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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ANGELO L. JOHNSON,

Plaintiff,

vs.

DR. JOHN, et al.,

Defendants.

) 3:06-CV-234-LRH (RAM)

) **REPORT AND RECOMMENDATION**
) **OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Defendants’ Motion for Summary Judgment (Doc. #50¹). Plaintiff has replied (Doc. #60), and Defendants have opposed (Doc. #61). After a thorough review, the court recommends that the motion be granted.

I. BACKGROUND²

This is an inmate civil rights complaint brought under 42 U.S.C. § 1983. At all relevant times, Plaintiff Angelo L. Johnson (“Johnson”) was a prisoner in custody of the Nevada Department of Corrections (NDOC) at Northern Nevada Correctional Center (NNCC). (Pl.’s Complaint (Doc. #5) 1.) Defendants include various physicians from the medical department

¹ Refers to the court’s docket number.

² Plaintiff argues that Defendants have failed to provide him with a copy of his medical records. At a motion hearing, the court ordered the court clerk to provide Plaintiff with a copy of the medical records that had been previously submitted under seal. (Doc. #57 [Minutes of Proceedings October 8, 2008].) Because Plaintiff’s counsel is now in possession of those records, the court finds that he is able to respond to all relevant issues raised by the instant motion.

1 at NNCC. (*Id.* at 2.) The sole claim in Plaintiff’s complaint relates to the adequacy of the
2 medical care he received for an injured right thumb between the months of March and
3 September 2005. The relevant treatment history is summarized as follows:

4 Plaintiff was initially treated at Pershing General Hospital on March 26, 2005 after
5 sustaining a fracture, multiple lacerations, and a split thumbnail on his right thumb. (Defs.’
6 Mtn. Summ. J. (Doc. #50) 3.) Upon returning to NNCC, Plaintiff was admitted to the Regional
7 Medical Facility (RMF) at NNCC. (*Id.*) Various nurses and physicians at the RMF examined
8 the thumb several times between March 26 and April 6. (*Id.*) On the latter date, Defendant
9 Dr. Long, an orthopedic specialist contracted by NDOC, concluded that the thumb was healing
10 well, and that the fracture could be addressed by splinting. (In Camera Submission of Med.
11 Records (Doc. #52) 56.) Plaintiff was discharged from the RMF on April 12th, 2005. (Defs.’
12 Mtn. 4.)

13 The parties dispute whether Plaintiff sought treatment for his thumb for soreness and
14 infection between April 12, 2005 and May 1, 2005. (*Id.*; *see also* Pl.’s Oppo. to Defs.’ Mtn.
15 Summ. J. (Doc. #60) 9.) Plaintiff alleges that he submitted multiple written requests (also
16 known as “kites”) to be seen by the infirmary, but Defendants have no record of these requests.
17 (*Id.*) On May 1, Plaintiff alleges that he experienced an emergency “man down” situation due
18 to the pain from his thumb, but Defendants have no documentation of this incident either.
19 (Defs.’ Mtn. 4; Pl.’s Oppo. 8.) Dr. Johns treated Plaintiff the following day, prescribing a
20 fifteen-day course of antibiotics, a culture test to determine the presence of an infection, and
21 re-admission to the RMF. (*Id.*) A few days later, Dr. Johns examined the thumb and
22 concluded that the infection had been eliminated. (*Id.* at 5.)

23 Similar to above, the parties dispute whether Plaintiff sought treatment for problems
24 with his thumb between May 11 and May 30, 2005. (*Id.* at 5; *see also* Pl.’s Oppo. 9.) In
25 particular, Plaintiff alleges that he made repeated complaints regarding a growth at the base
26 of his thumbnail. (Pl.’s Oppo. 9.) The May 30, 2005 entry in his medical records by a nurse
27 indicates that there was no evidence that he had been seen since his April 15 discharge. (Med.
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1 Records 33.) On May 30, when he was about to be transferred to another institution, Plaintiff
2 requested emergency treatment due to pain he was experiencing in his thumb. A nurse
3 provided Plaintiff with pain medication and dressings and scheduled a reevaluation
4 appointment with a doctor. (*Id.* at 103.) The following day, Defendant Dr. Gedney confirmed
5 a growth at the base of Plaintiff's thumb and referred him to Dr. Long. (*Id.* at 8.) After
6 reviewing X-rays films and consulting the relevant medical literature, Dr. Long concluded on
7 June 3 that Plaintiff's thumb fracture needed to be reduced and his nail bed reconstructed. (*Id.*
8 at 58-61.) A culture test indicated that the thumb had an infection, and Dr. Long prescribed
9 antibiotic coverage for the procedure. (*Id.*) Two days before the surgery, a nurse concluded
10 that the thumb infection had subsided. (*Id.* at 6.) After Dr. Gedney submitted a consultation
11 report and received NDOC approval for the surgery, Dr. Long performed the surgery on June
12 21st.

13 On June 22, Plaintiff was readmitted to the RMF for pain management following the
14 surgery. He left the RMF a week later at his own request. (*Id.* at 7; Med. Records 9.) On July
15 1, Plaintiff's medical records indicate that his thumb became reinfected. (Med. Records 10.)
16 The nurses' entries indicate that Plaintiff had to be counseled several times regarding the
17 proper care of his thumb, and that he was observed not using the splint and loosening the
18 bandages. Dr. Gedney prescribed Plaintiff an antibiotic and concluded that the infection had
19 been controlled during a reexamination on July 6. (*Id.*) On July 12, Plaintiff transferred out
20 of the RMF. (Defs.' Mtn. Summ. J. 7.) Besides a visit with a nurse to obtain dressing supplies,
21 Plaintiff did not have any other contact with the medical staff at NNCC until August 17. (Med.
22 Records 109.)

23 On August 17, 2005, Dr. Long examined Plaintiff's thumb. His report indicates that the
24 injury was healing satisfactorily and that the surgical pins needed to be removed. (Med.
25 Records 25.) The request for this surgery was approved on September 6. On September 9,
26 before the surgery was to occur, a basketball struck Plaintiff's thumb while he was on the yard.
27 The impact resulted in a partial amputation to the interphalangeal thumb joint. (*Id.* at 11, 68.)
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1 The prison transported Plaintiff to Carson Tahoe Hospital, where he was treated by Dr. Gabriel
2 Kent, a hand surgeon. Though there was a medical alternative to reattach the thumb, Plaintiff
3 requested a partial amputation due to the chronic pain he had experienced from it. (*Id.* at 69.)
4 Dr. Kent determined this was a reasonable course of treatment given Plaintiff's history of
5 tobacco use, multiple surgeries, and a high likelihood of altered blood flow in the area. (*Id.*)
6 Dr. Kent then performed the amputation.

7 Plaintiff alleges that Defendants delayed treatment for thumb over a three-month
8 period, causing him frequent severe pain and an eventual partial amputation. Plaintiff claims
9 that his medical providers violated the Eighth Amendment's prohibition on cruel and unusual
10 punishment through their deliberate indifference to his serious medical needs. (*Id.* at 15.)
11 Defendants move for summary judgment, arguing that Plaintiff received effective medical
12 treatment consistent with the Constitution and that he is responsible for the subsequent
13 traumatic injury to his thumb and the decision to amputate it. They also contend that claim
14 preclusion applies from a related state court proceeding.

15 **II. LEGAL STANDARD**

16 The purpose of summary judgment is to avoid unnecessary trials when there is no
17 dispute over the facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
18 F.3d 1468, 1471 (9th Cir. 1994). All reasonable inferences are drawn in favor of the non-moving
19 party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*,
20 477 U.S. 242, 244 (1986)). Summary judgment is appropriate if "the pleadings, the discovery
21 and disclosure materials on file, and any affidavits show that there is no genuine issue as to any
22 material fact and that the movant is entitled to judgment as a matter of law." *Id.* (citing
23 Fed.R.Civ.P. 56(c)). Where reasonable minds could differ on the material facts at issue,
24 however, summary judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441
25 (9th Cir. 1995), *cert. denied*, 516 U.S. 1171 (1996). In deciding whether to grant summary
26 judgment, the court must view all evidence and any inferences arising from the evidence in the
27 light most favorable to the nonmoving party. *Bagdadi*, 84 F.3d at 1197. In doing so, the court

1 must defer to the professional judgment of prison administrators when an inmate civil rights
2 complaint is involved. *Beard v. Banks*, 548 U.S. 521, 526, 530, 126 S.Ct. 2572, 65 L.Ed.2d 697
3 (2006); *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003).

4 The moving party bears the burden of informing the court of the basis for its motion,
5 together with evidence demonstrating the absence of any genuine issue of material fact.
6 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,
7 the party opposing the motion may not rest upon mere allegations or denials of the pleadings,
8 but must set forth specific facts showing there is a genuine issue for trial. *Anderson*, 477 U.S.
9 at 248. Although the parties may submit evidence in an inadmissible form, only evidence
10 which might be admissible at trial may be considered by a trial court in ruling on a motion for
11 summary judgment. Fed. R. Civ. P. 56(c).

12 In evaluating the appropriateness of summary judgment, three steps are necessary: (1)
13 determining whether a fact is material; (2) determining whether there is a genuine issue for the
14 trier of fact, as determined by the documents submitted to the court; and (3) considering that
15 evidence in light of the appropriate standard of proof. *Anderson*, 477 U.S. at 248. As to
16 materiality, only disputes over facts that might affect the outcome of the suit under the
17 governing law will properly preclude the entry of summary judgment; factual disputes which
18 are irrelevant or unnecessary will not be considered. *Id.* Where there is a complete failure of
19 proof concerning an essential element of the nonmoving party's case, all other facts are
20 rendered immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex*,
21 477 U.S. at 323.

22 III. DISCUSSION

23 **1. EIGHTH AMENDMENT**

24 A prisoner can establish an Eighth Amendment violation arising from deficient medical
25 care if he can prove deliberate indifference to serious medical needs. *Estelle v. Gamble*, 429
26 U.S. 97, 104 (1976). A finding of deliberate indifference involves the examination of two
27 elements: the seriousness of the prisoner's medical need and the nature of the defendant's
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1 responses to that need. *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992). A “serious”
2 medical need exists if the failure to treat a prisoner’s condition could lead to further injury or
3 the “unnecessary and wanton infliction of pain.” *Id.* (citing *Estelle*, 429 U.S. at 104). If
4 Plaintiff’s needs were serious, then he must show Defendants acted with deliberate indifference
5 to those needs. *Estelle*, 429 U.S. at 104. “Prison officials are deliberately indifferent to a
6 prisoner’s serious medical needs when they ‘deny, delay, or intentionally interfere with medical
7 treatment.’” *Hunt v. Dental Dept.*, 865 F.2d 198, 201 (9th Cir. 1989). “Deliberate indifference
8 entails something more than mere negligence.” *Farmer*, 511 U.S. at 835-36. Instead, it is only
9 present when a prison official “knows of an disregards an excessive risk” to an inmate’s health
10 and safety. *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2003) (quoting *Farmer v.*
11 *Brennan*, 511 U.S. 825, 858 (1994)).

12 _____ The parties do not dispute that in general, Plaintiff’s thumb injury presented a “serious”
13 medical need. Rather, this case turns on whether the Defendants possessed a state of mind that
14 is actionable under the Eighth Amendment. Plaintiff’s strongest argument in support of this
15 element of his claim is that he submitted multiple administrative requests (also known as kites)
16 that were allegedly disregarded by prison officials between April 18 and May 1, 2005, and
17 May 11 and May 30, 2005. (Pl.’s Oppo. 18, 19, 20, 21, 23.) Plaintiff contends that these periods
18 of administrative inaction necessitated emergency medical intervention on May 1 and May 30.

19 Defendants have submitted exhibits extensively documenting Plaintiff’s medical history
20 and maintain that he never sought treatment during the relevant periods. This is partially
21 corroborated by a May 30 entry where a nurse observed that Plaintiff had made no contact with
22 medical staff for the past two weeks. (Med. Records 33.) The court’s review of the records
23 reveals no entries corresponding to visits with medical staff during the relevant periods or any
24 apparent gaps in the file. Furthermore, while Defendants disclose the medical kites in their
25 possession from Plaintiff, none of these were submitted during the periods of administrative
26 inaction alleged by Plaintiff. In light of the detailed record, the amount of care that was
27 provided to Plaintiff for his thumb, and the fact that all of Plaintiff’s other requests appear to
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1 have been well-documented³, the court finds that Defendants have carried their burden to
2 demonstrate that they did not deliberately ignore his medical requests.⁴

3 The burden shifts to Plaintiff to set forth “specific facts” demonstrating a “genuine issue”
4 for trial. *Anderson*, 477 U.S. at 248. Plaintiff submits no evidence of these multiple ignored
5 medical requests or the May 1st emergency situation, as he has no copies of the multiple forms
6 he allegedly submitted.⁵ He also alleges that he saw a “Nurse Suzy” who took down his
7 complaints sometime during the latter half of April, but he does not identify the date and there
8 is no corresponding entry in Plaintiff’s medical chart. (Def.’s Oppo. 9; Med. Records 7-8.)
9 Plaintiff did not contemporaneously file any grievances at the time his medical kites were
10 allegedly ignored, as the only administrative complaint related to this matter was filed in
11 October 2005. (Def.’s Mtn. to Dismiss (Doc. #49) 25; Med. Records 133.) Furthermore, he
12 does not deny knowledge of the grievance procedure. (Pl.’s Oppo. 20.) Plaintiff generally⁶ fails
13 to provide the date that he submitted the various medical kites, the total number of requests
14 he alleges went ignored, specific information regarding the content of these requests, or
15 whether he has any knowledge of who received or processed the forms. With respect to the
16 alleged “man down” incident on May 1st, Plaintiff does not provide any witnesses who could
17 corroborate his allegations. (Pl.’s Oppo. 8.) While it is true that it is the prison’s responsibility
18 to maintain medical records, an inmate cannot exclusively rely on his own unverified assertions
19 to survive summary judgment when they are inconsistent with those records. *See Anderson*,
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22 ³ The only medical kites contained in Plaintiff’s medical record were filed after the emergency intervention
of May 30th and received responses by the infirmary. (Med. Records 107-10.)

