Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-363

AUGUST TERM, 2018

Kirk Wool* v. Andrew Pallito et al.	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 360-6-15 Wncv
		Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Plaintiff inmate sued prison officials and a prison contract employee for damages and injunctive relief based on his claim that they were deliberately indifferent to his mental health needs, thereby engaging in cruel and unusual punishment, in violation of the Eighth Amendment to the U.S. Constitution. The civil division of the superior court granted summary judgment to defendants on the alternate grounds that defendant (1) failed to exhaust his administrative remedies and (2) failed to proffer sufficient evidence to show any triable issue on his Eighth Amendment claims. We affirm.

Plaintiff is an inmate in the custody of the Department of Corrections (DOC). In June 2015, he initially filed suit against the DOC, its commissioner, and specified employees of either the Department or its medical-provider contractor. He amended the complaint several times. The allegations relevant to this appeal, as pleaded in his May 2016 amended complaint, are that he did not receive adequate mental health treatment from April to October 2014, resulting in cruel and unusual punishment prohibited by the Eighth Amendment.[1] The named defendants in the amended complaint are Andrew Pallito, former DOC commissioner; Dr. Delores Burroughs-Biron, former DOC medical director of health services; Dr. Meredith Larson, former DOC chief of mental health services; and Dr. Pam Fadness, former director of psychiatric services for Correct Care Solutions of Vermont (CSS), with whom the DOC had contracted to provide medical care for inmates. Plaintiff's claims, pursuant to 42 U.S.C. § 1983, are actionable against the defendants only in their personal capacities. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 64, 71 (1989)

[1] In his complaint, plaintiff cited two Vermont statutes relating to the provision of medical and mental health care for inmates. The superior court inferred that plaintiff cited these statutes in support of his Eighth Amendment claim rather than as independent grounds for relief, and ruled that, in any event, the statutes did not give rise to a private cause of action. Plaintiff does not challenge this analysis on appeal. We likewise read defendant's arguments on appeal as resting on an Eighth Amendment claim pursuant to 42 U.S.C. § 1983 and do not understand defendant to rely on these statutes as separate bases for injunctive relief or damages.

(concluding that neither state nor official acting in official capacity is person within meaning of § 1983 action).

On defendants' and plaintiff's cross-motions for summary judgment, the superior court granted defendants judgment and denied plaintiff's motion. The court first ruled, on its own initiative without defendants having raised the issue, that plaintiff failed to exhaust his administrative remedies and therefore was not entitled to relief. The court further ruled, in the alternative, that even viewing plaintiff's evidence in the light most favorable to plaintiff, he failed to show deliberate indifference necessary to support his Eighth Amendment claims. Defendant challenges both rulings on appeal. We agree with the superior court that plaintiff's complaint alleging cruel and unusual punishment is insufficient to survive summary judgment under the applicable law and his supported allegations.[2] See Vt. Coll. of Fine Arts v. City of Montpelier, 2017 VT 12, ¶ 7, 204 Vt. 215 (noting that nonmoving party is entitled to all reasonable doubts and inferences, but that summary judgment is appropriate when moving party demonstrates that there is no genuine dispute of material fact and that that party is entitled to judgment as matter of law).

The U.S. Supreme Court has recognized that "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment" and states a cause of action under § 1983. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (quotation omitted). "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id. at 106. Thus, to support such a claim, a plaintiff must satisfy two requirements, the first one objective and the second one subjective.

The objective requirement is that the prisoner must have actually been deprived of adequate medical care and that the inadequacy in medical care is sufficiently serious from an objective perspective. Salahuddin v. Goord, 467 F.3d 263, 279-80 (2d Cir. 2006). In considering this first requirement, the court must "examine how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner." Id. at 280. If the court determines that there was an unreasonable failure to provide any treatment for an inmate's medical condition, the court must "examine whether the inmate's medical condition is sufficiently serious." Id. Relevant factors to this inquiry "include whether the condition significantly affects the

[2] Because we resolve this case in the State's favor on the merits, we decline to reach the questions surrounding plaintiff's exhaustion of his administrative remedies. We do not question the superior court's conclusion that plaintiff did not exhaust his administrative remedies, and that such failure to exhaust may preclude plaintiff from seeking a remedy in court. However, under the applicable federal law, it is not clear that it was proper for the court, on its own initiative, to dismiss plaintiff's claim due to that failure to exhaust. The U.S. Supreme Court has held that "failure to exhaust is an affirmative defense under the [Prison Litigation Reform Act], and that inmates are not required to specially plead or demonstrate exhaustion in their complaints." Jones v. Bock, 549 U.S. 199, 216 (2007). Given this, at least one federal court has held that "permitting courts to sua sponte screen complaints and demand further documentation of exhaustion . . . would frustrate the principles laid out in Jones and turn the affirmative defense into a pleading requirement." Custis v. Davis, 851 F.3d 358, 362-63 (4th Cir. 2017). For the purposes of our analysis, we assume without deciding that the trial court had jurisdiction in this case.

individual's daily activities" and "whether it causes chronic and substantial pain." Id. (quotation omitted).

