IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOSÈ A. RODRIGUEZ, Plaintiff, v. SHERESE BREWINGTON-CARR, et al., Defendants.	)	Civil Action No. 98-442-GMS

MEMORANDUM AND ORDER

I. INTRODUCTION

On July 28, 1998, plaintiff Josè Rodriguez filed a complaint asserting various causes of action against correctional officers and officials at the Gandor Hill prison in Wilmington, Delaware. After answering, the defendants filed motions to dismiss. On July 13, 2000, the court issued a memorandum opinion dismissing all claims except the claim under §1983 against Dr. Gordon Ostrum, Sr. (D.I. 46). The plaintiff claims that Dr. Ostrum showed deliberate indifference to his serious medical needs, and therefore violated his Eighth Amendment right against cruel and unusual punishment.

Presently before the court is the defendant's motion for summary judgment. Dr. Ostrum maintains that the facts do not demonstrate that he showed deliberate indifference to the plaintiff's medical needs. Moreover, he argues that expert testimony is necessary to establish whether plaintiff's medical needs were sufficiently serious. The plaintiff responds that, in this case, deliberate indifference is a question of fact, and expert testimony is not required.

The court agrees with the plaintiff and will, therefore, deny the defendant's motion for summary judgment. The court will now explain the reasons for its ruling.

II. FACTS

Josè Rodriguez was incarcerated at Gandor Hill on February 13, 1998. Dr. Ostrum served as Medical Director of the facility at that time.

Prior to his incarceration, Rodriguez was diagnosed as being positive for the HIV (human immunodeficiency) virus. Rodriguez also suffered from condyloma, or venereal warts. He underwent laser surgery to remove warts on January 23, 1997, and October 30, 1997. Rodriguez notified the Gandor Hill medical staff of both conditions during his intake interview.

Rodriguez's venereal warts returned while he was in prison, and he requested a doctor's appointment. On March 4, 1998, Dr. Ostrum saw him. Dr. Ostrum's notes indicate that Rodriguez complained that he had warts near his anal area, and that they bled. Dr. Ostrum observed that Rodriguez had approximately twelve to fifteen warts, "some [as] large [as] 1 to 1.5 cm [0.40 to 0.60 inches]." (D.I. 79 at Exh. G). Dr. Ostrum's report does not mention whether the warts caused pain at the time. Rodriguez requested that the warts be surgically removed. Dr. Ostrum denied this request. He told Rodriguez that he would not approve surgical treatment since the warts would grow back, and at any rate, "should disappear on their own." (*Id.*)[1] At his deposition, Dr. Ostrum testified it was possible for warts roughly a sixteenth to an eighth of an inch in size to resolve themselves. (D.I. 80 at B-42-43.)

[1] The complete text of Dr. Ostrum's treatment note on this issue reads, "Advised Inmate that they (PHS) [Prison Health Services] will not sent him out for Rx - since they [the warts] will grow back and should disappear on their own." (D.I. 79 at Exh. G.)

Contrary to Dr. Ostrum's diagnosis, Rodriguez's warts did not disappear, but remained and caused him concern. In a medical grievance form dated April 26, 1998, Rodriguez reiterated his request for surgery, stating that "the warts are getting bigger and they realy [sic] are bothing [sic] me." (*Id.* at Exh. H.) In a sick call slip dated May 23, 1998, Rodriguez again mentioned the warts. He was seen on June 6, 1998 by Dr. Audrey Pessa-Uwah.[2] Dr. Pessa-Uwah's treatment notes for that visit indicate that Rodriguez complained, "The warts are growing . . . When I wipe, I'm irritated. I bleed when I have a bm and when I wipe . . ." (*Id.* at Exh. K.) Dr. Pessa-Uwah later testified that she was "quite sure they [the warts] were painful, you know, to him. They were – they were probably very uncomfortable." (D.I. 80 at B-55-56).

Dr. Pessa-Uwah referred Rodriguez to Dr. Gueco. Dr. Gueco determined that the warts were too large for laser removal and would require surgery. Dr. Thomas Emmen performed the surgery under general anesthesia on August 26, 1998. Some of the warts removed were as large as one inch [2.5 cm] in diameter. (*Id.* at B-26.)