23 ⁴ It should also be noted that Defendants provided proper care to Plaintiff before the emergency
24 situations. This casts doubt on whether Plaintiff’s complaints during the intervening period of alleged
25 administrative inaction constituted a “serious” medical need, as the complaints may have merely evidenced
discomfort with the thumb.

26 ⁵ There is an unusual occurrence report documenting the May 30th emergency (Med. Records 103),
27 though the mere fact that there was such an emergency does not necessarily prove that Defendants were
deliberately indifferent to Plaintiff’s medical needs.

28 ⁶ Plaintiff does allege that submitted a medical kite on April 15, 2005. (Pl.’s Oppo. 7.)

1 477 U.S. at 248. There is a complete failure of proof that Defendants were deliberately
2 indifferent to Plaintiff's medical needs by ignoring his requests for medical attention.

3 Plaintiff's remaining allegations fail to raise a claim under the Eighth Amendment. He
4 contends that prison officials failed to provide him with instructions to care for his thumb.
5 There is no evidence to support this contention. To the contrary, the record indicates that
6 nurses repeatedly counseled Plaintiff regarding the proper care of his thumb and that he was
7 observed in the cafeteria without a splint and the dressings loosened, which would prevent its
8 proper healing and potentially expose it to infection. (Med. Records 10.) In any case, the
9 failure to properly counsel a patient regarding self-care states a claim for medical negligence,
10 not a constitutional violation.

11 The eventual complications that led to a partial amputation of Plaintiff's thumb similarly
12 fail to prove that Plaintiff's care was inadequate. Approximately six weeks after his surgery,
13 Plaintiff experienced an accident causing a serious dislocation and open fracture to his thumb
14 just before his surgical hardware was to be removed. (*Id.* at 69.) There is no evidence that
15 inadequate treatment or post-surgical care contributed to the injuries, and Plaintiff's theory
16 that a bone infection led to the eventual partial amputation is unsupported by the evidence.
17 Approximately three weeks before the injury, Dr. Long reviewed Plaintiff's thumb and found
18 no post-surgical complications. Moreover, the record indicates that following the accident, it
19 was Plaintiff who first proposed the partial amputation and that the attending physician
20 presented an alternative therapy to preserve the digit. However, given Plaintiff's chronic
21 problems with his thumb, including a predisposition for infection, the doctor determined that
22 his request was "appropriate." (*Id.*) An unexpected accident followed by Plaintiff's voluntary
23 decision to amputate his thumb does not amount to a constitutional violation.

24 Because there is no evidence of a deliberately indifferent state of mind by Defendants
25 in providing medical care, Plaintiff has failed to carry his burden to demonstrate a genuine
26 issue of fact with respect to an essential element of his claim. It is not necessary to consider the
27 other defenses raised by Defendants at this time. The motion for summary judgment should
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1 be granted.

2 **IV. RECOMMENDATION**

3 **IT IS HEREBY RECOMMENDED** that the District Judge enter an Order
4 **GRANTING** Defendants' Motion for Summary Judgment (Doc. #50).

5 **IT IS FURTHER RECOMMENDED** that the District Judge enter an Order
6 **DENYING** Defendants' Motion to Dismiss (Doc. #49) as moot.

7 The parties should be aware of the following:

8 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the
9 Local Rules of Practice, specific written objections to this Report and Recommendation within
10 ten (10) days of receipt. These objections should be titled "Objections to Magistrate Judge's
11 Report and Recommendation" and should be accompanied by points and authorities for
12 consideration by the District Court.

13 2. That this Report and Recommendation is not an appealable order and that any
14 notice of appeal pursuant to Rule 4(a)(1), Fed. R. Civ. P., should not be filed until entry of the
15 District Court's judgment.

16 DATED: July 17, 2009.

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18 UNITED STATES MAGISTRATE JUDGE