free of cruel and unusual punishment, along with a claim under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, and a breach of contract claim pursuant to the Tucker Act, 28 U.S.C. § 1346(a)(2).

On August 4, 2004, CCA and the individual CCA defendants filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted (doc. 21). On September 30, 2004, the federal defendants filed a similar motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment (doc. 28).

On December 16, 2004, Judge Belot granted both of the above-referenced dispositive motions, dismissing the complaint in its entirety (doc. 30). Judgment was entered accordingly (doc. 31). Plaintiff, still proceeding pro se, appealed (doc. 32). On August 13, 2006, the United States Court of Appeals for the Tenth Circuit affirmed the dismissal of

the claims against the federal de[illegible] and CCA, but reversed the dismissal of [illegible] claim against the individual CCA de[illegible] for lack of subject matter jurisdiction, remanding the case for further proceedings only on the [illegible] claim (see doc. 48).

***2** As earlier indicated, the indivi[illegible] CCA defendants' original motion to dismiss [illegible] based Defendants lack of subject matter jurisdiction and [illegible] to state a claim upon which relief can be [illegible] The Tenth Circuit found that Judge Belot[illegible] motion on the basis of lack of subject [illegible] jurisdiction and held this was inappropriate because the appropriate basis for dismissing a *Bivens* [illegible] failure to state a claim upon which relief can be [illegible] granted.

On August 29, 2006, after this [illegible] been remanded, Judge Belot determined [illegible] individual CCA defendants should be allowed [illegible] to supplemental motion to dismiss for [illegible] claim or upon any other appropriate [illegible] (doc. 42). He also set briefing deadlines [illegible] motion.

The individual CCA defendants supplemental motion to dismiss and [illegible] in support (doc. 46) on September 13, [illegible] after receiving a letter from plaintiff stating [illegible] could not file a response by the previously set [illegible] the court gave plaintiff an extension of time [illegible] November 3, 2006 to respond to the individual [illegible] motion (see doc. 47). The court [illegible] cautioned cause the individual CCA defendants [illegible] of plaintiff's medical records [illegible] in support of their motion, he [illegible] convert the motion to one for summary [illegible] issue of when plaintiff was given [illegible] The court stated plaintiff could [illegible] evidence on this issue.

The court received another letter from plaintiff requesting an extension of time [illegible] CCA defendants' motion (doc. 50). On December 26, 2006, plaintiff [illegible] sponse to the individual CCA [illegible] dismiss, which plaintiff [illegible]

had converted to a motion for summary judgment on the issue of whether plaintiff was given pain medication [illegible] (doc. 51). The court then allowed the individual CCA defendants to supplement their motion to [illegible] plain whether administrative remedies were or [illegible] available at the Leavenworth Detention Center [illegible] if so, what the remedies were or are (see doc. 52). The court's order included a footnote stating [illegible] individual CCA defendants' "motion may be [illegible] verted to summary judgment."

The individual CCA defendants timely filed a supplement to their motion to dismiss addressing the availability of administrative remedies and whether plaintiff exhausted those remedies (doc. 53). The individual CCA defendants attached to their supplement an affidavit of defendant Fredrick Lawrence, Chapter [illegible] of the CCA Corporate and Facility Policy [illegible] the CCA Inmate Handbook for the Leavenworth Detention Center. The court then noted the evidence presented by the individual CCA defendants was contrary to plaintiff's statement in his complaint that he was told there were no administrative remedies available at the Leavenworth Detention Center (see doc. 54). The court converted the individual CCA defendants' motion to dismiss [illegible] for summary judgment pursuant to Fed.R.Civ.P. 12(c) and gave plaintiff an opportunity to respond to the individual CCA defendants' motion for summary judgment. In an abundance of caution, the court sent plaintiff its previous order allowing the individual CCA defendants to supplement their motion regarding administrative remedies. The individual CCA defendants' supplement is the motion to which he was recently moved. Plaintiff [illegible] Judge Belot an illegible letter [illegible] a letter requesting an extension of time [illegible] the individual CCA defendants' supplemental motion (docs. 55 & 56).

[illegible] 2007, Judge Belot provisionally appointed [illegible] A. Kameden as counsel to represent plaintiff [illegible] (doc. 57). On February 6, 2008, plaintiff, through [illegible] filed a motion for leave to amend [illegible] to properly identify the previously

unknown or incorrectly identified individual CCA defendants and to add claims against CCA and the individual CCA defendants (doc. 70). CCA opposes the motion arguing plaintiff unduly delayed in filing the motion to amend (doc. 71). CCA further argues that because it had not been a defendant at the time plaintiff's proposed negligence claim arose, it will suffer undue prejudice if plaintiff is allowed to add it as a defendant now. The individual CCA defendants did not file any opposition to plaintiff's proposed amendments.

On February 23, 2007, plaintiff filed a brief in support of his motion to amend. Plaintiff also filed a motion for leave to file a reply brief to address his misstatement that CCA had not been served in this pending (doc. 76). In this motion, plaintiff argued that his opportunity to amend as a matter of right had not yet ended and therefore the court should consider the arguments raised in plaintiff's proposed amended complaint and the subsequent motion to amend filed on the same day. Plaintiff filed a proposed amended complaint (doc. 77) and withdrew his motion for leave to amend and motion for leave to file a reply brief (doc. 78). CCA then filed a motion to strike plaintiff's amended complaint to the extent it added claims (doc. 80). Plaintiff filed a response to CCA and the individual CCA defendants' answer to plaintiff's amended complaint. Defendants subsequently filed an answer to plaintiff's amended complaint (doc. 84).

Meanwhile, plaintiff filed several motions for extensions of time to file his response to defendants' motion for summary judgment (*see* docs. 67, 69, 74, and 75). In the pending discovery motion, plaintiff seeks to file his response to the individual CCA defendants' supplemental motion for summary judgment. The individual CCA defendants have filed a reply brief regarding their motion to dismiss.

[illegible] When considering a motion to dismiss, the court must accept as true all well-pleaded facts, as distinguished from conclusory allegations, and must grant plaintiff [illegible] reasonable inferences from the well-pleaded facts. [illegible]

supplemental motion to dismiss addressing the issue of exhaustion of administrative remedies at the Leavenworth Detention Center. Plaintiff already had filed a pro se response to the individual CCA defendants' motion (doc. 54). Plaintiff was to file his response to the individual CCA defendants' supplemental by March 16, 2007 (*see* doc. 54). Plaintiff sent Judge Belot a letter dated March 5, 2007 requesting an extension of time to file his response (doc. 56). This request, which the court construed as a motion, was never ruled, but as mentioned above the court appointed counsel for plaintiff on June 28, 2007.

The court, however, will consider plaintiff's response filed through counsel in its entirety. The court finds that plaintiff, who now has the benefit of counsel, should not be limited to the arguments and exhibits he presented in his pro se response. Further, plaintiff's motions for extensions of time to file his response and the court's orders granting those motions were not extremely precise as to what plaintiff was being given an extension of time to file (*see* docs. 67-69 & 73-74).

[illegible] Individual CCA Defendants' Supplemental Motion to Dismiss

[illegible] Exhaustion of Remedies

The individual CCA defendants' supplemental motion to dismiss asserted pursuant to Fed.R.Civ.P. 12(b)(6) that dismissal of plaintiff's *Bivens* claim for failure to state a claim upon which relief can be granted was proper because the individual CCA defendants attached several of plaintiff's medical records to their supporting memorandum. Judge Belot stated he would not convert the motion to one for summary judgment for the issue of whether plaintiff was given [illegible] administrative remedies. Judge Belot gave plaintiff an opportunity to submit contrary evidence on the issue.

The individual [illegible] defendants [illegible] their motion [illegible] trative remedies [illegible] outside the pleadings [illegible] motion may be converted [illegible] "the court will convert [illegible] miss to one for summary judgment [illegible] noted the conversion [illegible] because [illegible] be on [illegible] his response [illegible] court should [illegible] fendants [illegible] should [illegible] ings.