III. STANDARD OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P 56(c). A fact is material if it might affect the outcome of the case, and an issue is genuine if the evidence is such that a reasonable factfinder could return a verdict in favor of the nonmovant. *See In re Headquarters Dodge, Inc.*, 13 F.3d 674, 679 (3d Cir. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, the court must evaluate the evidence

[2] Dr. Pessa-Uwah replaced Dr. Ostrum as Medical Director upon his retirement.

in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir. 1999). The nonmoving party, however, must demonstrate the existence of a material fact supplying sufficient evidence -- not mere allegations -- for a reasonable jury to find for the nonmovant. *See Olson v. General Elec. Aerospace*, 101 F.3d 947, 951 (3d Cir. 1996) (citation omitted). To raise a genuine issue of material fact, the nonmovant "need not match, item for item, each piece of evidence proffered by the movant but simply must exceed the 'mere scintilla' [of evidence] standard." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.,* 998 F.2d 1224, 1230 (3d Cir. 1993) (citations omitted). The nonmovant's evidence, however, must be sufficient for a reasonable jury to find in favor of the party, given the applicable burden of proof. *See Anderson*, 477 U.S. at 249-50.

IV. DISCUSSION

In order to state a claim under the Eighth Amendment for cruel and unusual punishment regarding the deprivation of medical treatment, a plaintiff must demonstrate that the defendant was deliberately indifferent to his serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The court will first examine whether Dr. Ostrum was deliberately indifferent, and will then consider whether Rodriguez's medical needs were serious.

A. Deliberate Indifference

"[D]eliberate indifference l[ies] somewhere between the poles of negligence at the one end and purpose or knowledge at the other . . ." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). Thus, the deliberate indifference standard may be satisfied by a number of factual scenarios. Deliberate indifference may exist:

> (1) where "'knowledge of the need for medical care [is accompanied by the] ... intentional refusal to provide that care;' " (2) where "[s]hort of absolute denial ... 'necessary medical treatment [i]s ... delayed for non-medical reasons;'" (3) where " 'prison authorities prevent an inmate from receiving recommended treatment;'" (4) "[w]here prison authorities deny reasonable requests for medical treatment ... and such denial exposes the inmate 'to undue suffering or the threat of tangible residual injury;'" and (5) "where prison officials erect arbitrary and burdensome procedures that 'result[ ] in interminable delays and outright denials of medical care to suffering inmates.'"

Douglas v. Hill, 1996 WL 716278, No. 95-6497, at * 7 (E.D. Pa. Dec. 6, 1996) (quoting *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326, 346 (3d Cir. 1987)).

Dr. Ostrum argues that the facts presented do not establish that he had the requisite mental state for deliberate indifference. In particular, he contends that there is a dearth of evidence that he had a non-medical motive for refusing treatment. Although the defendant correctly notes that are no facts to indicate that he had a non-medical motive, this is only one method of establishing deliberate indifference. The plaintiff argues, in part, that the lack of treatment caused him further pain and also required him to undergo a more invasive procedure. The *Lanzaro* court noted that deliberate indifference can be shown "[w]here prison authorities deny reasonable requests for medical treatment ... and such denial exposes the inmate 'to undue suffering or the threat of tangible residual injury.'" *Lanzaro*, 834 F.2d at 346. The facts clearly demonstrate that Rodriguez's request for treatment was reasonable and that Dr. Ostrum refused medical treatment. Whether Dr. Ostrum's denial exposed Rodriguez "to undue suffering" is a question of fact, however. Although the

defendant correctly notes that Rodriguez did not state that he was in pain on his initial visit, there are several facts from which it can be inferred that Rodriguez's suffering increased after the denial of treatment. First, in his deposition, Dr. Ostrum admitted that the warts could be painful. (D.I. 80 at B-44.). Second, Dr. Pessa-Uwah also acknowledged that Rodriguez's condition was likely to cause him pain. Third, Rodriguez's condition progressively worsened between March 4, 1998 and his August surgery. Although his largest legions in March were roughly one-half inch in diameter, some of the warts that were removed in August were one inch in diameter - nearly twice as large. These facts indicate that it is possible that Dr. Ostrum's refusal exposed Rodriguez to further, unnecessary suffering. However, since Rodriguez himself stated only that the warts were "bothering" him and this term is ambiguous, a fact finder must determine whether he actually suffered after treatment was refused.

Dr. Ostrum's mental state can also be called into question by his later deposition testimony. Although he told Rodriguez that the warts should eventually disappear, in his deposition he acknowledged that warts that were approximately one-sixteenth to one-eighth of an inch in size are likely to resolve themselves. However, on March 4, 1998, Rodriguez's legions were *already* roughly one-half inch in diameter. Thus, they were significantly beyond the point where they would be able to resolve themselves, according to Dr. Ostrum. This discrepancy creates a question as to whether Dr. Ostrum should have known that the legions, in fact, would not resolve themselves. This question regarding Dr. Ostrum's mental state precludes a grant of summary judgment in his favor. *See Coolspring Stone Supply, Inc. v. American States Life Ins. Co.*,10 F.3d 144, 148 (3d Cir. 1993) (noting that summary judgment is inappropriate where state of mind is at issue).

B. Serious Medical Needs

In the Third Circuit, a plaintiff must meet a two-pronged test to prove that he had a serious medical need. First, he must demonstrate that "the failure to treat [the condition] can be expected to lead to substantial and unnecessary suffering, injury, or death." *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1023 (3d Cir. 1991). After making this showing, the plaintiff must demonstrate that the condition "has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." *Id.*

The court finds that there are genuine issues of material fact surrounding the first prong of the test. As previously noted, there are facts in the record from which it can be gleaned that Rodriguez suffered after treatment was denied. Whether this suffering was substantial is a question of fact because the court cannot determine, on the record before it, the severity of any alleged suffering. Moreover, as noted above, there is a question of fact concerning whether Dr. Ostrum should have known that the warts would not resolve and that his failure to treat would, therefore, lead to unnecessary suffering. Given these questions of fact, summary judgment is inappropriate.

The defendant's primary argument on the second prong is that expert testimony is required because lay witnesses cannot determine whether Rodriguez's condition was serious. The court disagrees for three reasons. First, the case the defendant relies on for this proposition, *Boring v. Kozakiewicz*, 833 F.2d 468 (3d Cir. 1987), required expert testimony on the facts presented, but stopped short of requiring expert testimony in every deliberate indifference claim. *See id.* at 473 ("In some situations in which the seriousness of injury or illness would be apparent to a lay person, expert testimony would not be required, *e.g.,* a gunshot wound.") (citations omitted). Moreover, at least one other court citing *Boring* has held that the Third Circuit does not require expert testimony

on this claim. *See McCabe v. Prison Health Services,* 117 F. Supp. 2d 443, 452 (E.D. Pa. 1997) (citing *Boring* and noting that although expert testimony may be required in certain cases, "there is no general requirement in the Third Circuit that a plaintiff present expert testimony in Eighth Amendment deliberate indifference cases"). Thus, the court finds that the law does not require expert testimony on this claim.

Second, the facts of the present case are distinguishable from *Boring*. In *Boring*, the plaintiffs complained of nerve damage, knee pain, severe dandruff, and migraine headaches. *Boring*, 833 F.2d at 470. The difference between the plaintiffs in *Boring* and the present case is that the ailments in *Boring* (or their severity) would not be apparent to the untrained eye. The court noted, "On this record, the need for treatment does not appear to be one that was acute." *Id.* at 473. In other words, since it is possible, but rare, that nerve damage, knee pain, or migraine headaches would require immediate treatment, a physician would need to explain whether the plaintiffs' particular symptoms presented a serious medical risk under the circumstances. In the present case, however, Rodriguez had twelve to fifteen legions on his anal area that were as large as one-half inch in diameter. Additionally, the legions often bled. (The fact that the legions bled is more significant in light of Rodriguez's HIV positive status.) On these facts, the need for prompt medical treatment of some sort is more readily apparent than it was on the facts in *Boring*. Given the facts in the present case, the court is confident that a layperson's untrained eye could determine that this was an abnormal and serious condition that required medical attention.

Finally, the *McCabe* court noted that courts "may look to the *result* of [the plaintiff's] need

going untreated to gauge its seriousness." *McCabe*, 117 F.2d at 452. Here, the result of Rodriguez's delay in treatment was that he eventually had to undergo a more invasive surgery, under general anesthesia, to have the legions removed. The fact of the surgery tends to establish that the medical problem was more serious than not. For all of these reasons, the court concludes that although expert testimony on this point is welcome, the failure to provide it will not bar Rodriguez's claim for deliberate indifference.

V. CONCLUSION

For all of the foregoing reasons, the court finds that there are genuine issues of material fact that preclude summary judgment for the defendant. There are genuine issues of material fact as to whether the plaintiff suffered after being denied treatment, the extent of that suffering, and the mental state of Dr. Ostrum at the time treatment was denied. The court will, therefore, deny the defendant's motion for summary judgment.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The Defendant's Motion for Summary Judgment (D.I. 78) is DENIED.

Dated: March 14, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE