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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GABRIEL WILSON,

Plaintiff,

v.

PIERCE COUNTY, a municipal
corporation organized under the laws of
the State of Washington, PIERCE
COUNTY JAIL, PIERCE COUNTY
JAIL CORRECTIONAL OFFICERS
JOHN DOE (1) and JANE DOE (1),
Nurses STEVE CARVER RN, KRISTIN
BERRES, RN,

Defendants.

CASE NO. 16-5455 RJB

ORDER GRANTING
DEFENDANTS CARVER AND
BERRES' MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on Defendants Steve Carver and Kristin Berres' Motion for Summary Judgment Dismissal of All Claims. Dkt. 46. The Court has considered the pleadings filed regarding the motion and the file herein.

In this case, Plaintiff, a former prisoner, alleges that Defendants Carver and Berres, nurses at the Pierce County, Washington jail, violated his federal constitutional rights when they

1 showed deliberate indifference to his serious medical need regarding a leg lesion and were
2 negligent. Dkt. 26. Defendants Carver and Berres now move for summary dismissal of the
3 claims against them. Dkt. 46. Plaintiff did not respond. For the reasons stated below, the
4 motion (Dkt. 46) should be granted, and the claims dismissed.

5 **I. FACTS**

6 On June 19, 2014, Plaintiff made a healthcare request, which stated, “I have a zit like soar
7 [sic] on my right leg. It started out itching but now its [sic] grown and its [sic] very red and its
8 [sic] painful, and it keeps growing.” Dkt. 47, at 8. The next day, he was seen by Defendant
9 Berres, who diagnosed Plaintiff with a lesion, thought to be an insect bite, and prescribed oral
10 antibiotics. *Id.*, at 15.

11 On June 22, 2014, Plaintiff made a second healthcare request, stating, “[t]he so called bug
12 bite on my [right] leg has gotten worse and [now] is a throbbing pain. I can’t sleep cause [sic]
13 just the slightest touch send horrible pain, and it hurts to walk.” Dkt. 47, at 9. The response
14 states only “Seen by SCarver DNP on 6/20/14.” *Id.*

15 On June 23, 2014, Plaintiff sent a third healthcare request form, which provided, “I now
16 believe I have merca on my [right] leg. It has more than tripled its size since I saw the doctor
17 and my lower leg is completely swollen. This is the 3rd [request] I’ve put in. Can someone
18 please help me!” Dkt. 47, at 10.

19 On June 24, 2014, Plaintiff was seen by Defendant Carver, who noted that the lesion had
20 grown. Dkt. 47, at 15. Defendant Carver incised and drained the lesion, gave Plaintiff an
21 injection of antibiotic, and placed him on additional antibiotics. *Id.* The fluid drained from the
22 lesion was sent for culture, Dkt. 47, at 18, and his antibiotics were changed as a result. *Id.*

1 Plaintiff was seen again on July 10, 2014, and the lesion was noted to be healing slowly.
2 *Id.*, at 16. He was given an additional antibiotic. *Id.* On August 5, 2014, Plaintiff was again
3 seen and reported that he lesion was “just about healed.” *Id.* He sought no further treatment.

4 In connection with the treatment of his leg lesion, Plaintiff makes claims against Steve
5 Carver RN and Kristin Berres, RN, for violation of his Eighth Amendment rights against cruel
6 and unusual punishment, pursuant to 28 U.S.C. § 1983, and negligence. Dkt. 26. Plaintiff also
7 asserts a claim for negligence against Pierce County, Washington regarding the leg lesion
8 treatment, but that claim is not the subject of this motion.

9 II. DISCUSSION

10 A. STANDARD FOR MOTION FOR SUMMARY JUDGMENT

11 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
12 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
13 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is
14 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
15 showing on an essential element of a claim in the case on which the nonmoving party has the
16 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
17 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
18 for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
19 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some
20 metaphysical doubt.”). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a
21 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
22 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*

1 *Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
2 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

3 The determination of the existence of a material fact is often a close question. The court
4 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
5 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
6 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
7 of the nonmoving party only when the facts specifically attested by that party contradict facts
8 specifically attested by the moving party. The nonmoving party may not merely state that it will
9 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
10 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
11 Conclusory, non specific statements in affidavits are not sufficient, and “missing facts” will not
12 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

13 **B. EIGHTH AMENDMENT CLAIM PURSUANT TO SECTION 1983**

14 In order to assert a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that (1)
15 the conduct complained of was committed by a person acting under color of state law, and that
16 (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution
17 or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other*
18 *grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to
19 remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769
20 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). To make a civil rights
21 claim, a plaintiff must set forth the specific factual bases upon which he claims each defendant is
22 liable. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).

1 The government has an “obligation to provide medical care for those whom it is
2 punishing by incarceration.” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). “Deliberate
3 indifference to serious medical needs of prisoners constitutes the unnecessary and wanton
4 infliction of pain, proscribed by the Eighth Amendment,” and can give rise to a claim under §
5 1983. *Id.* (*internal quotations omitted*). “In order to prevail on an Eighth Amendment claim for
6 inadequate medical care, a plaintiff must show deliberate indifference to his serious medical
7 needs.” *Id.* “This includes both an objective standard—that the deprivation was serious enough
8 to constitute cruel and unusual punishment—and a subjective standard—deliberate indifference.”
9 *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014)(*internal citation omitted*).

10 Defendant Carver and Berres’ motion to summarily dismiss Plaintiff’s Eighth
11 Amendment claim against them based on the treatment of his leg lesion (Dkt. 46) should be
12 granted. Plaintiff fails demonstrate that they acted with “deliberate indifference;” that is that
13 they knew of and disregarded “an excessive risk to inmate health and safety.” *Toguchi v. Chung*,
14 391 F.3d 1051, 1057 (9th Cir. 2004). “This second prong — that defendant’s response to the
15 need was deliberately indifferent—is satisfied by showing (a) a purposeful act or failure to
16 respond to a prisoner’s pain or possible medical need and (b) harm caused by the indifference.”
17 *Jett*, at 1096. Deliberate indifference “may appear when prison officials deny, delay or
18 intentionally interfere with medical treatment, or it may be shown by the way in which prison
19 physicians provide medical care.” *Id.* (*internal quotation omitted*). “[A]n inadvertent or
20 negligent failure to provide adequate medical care alone does not state a claim under § 1983,”
21 however. *Id.*

22 Plaintiff has failed to show that Carver or Berres were deliberately indifferent to a serious
23 medical need regarding his leg lesion. He points to no evidence that either of them knew of and
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1 “disregarded ‘an excessive risk to [his] health and safety.’” *Toguchi*, at 1057. He does not point
2 to an act or failure to respond to his pain or medical need as to any of these Defendants. Vague
3 and conclusory allegations of official participation in civil rights violations are not sufficient to
4 support a claim under § 1983. *Ivey v. Board of Regents*, 673 F.2d 266 (9th Cir. 1982). The
5 record indicates that he was being monitored and treated for his condition. “To show deliberate
6 indifference, the plaintiff ‘must show that the course of treatment the doctors chose was
7 medically unacceptable under the circumstances’ and that the defendants chose this course in
8 conscious disregard of an excessive risk to plaintiff’s health.” *Colwell*, at 1068 (*internal*
9 *quotations and citations omitted*). Plaintiff has made no such showing. His federal
10 constitutional claim against them should be dismissed.

11 **C. STATE LAW CLAIMS FOR NEGLIGENCE**

12 In Washington, “[a]n actionable claim for negligence includes four essential elements:
13 (1) a duty owed to the complaining party; (2) a breach of that duty; (3) resulting injury; and (4)
14 proximate cause between the breach and the resulting injury.” *Stenger v. State*, 104 Wn.App.
15 393, 399 (2001)(*citing Pedroza v. Bryant*, 101 Wn.2d 226, 228 (1984)).

16 Plaintiff’s claim for negligence, asserted against Defendants Carver and Berres should be
17 dismissed. Plaintiff fails to demonstrate that Defendants Carver or Berres breached their duty of
18 care, that is they failed to “exercise that degree of care, skill and learning expected of a
19 reasonably prudent healthcare provider” RCW 7.70.040 (1). Further, he has failed to
20 demonstrate that he was injured as a result of their actions. Defendants Carver and Berres’
21 Motion for Summary Judgment (Dkt. 46) on this claim should be granted.

22 **D. NEW MOTION IN REPLY**

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1 In their reply, Defendants Carver and Berres also move for dismissal of Defendant Pierce
2 County's claim asserted against them. Dkt. 58. To the extent Defendants intend this to be a
3 motion, it should be denied without prejudice for failure to comply with the Federal and Local
4 Rules of Civil Procedure.

5 **III. ORDER**

6 Therefore, it is hereby **ORDERED** that:

- 7 • Defendants Steve Carver, ARNP, and Kristin Berres, RN's Motion for Summary
8 Judgement Dismissal of All Claims (Dkt. 46) **IS GRANTED**; and
- 9 • All claims asserted against Defendants Steve Carver and Kristin Berres **ARE**
10 **DISMISSED**; and
- 11 • To the extent that Defendants Carver and Berres move for dismissal of Defendant Pierce
12 County's claim asserted against them, the motion (Dkt. 58) **IS DENIED WITHOUT**
13 **PREJUDICE**.

14 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
15 to any party appearing *pro se* at said party's last known address.

16 Dated this 5th day of September, 2017.

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18 ROBERT J. BRYAN
19 United States District Judge