[illegible]

*4 [illegible] presents [illegible] a motion [illegible] which relief can [illegible]

If, on a motion [illegible] ters outside [illegible] excluded by the court [illegible] as one for summary judgment [illegible] parties shall [illegible] present [illegible] motion.

[illegible] (2)(6).

The court has discretion to accept or reject documents attached to a motion to dismiss pursuant to [illegible] 12(b)(6). The court, however, [illegible] the parties notice and an opportunity to [illegible] evidence before converting a motion [illegible] into a motion for summary judgment. [illegible] required notice may be actual or [illegible] In some circumstances, courts [illegible] held that the submission of evidentiary material by the movant, the nonmovant, or both of [illegible] sufficient notice. [illegible]

[illegible] v. [illegible] of Farmington [illegible], 232 F.3d 1334, [illegible] (2000).

[illegible] City & County of Denver, [illegible] F.3d 1352 (10th Cir.1996).

[illegible] the court should not treat the motion [illegible] summary judgment because the individual [illegible] defendants failed to comply with D. [illegible] which requires parties moving for summary judgment to number the facts and specifically [illegible] the supporting portions of the record. [illegible] whether a movant complies with [illegible] when filing a motion it intended [illegible] for failure to state a claim does [illegible] that the court can exercise its discretion [illegible] the motion.

[illegible] 262 [illegible] Supp.2d [illegible] (D.Kan. 2003) (declining to exercise discretion to treat motion to dismiss [illegible] summary judgment for several [illegible] including that the motion did not [illegible] a concise statement of material [illegible] required by D. Kan. Rule 56.1).

[illegible] also argues that, if the court [illegible] the motion as one for summary [illegible] the court should deny summary judgment because the individual

[illegible]

Plaintiff [illegible] the motion to [illegible] the parties' [illegible] summary judgment discovery. As [illegible] tion to [illegible] and therefore [illegible] ment. [illegible] sion is [illegible]

[illegible]

The [illegible] to effectuate [illegible] One [illegible] sion [illegible] motion [illegible] ant's [illegible] extension [illegible] the [illegible] CCA. [illegible] before [illegible] atories [illegible] sponse [illegible] the parties [illegible] motion [illegible] this stage [illegible]

[illegible] 2003 WL [illegible] *Wasserman v. Lappin*, No. [illegible] 2005 WL 3789, at *8 (D.Kan. [illegible]) (finding that a motion for summary judgment was premature when [illegible] had not engaged in discovery).

[illegible] argues the court should not convert [illegible] for summary judgment because [illegible] notified the parties it will use the [illegible] standard. Such an argument ig- [illegible] the [illegible] orders in the case. The [illegible] plaintiff's counsel was appointed [illegible] case with the anticipated proceed- [illegible] plaintiff's counsel, however, filed [illegible] response over eight months after being [illegible] should have been sufficient time [illegible] case's history. Regardless, [illegible] warned the parties the motion may be [illegible] that the motion would be con- [illegible] for summary judgment, clearly giving [illegible] notice of such a conversion." Given [illegible] court's order converting the motion [illegible] [illegible] the undersigned [illegible] consider the matters outside [illegible] pleadings attached to the indi- [illegible] defendants' memorandum in support of [illegible] motion, plaintiff's re- [illegible] and plaintiff's request that the motion be treated [illegible]

[illegible] 54, the Judge Belot precedent [illegible] motion cannot be converted [illegible] summary judgment on the issue [illegible] plaintiff was given adequate notice. [illegible] subsequent order, [illegible] motion as a whole [illegible]

[illegible] of the moving [illegible] genuine issue as to [illegible] entitled to judgment as [illegible] In applying this standard, the [illegible] evidence and reasonable infer- [illegible] the light most favorable to the

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nonmovant
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showing that there is a genuine issue
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could find for the
accomplish this, the facts
to affidavits, depos-
specific exhibits incorporated

at 256;
(concerning
on summary judgment)

477 at 256;

at 671 (internal
omitted).