The subjective requirement is that the defendant have a sufficiently culpable state of mind, referred to as deliberate indifference. Id. There is deliberate indifference if "the official knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). "In medical-treatment cases not arising from an emergency situation, the official's state of mind need not reach the level of knowing and purposeful infliction of harm; it suffices if the plaintiff proves that the official acted with deliberate indifference to inmate health." Salahuddin, 467 F.3d at 280. "Deliberate indifference is a mental state equivalent to subjective recklessness," which requires a showing "that the charged official act[ed] or fail[ed] to act while actually aware of a substantial risk that serious inmate harm would result." Id. "[T]he risk of harm must be substantial and the official's actions more than merely negligent." Id. Moreover, the charged officials must be subjectively aware of the risk resulting from their conduct. Id. at 281. This "inquiry does not include an objective-reasonableness test," id. at 282; thus, prison officials may "introduce testimony that 'they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.' " Id. at 281 (quoting Farmer, 511 U.S. at 844).

With these standards in mind, we examine the facts as alleged and disputed by the parties. The following are the basic undisputed facts alleged by plaintiff. Plaintiff suffers from severe anxiety attacks and depression that date back to the 1980s, when he was twice involuntarily committed to the Waterbury State Hospital. The symptoms resulting from his anxiety are shortness of breath, dizziness, chest pains, profuse sweating, and feelings of terror. On April 1, 2014, plaintiff saw a mental health provider authorized to prescribe medication (prescriber), but plaintiff declined the prescriber's suggestion that he be placed on medication to address his symptoms. Shortly thereafter, plaintiff had a change of heart and filed a health service request asking to see the prescriber in light of an upcoming painful anniversary. Plaintiff made additional requests to see a prescriber through the summer, received an urgent referral by a nurse for a mental health consultation on September 5, and was ultimately seen by a prescriber who prescribed medication in mid-October 2014. In a September 8, 2014 email, Dr. Burroughs-Biron indicated to Commissioner Pallito that plaintiff would see a prescriber within the next day or so, but plaintiff was not able to see a prescriber until October 14, 2014. During the period between April and September of 2014, plaintiff suffered from severe anxiety and depression with symptoms that included chest pains, shortness of breath, dizziness, profuse sweating, and insomnia. Plaintiff submitted affidavits of an expert and a social worker stating their opinion that plaintiff not being seen by a prescriber during a six-month period did not meet a community standard of care.

Plaintiff also alleges the following facts, which are disputed by defendants and are either not supported or only partially supported by the record. Plaintiff alleged that Commissioner Pallito signed a contract with CSS in 2010, as amended in 2013, that allowed for the hiring of only one "prescriber" for each prison facility. The documentation attached to plaintiff's affidavit and statement of material facts does not fully support this claim. Plaintiff appears to be relying on an attachment to the contract containing a staffing matrix identifying the hours per week associated with different provider positions. That document does not identify which providers are also

prescribers. The documentation contemplates one psychiatrist (at nine hours per week), one other physician (at thirty-four hours per week), and an advanced practice provider (nurse practitioner or physician's assistant) for twenty hours per week at plaintiff's facility. It identifies numerous other mental health providers (who presumably provide mental health services but don't have prescribing privileges). The State disputes plaintiff's assertion of fact on this, asserting that the contract provided for two prescribers for the facility in which plaintiff resided, but a vacancy was created in the spring of 2014 when a prescriber resigned, and the Department had difficulty filling that vacancy. The State proffers some evidence that during the contract period, other than the period of the additional vacancy, there were two "prescribers" working in defendant's facility.

Plaintiff states that he reported his symptoms to Dr. Burroughs-Biron and Dr. Larson, but that Dr. Burroughs-Biron never responded to his letters and that, in a September 2014 response, Dr. Larson ignored the fact that he had begun reporting his severe symptoms back in April 2014. However, the record, including plaintiff's own statements, indicates that any letters sent to Dr. Burroughs-Biron were sent no earlier than late September 2014. Plaintiff himself avers that, apart from his first request to see a prescriber immediately after having seen one in April 2014 when he declined medication, his next written request to see a prescriber was on August 19, 2014 and then again not until mid-September 2014.