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of Rules summary judgment is not a
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477 at 327 (quoting
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of course, constitutes the
light most favorable to plaintiff
moving party is required by
to set forth specific, material facts and
properly supported by the record
. When necessary, additional
added in the analysis section of
this opinion.

its original complaint was sworn to

under ... defendants produced two facility
fidavit ... either of which were effective
facts ... at the Leavenworth Detention
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amends... U.S. amended complaint well after ... defendants filed their motion to ... agreement. Because plaintiff's ... supersede the original com- ... the Individual CCA de- ... allegations and ... plaintiff's ... amended ... 2007). His amended ... his original complaint as to his ... the underlying allegations and ... claim against the individual ... CCA.

... *Ass'n of Prevent* ... 2d ... 2004).

... Defendants ...

... Defendants argue plaintiff ... and therefore ... The Prison Litiga- ... (PLRA) requires prisoners ex- ... administrative remedies before ... to have ... conditions under ... Discretion ... and ... in ... with the individual ... to ... required to ex- ... Leave ... Lawrence ... tion ... plaintiff ... with ...

... 549 U.S. 199, 127

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plaint, it was held by U.S. Dis-
Columbia also of the District of
assuming a *Bivens* action against
was available, the plaintiff
claim upon which relief could

2. The
Bivens

5129, 2011 WL 74317, at *7
15 (9th Cir.), *aff'd*, 422 F.3d
(9th Cir.2005), *reh'g en banc*, 449
(9th Cir.2006), *cert. denied*, --
(2006).

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(D.Ariz.2006),
(9th Cir.2005), *aff'd*
reh'g en banc, 449 F.3d
(9th Cir.2006), *cert. denied*, --
(2006).

held a *Bivens* cause
, prisoner below
which we conclude that
cause of action arising
federal law against the insti-
the one recognized by the consti-
, 2005,
was solely devised for the
Bivens actions available against
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majority of the en banc panel
ruling in *Peoples II*
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precedential

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, 127 S.Ct. 1843, 167 L.Ed.2d

[illegible] 1365, 61 L.Ed.2d 15 (1980) [illegible] for prison officials for [illegible] violation). Since 1980, [illegible] Supreme Court has refused to [illegible] cause of action for money dam[illegible] directly from the Constitution. *See* [illegible]

[illegible] 2018 WL 2331175, at *4.

Based [illegible] Supreme Court declined to extend a [illegible] action in a new circumstance. Spe[illegible] Court declined to imply a *Bi*[illegible] Vratil [illegible] cuits has [illegible] dividual [illegible] inmate [illegible] leged [illegible] plaintiff to [illegible] *vens* [illegible] prison [illegible] Supre[illegible] actions [illegible]

[illegible] Court has stressed it has only [illegible] to provide an otherwise [illegible] a plaintiff who lacked [illegible] remedy for harms caused by an in[illegible] officer's unconstitutional [illegible] Supreme Court emphasized the [illegible] alternative remedies and fol[illegible]

[illegible] citing *Malesko*, 534 U.S. at 66[illegible]

[illegible] 554 U.S. at 270

[illegible] at *2-*4.

[illegible] magistrate judge finds Judge Vrat[illegible] *Bivens* [illegible] persuasive and

On three [illegible] the similar [illegible] Courts [illegible] for [illegible] respectively. As Judge Vratil stated [illegible] Constitution [illegible] federal prisoner has no implied [illegible] 1999). [illegible] against employees of a privately [illegible] eral [illegible] which state or federal law affords an [illegible] Amen[illegible] remedy." Therefore, [illegible] U.S. [illegible] must determine whether state [illegible] (impl[illegible] administrative remedies for plaintiff's al[illegible] Amen[illegible]

[illegible] No C[illegible] Govt Works.

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to *Bivens* the court disagrees
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Court in *Correctional Services*
rejected the heightened deliberate
standard of Eighth Amendment liabil-
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difficult for a plaintiff to
pursuant to *Bivens* than
ordinary negligence." The Su-
that a plaintiff's
state tort remedies available
Iqbal were not inconsistent or
remedy meant that such
stood, the alternative remedy
plaintiff in *Bivens* resisting the
had amounted to a crime[.]"
by pursuit of a negligence
could constitute a crime or rise to
key about the plaintiff in *Bivens*

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al CCA defendants owed him a
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dants' interpretation of *Bivens*,
lowed, they must either concede
how negligence claim or con-
claim exists. Although the indi-
nts certainly have not conceded
whether state law negligence
to the motion to dismiss
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Bivens plaintiff did not discuss
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available under a *Bivens* reme-
suggest, but he set forth specific
there was a genuine dispute of a
to this issue. The court finds
determining whether *Bivens*
CCA defendants,
presents solely
though courts are split on the
side of law and it may present a
summary judgment to all
since the plaintiff has al-
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plaintiff's right to amend as
the motion is before the court
to amend is of course termin-
motion is granted.

Thiem, 780 F.2d at 97,
(1975) (WRIGHT, MILLER & KANE, §
Rockwell
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, 145 F.3d at 582.

's procedural history is
the complaints filed by the
plaintiffs, the court granted
defendants' motion to
dismiss. Plaintiffs' motion to
dismissed the complaint in its
Accordingly, Sub-
Court will recall, all of the dis-
explained earlier, the dismissal
claims against the individual
Each of them stated that
the amended complaint affirmed in
pending
fore plaintiffs
ary 28,

Rule 7.

motion does not first prove to
amend. Rule 7.1 requires (this)
that the parties disagree as to the
In this case, while the parties
disagree as to the
Plaintiffs' counsel essentially
argues that the case and
Rule requires the court to amend.
Because the case has remained
its pleadings was filed, the
ing
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before

[illegible] filed a responsive pleading, the [illegible] the plaintiff's right to amend as a [illegible] as to defendant King, remained un- [illegible] district court should [illegible] plaintiff's opposition as an amend- [illegible] ment, considered it in ruling on de- [illegible] to dismiss and subsequently

The Tenth Circuit [illegible] miss is treated [illegible] nal judgment [illegible] amended [illegible] cludes [illegible] right [illegible] amend [illegible] claims [illegible] had not [illegible]

[illegible] 1983 [illegible]

[illegible] 746–47

[illegible] 748

[illegible] *established* [illegible] proposition that [illegible] have been [illegible] defendant King [illegible] tion without leave of court. Such [illegible] missed. The Tenth Circuit held the [illegible] Tenth [illegible] was its right to amend before the dis- [illegible] of all [illegible] the motion to dismiss and therefore [illegible] because [illegible] should never have been dismissed. [illegible] fendant [illegible] cites *Broadbury* [illegible] v. *Dissler*, [illegible] plaintiff [illegible] District of Kansas case which [illegible] a matter of [illegible] with regards to correctly ruling a [illegible] reverse the [illegible] Defendant, the court in *Bradbury Co.* [illegible] court finds [illegible] 20 servants cannot amend as a matter [illegible] *Brewer* [illegible] complaints filed against the coun- [illegible] have sought [illegible] ty, who had not yet [illegible] ously dismissed [illegible] subject [illegible] did not involve [illegible] ants [illegible] waiver of right [illegible] a defendant who [illegible] plaintiff's [illegible] address.

[illegible] 2d [illegible] D.Kan.1993).

[illegible] 743

The [illegible] lies to [illegible] stant [illegible] had [illegible] defense [illegible] plaintiff [illegible] plaintiff [illegible] and R[illegible] ted [illegible] not reversed the dis- [illegible] Circuit's decision [illegible] plaintiff's right to amend would [illegible] to amend, he would have had to [illegible] case [illegible] a motion for [illegible] however, [illegible] the Tenth Cir- [illegible] defendants oth- [illegible] case remains pending. The Tenth