Given these facts, and considering the applicable law, we agree with the superior court that plaintiff has failed to demonstrate that there is any triable issue regarding his Eighth Amendment claim. Assuming without deciding that plaintiff's anxiety and insomnia constitute a serious medical need for purposes of making an Eighth Amendment claim, plaintiff's proffered facts that are supported in the record do not, as a matter of law, establish a triable issue on whether there was deliberate indifference on the part of any of the four defendants.

Plaintiff emphasizes the six-month period in which he did not see a prescriber following his request, but the record demonstrates that three of the four defendants had notice of plaintiff's complaints about not being seen by a prescriber at the most eight weeks before he actually saw a prescriber. Specifically, plaintiff presents no notice of any written requests for psychiatric treatment after April 1 and before mid-August. Moreover, the record shows that, once plaintiffs' complaints were known to them, three defendants responded to the complaints, even if not in the manner plaintiff had hoped. We consider the evidence relating to each defendant, respectively, below.

Neither Commissioner Pallito's signing of a contract with CSS nor his receipt of an August 24, 2014 letter from plaintiff support plaintiff's claim of deliberate indifference on the commissioner's part to plaintiff's mental health needs. Even assuming that the damage claim against Commissioner Pallito was not precluded by sovereign immunity, plaintiff has not shown that the staffing plan reflected in the contract signed by Commissioner Pallito, rather than an inability to fill a vacant position despite reasonable efforts, is what gave rise to plaintiff's delayed treatment. Nor has he shown, for the purposes of injunctive relief, that the facility remained short staffed and unable to meet his serious mental health needs after it filled the temporarily vacant position. Finally, Commissioner Pallito had no role in the provision of plaintiff's medical care. Plaintiff did not avail himself of the grievance mechanisms outlined in DOC directives, but instead sent an "emergency grievance" letter—a request wholly outside of the formal grievance process—

to Commissioner Pallito.[3] Commissioner Pallito's failure to respond to this letter does not support the claim of "deliberate indifference."

Plaintiff has likewise failed to show deliberate indifference by Dr. Burroughs-Biron. Dr. Burroughs-Biron was Medical Director of Health Services for the Vermont Agency of Human Services during the period in issue. She was responsible for system-wide administrative oversight of the delivery of health services by the DOC, through its contractor. Plaintiff does not allege that she was directly involved in his medical care, or that he gave her notice of his need for medical treatment. He seems to primarily rely on the fact that the events at issue in this case occurred while she held the position of medical director. In addition, he points to a September 8, 2014 email Dr. Burroughs-Biron sent to DOC Commissioner Pallito representing that Dr. Larson would make sure that plaintiff would see a prescriber within the next day or so. This email attached an email she had sent earlier in the day to the office of Dr. Harry Chen, then-Secretary of the Agency of Human Services, and others regarding the complaint plaintiff had registered with Secretary Chen's office. In that letter, she represented that plaintiff had been seen in the past few days by a mental health clinician and referred to a psych provider. Plaintiff was not actually seen by a prescriber until more than a month later.

To the extent that, in support of his § 1983 claim against Dr. Burroughs-Biron, plaintiff is relying on the fact that these events took place while she was medical director, the claim fails. Setting aside questions of qualified immunity, he has not alleged any policy decisions or other actions by her that led to the alleged failure to provide him timely treatment. With respect to plaintiff's own circumstances, based on the record evidence, the earliest Dr. Burroughs-Biron apparently had notice of plaintiff's claim that he was not being seen was early September 2014. She had no ongoing involvement in his care. The basis for her representation that he would be seen within the next couple of days was not entirely clear from the email traffic attached to plaintiff's statement of undisputed material facts, but it appears to be based on her own review of

[3] A DOC directive supplies forms for informal complaints and formal grievances. Dep't of Corrs., Offender Grievance System for Field and Facilities, Directive 320.01 (Jan. 1, 2007), http://www.doc.state.vt.us/about/policies/rpd/correctional-services-301-550/301-335-facilities-general/320.01.pdf [https://perma.cc/8BZ6-BYNB]. This directive explains that it is DOC policy to resolve issues "at the lowest possible and most immediate level" and that although inmates may write the DOC Commissioner, the administrative process is the method for resolving complaints. Id. at 1. The directive supplies a process for initiating informal complaints and formal and emergency grievance procedures. The emergency grievance procedure applies to grievances that present "(1) a threat of death or injury, (2) a threat of disruption of facility operations, or (3) a need for prompt disposition because the time is lapsing when meaningful action or decision is possible." Id. at 8. Emergency grievances are to be on a grievance form with "emergency" written on top and given to staff for resolution by the shift supervisor. Id. The directive also specifically provides a process for resolving nonemergency health grievances, which begins by completing a grievance form and notifying correctional staff. Id. at 11. It is undisputed that plaintiff did not follow the proper procedure for a nonemergency medical grievance. He did not complete a form or notify correctional staff that he was initiating a grievance. Moreover, even assuming that plaintiff's complaint fell within the definition of an emergency grievance, he did not use the proper procedure for emergency grievances.

his medical record and knowledge that he had at that time been seen by a mental health clinician and referred to a psych provider. It is also apparent from the records provided in plaintiff's statement of undisputed material facts that Dr. Burroughs-Biron forwarded the information about plaintiff's concerns to Dr. Larson. These facts are not sufficient to show deliberate indifference by Dr. Burroughs-Biron.

Plaintiff's claims against Dr. Larson fail for similar reasons. Dr. Larson served as Chief of Mental Health Services for the DOC during the period at issue here. The undisputed evidence reflects that the first she learned of plaintiff's complaints was after his September 2, 2014 letter to Secretary Chen. Dr. Larson had no knowledge of plaintiff's requests to see a prescribing provider for his mental health issues until that time. In response to plaintiff's September 2, 2014 letter sent to Secretary Chen, Dr. Larson sent plaintiff a letter six days later in which she indicated that she had reviewed his medical history and noted that he had declined medications in April and then requested to see a psychiatric provider in late August. She further stated that medications are not generally prescribed for panic attacks and insomnia, that she had directed the mental health team at plaintiff's facility to meet with him to develop a treatment plan; and that she had asked CCS to develop classes and groups to target sleep and panic attacks. In her letter, Dr. Larson acknowledged that during the past few weeks some patients had waited longer than usual to see a medical or mental health provider due to various circumstances, and she explained that all sick slips had been promptly reviewed, with the most seriously ill or emergent matters tended to first. She said that the DOC was working to increase the professional staff and that that would ease wait times over the coming weeks. Plaintiff responded directly to Dr. Larson by letter dated September 16, 2014, identifying various perceived omissions or misrepresentations in Dr. Larson's letter. He reiterated his complaint that he had not been seen by anyone in mental health from April 1 through late August and that the CCS prescriber was over 300 appointments behind. Dr. Larson responded by letter dated September 26, 2014, indicating that she had reviewed his chart, that she understood he was working with the mental health professional at his facility to address his panic attacks, and that he was keeping at it even though it was challenging. She encouraged him to keep up in his efforts.

As with Dr. Burroughs-Biron, there is no evidence that in her administrative role Dr. Larson had any responsibility for policy or other decisions that contributed to the alleged delayed treatment for plaintiff's serious medical issues. Accordingly, even assuming qualified immunity was not a bar, there is no evidence to support a § 1983 action against Dr. Larson on the ground of deliberate indifference based on her general administrative responsibilities. With respect to her role in plaintiff's individual treatment, plaintiff's evidence does not demonstrate a deliberate indifference. Dr. Larson had no direct role in plaintiff's treatment. There is no evidence that Dr. Larson sought to prevent plaintiff from seeing a prescriber if appropriate. The only evidence is that after she became aware of plaintiff's situation she reviewed his chart and took steps to ensure that he was receiving care. Plaintiff has not established deliberate indifference on Dr. Larson's part.

Finally, the evidence cannot support a § 1983 claim against Dr. Fadness on the ground of deliberate indifference. Dr. Fadness was Director of Psychiatric Services for CCS during the period in question. Due to a staff vacancy, she was the sole psychiatric prescriber at plaintiff's facility from May 31 to October 1, 2014. Defendant alleges that Dr. Fadness refused to see him from April 1 through mid-October 2014, even though she was at the prison forty times during that

period. Dr. Fadness testified in her deposition that she was dealing with a reduction of staff during the period in question and had to prioritize the most serious requests. She testified that through the period in question plaintiff was seeing professional staff weekly, through his recreation therapy, nurses, and other professional contacts. This afforded ongoing opportunities to triage his condition and make a decision about treatment in the context of limited resources. In that context, during this period plaintiff's symptoms did not, from an objective perspective, meet a crisis or emergency–type need. Plaintiff has offered no evidence to dispute this account.

Plaintiff's evidence cannot satisfy the deliberate indifference standard. His claim rests on the inference, which we indulge for purposes of summary judgment, that his condition was more severe than Dr. Fadness credited, that it was sufficiently serious to warrant more immediate attention, including medications, and that Dr. Fadness should have recognized that. Plaintiff's experts opine that the delay in treating plaintiff constituted medical negligence, but we see nothing in the record, including medical expert testimony, supporting a claim that, given the information available to Dr. Fadness, any misjudgment on her part as to plaintiff's mental health needs rose to the level of deliberate indifference. Salahuddin, 467 F.3d at 281 (noting that in cases like this prison officials may introduce "testimony that 'they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.' " (quoting Farmer, 511 U.S. at 844)).

Based on this record, we accordingly affirm the superior court's summary judgment for defendant.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice