UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PATRICK ALEXANDRÉ,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 03-132-B-W
	)	
AL CICHON, et al.,	)	
	)	
Defendants	)	

ORDER ON MOTION TO STRIKE REPLY BRIEF AND RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT BY JONATHAN COGGESHALL

Patrick Alexandré is incarcerated at the Maine State Prison and is the plaintiff in this 42 U.S.C. § 1983 action seeking remedy for the allegedly inadequate medical attention he received when he was at the Penobscot County Jail. (Docket No. 1.) He alleges that the defendants, in contravention of the Eighth Amendment prohibition against cruel and unusual punishment, were deliberately indifferent to his need for treatment of a shoulder injury sustained when he slipped when exiting the shower at the jail. Currently pending are three motions for summary judgment on behalf of the three defendants, Penobscot County Sheriff Glenn Ross (Docket No. 32), and physician assistants Al Cichon (Docket No. 38) and Jonathan Coggeshall (Docket No. 36). In this decision I address Coggeshall's motion (Docket No. 36). Coggeshall has also filed a motion to strike (Docket No.45), targeting Alexandré's reply brief to his motion for summary judgment (Docket No. 44). I **DENY** the motion to strike and I recommend that the court **GRANT** summary judgment in favor of Coggeshall.

Discussion

While at the jail Alexandré was entitled to "'the minimal civilized measure of life necessities.'" Wilson v. Seiter, 501 U.S. 294, 298 (1991) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). One such necessity is treatment of medical conditions and, accordingly, the denial of necessary medical care can rise to the level of a constitutional violation, see generally Farmer v. Brennan, 511 U.S. 825 (1994); Estelle v. Gamble, 429 U.S. 97 (1976).[1]

However, deliberate indifference liability attaches only when a state actor "knows of and disregards an excessive risk to inmate health or safety." Farmer, 511 U.S. at 837. The state actor "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837. In other words, a plaintiff with such a claim must not only demonstrate inadequate care, he or she must demonstrate the defendant(s) who deprived the inmate of care did so with a culpable state of mind. Id. 834.

Related to this state-of-mind requirement are the tenets that inmates do not have a right to limitless doctor visits or their choice of medications, and negligence and medical malpractice are not actionable in 42 U.S.C. 1983 suits. Daniels v. Williams, 474 U.S. 327 (1986) (noting that 42 U.S.C. § 1983 provides a right of action for civil rights

[1] In terms of the applicable Constitution standard, there is a twist in this case, in that Alexandré was both a convicted prisoner and a pre-trial detainee while at the jail. However, the First Circuit stated in Burrell v. Hampshire County that: "Pretrial detainees are protected under the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment; however, the standard to be applied is the same as that used in Eighth Amendment cases." 307 F.3d 1, 7 (1st Cir. 2002) (citing Bell v. Wolfish, 441 U.S. 520, 545(1979) (the Due Process Clause protections are at least as great as those under the Eighth Amendment); 1 M.B. Mushlin, Rights of Prisoners § 2.02 (2d ed. Supp.2001)"); accord Calderon-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002); Elliott v. Cheshire County, 940 F.2d 7, 10 (1st Cir. 1991); Gaudreault v. Municipality of Salem, 923 F.2d 203, 208 (1st Cir.1990); McNally v. Prison Health Servs., Inc., 28 F.Supp.2d 671, 673 (D. Me.1998).

violations and cannot be used to sue correctional officials for negligence). "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle, 429 U.S. at 106.

Coggeshall is entitled to summary judgment on Alexandré's Eighth Amendment claim only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [Coggeshall] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. I view the record in the light most favorable to Alexandré and I indulge all reasonable inferences in his favor. See Savard v. Rhode Island, 338 F.3d 23, 25 -26 (1st Cir. 2003). However, to the extent that Alexandré has failed to place Coggeshall's facts in dispute, I deem the properly supported facts as admitted, see Faas v. Washington County, 260 F. Supp. 2d 198, 201 (D. Me. 2003).[2]

Coggeshall's Material Facts

Jonathan Coggeshall is a resident of Augusta, Maine and he is a licensed physician assistant. (Coggeshall SMF ¶¶ 1-2.) Pursuant to contract, he has provided medical services for inmates in several county jails in the State of Maine including the

[2] Alexandré's pro se status does not relieve him of his duty to respond, see Parkinson v. Goord, 116 F.Supp.2d 390, 393 (W.D.N.Y 2000) ("[P]roceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment"), nor does it mitigate this Court's obligation to fairly apply the rules governing summary judgment proceedings, see Fed. R. Civ. P. 56; Dist. Me. Loc. R. Civ. P. 56.

Penobscot County Jail. (Id. ¶ 3.) He terminated his contract to provide medical services in June 2003. (Id. ¶ 4.) He has never been an employee of the State of Maine or of any governmental entity. (Id. ¶ 5) He has never been an employee of the Penobscot County Jail. (Id. ¶ 6.)

Coggeshall became involved in the treatment of Alexandré, while Alexandré was an inmate at the Penobscot County Jail. Alexandré was a pre-trial detainee, awaiting trial on a murder charge. (Id. ¶ 7.) On March 27, 2003, Coggeshall saw Alexandré for a painful right shoulder, which Alexandré stated resulted from a fall in the shower two weeks before. (Id. ¶ 8.) He diagnosed Alexandré as suffering from a right shoulder tendinitis. (Id. ¶ 9.) The treatment plan for Alexandré involved rest and advice to protect his right arm. (Id. ¶ 10.) Coggeshall next saw Alexandré on April 9, 2003, and he still had a painful right shoulder. (Id. ¶¶ 11, 12.) The diagnosis remained right shoulder tendinitis. (Id. ¶ 13.) Coggeshall advised Alexandré to continue to rest his right shoulder. (Id. ¶ 14.)

Coggeshall again saw Mr. Alexandré on April 14, 2003. (Id. ¶ 15.) Alexandré indicated that his right shoulder was "killing him," was keeping him awake, and causing great pain. (Id. ¶ 16.) Coggeshall changed his diagnosis from right shoulder injury to right shoulder synovitis. (Id. ¶ 17.)

Coggeshall next examined Alexandré on May 2, 2003, at which time he noted that Coggeshall had had right shoulder pain for two months and that he had a history of many injuries to his shoulder. (Id. ¶ 18.) The physical examination that he conducted revealed a reduced range of motion to the right shoulder but not crepitus. (Id. ¶ 19.) As a result of his examination, Coggeshall scheduled Alexandré for an x-ray on his right shoulder. (Id.

¶ 20.) The April 29, 2003, x-rays were negative, indicating no fracture or dislocation. (Id. ¶ 21.) The x-rays only had identified chronic degenerative changes in the shoulder. (Id. ¶ 25.)

Alexandré was seen next by Coggeshall on May 16, 2003. (Id. ¶ 22.) Alexandré again indicated that he had fallen in the shower on March 10, 2003, and that is when the pain in his right shoulder began. (Id. ¶ 23.) Alexandré had not been taking the Ibuprofen Coggeshall had prescribed. (Id. ¶ 24.) Coggeshall obtained additional medical history from Alexandré at this time, with Alexandré indicating that he had worked as a woodcutter and that he had suffered many injuries to his right shoulder in the past. (Id. ¶ 26.) Based upon his evaluation of Alexandré, including a review of his history and the x-rays, it was Coggeshall's opinion that Alexandré had not suffered a rotator cuff injury. (Id. ¶ 27.) It was also his recommendation that Alexandré continue to receive a conservative course of treatment. (Id. ¶ 28.) On May 18, 2003, Coggeshall placed Alexandré on new medication, Hydrocodone. (Id. ¶ 29.)

Coggeshall next saw Alexandré on May 23, 2003, at which time his treatment options were discussed. (Id. ¶ 30.) While Coggeshall believed that there were a number of security risks associated with referring Alexandré to an orthopedist, he nonetheless referred Alexandré to the orthopedic clinic at Eastern Maine Medical Center (EMMC). (Id. ¶ 31.) Coggeshall discussed Alexandré's orthopedic examination with Dr. Rajendra Tripathi who recommended that an MRI study be scheduled. (Id. ¶ 32.) An MRI study was taken which indicated a small partial thickness tear to the posterior fibers of the supraspinatus tendon, degenerative atrophy to the acromioclavicular joint, inflammation in the region of the coracoclavicular ligament, and a small intrasubstance tear in the

medial portion of the deltoid muscle. (Id. ¶ 33.) Alexandré was given a prescription for Percocet. (Id. ¶ 34.)

Coggeshall then received a letter from Patricia Griffith, M.D. of the Orthopedic Clinic which provided as follows:

> Thank you for speaking to me about Patrick Alexander. He had been referred to my care by Dr. Tripathy (sic) for a rotator cuff tear as well as acromioclavicular degenerative joint disease. Per our conversation, I feel his medical care can be deferred until his social situation is clarified in one month. My understanding of his history is that he has had multiple prior injuries to his shoulder, neck and head. He sustained shoulder pain after falling in March while in custody. He had an MRI which did show chronic arthritic changes as well as a small rotator cuff tear. My understanding from speaking with you is that he is to be tried within the month. At that time he will either be released or transferred to a different facility. I believe his care would be best facilitated by having him seen by myself after release or seen by a physician at the accepting facility after his trial.

(Id. ¶¶ 35-36.)

Coggeshall saw Alexandré on June 13, 2003, and advised him to continue on the Percocet for his pain and shoulder discomfort. (Id. ¶ 38.) It was Coggeshall's opinion that Alexandré received proper and appropriate medical care and treatment at the jail. (Id. ¶ 39.) Furthermore, Coggeshall asserts, that the letter by Dr. Griffith is evidence that the conservative medical treatment provided to Alexandré for his right shoulder complaints was appropriate. (Id. ¶ 40.)

Alexandré's Response to the Motions for Summary Judgment

In his response to these motions (Docket No. 41), Alexandré states, barefacedly, that the three defendants have filed untrue statements in their motions for summary judgment and in their affidavits and he intimates that there are many inconsistencies in their pleadings that he has not addressed.

Turning to specific complaints, he asserts that he never suffered injuries to his shoulder while working as a logger, although he did injure his shoulder when he was a child when he fell off his bike and broke his collar bone. This childhood accident resulted in the only injury of Alexandré's shoulder prior to the slip and fall at the jail. Alexandré complains that Coggeshall cancelled the follow-up appointment with the orthopedist. On this score, Alexandré also disputes Coggeshall's claims that the orthopedic surgeon continued to recommend conservative treatment, asserting that the orthopedic surgeon had recommended a follow-up treatment but that this treatment was cancelled by Coggeshall, in a deliberate indifference to Alexandré's medical needs. And, with respect to Coggeshall's claim that on June 13, 2003, he advised Alexandré to continue on Percocet for his pain and shoulder discomfort, Alexandré protests that he had to beg Coggeshall for that pain reliever.[3]

Reply to Coggeshall's Motion and the Motion to Strike

In addition to his omnibus response to the three motions for summary judgment, Alexandré filed a reply targeting only Coggeshall's motion. (Docket No. 44.) In this pleading he takes issue with Coggeshall's representation that during the May 16, 2003, visit with Alexandré he learned that Alexandré had not been taking his Ibuprofen. Alexandré states that the medicine review chart for that date indicates that Alexandré was taking one hundred percent of his medication. He renews his protestation against Coggeshall's assertion that he told him that he had sustained shoulder injuries as a logger. He alleges that, with respect to the interrupted Percocet situation, that the EMMC doctor had issued a sixty-pill Percocet prescription and that Coggeshall discontinued the pain

[3] Coggeshall states that he has not been served with a Notice of Claim by the Plaintiff in accordance with 24 M.R.S.A. §§ 2853, 2903. (Coggeshall SMF ¶ 41.) Alexandré points out that he did not have to file a notice of claim to pursue his § 1983 claims. Thus, there is no dispute here.

killer after only thirteen dosages and, further, that Alexandré was only re-prescribed this painkiller after Alexandré filed two grievances. This, Alexandré contends, demonstrates a deliberate interference with Alexandré's prescribed medical care on Coggeshall's part. Finally, Alexandré renews his disagreement with Coggeshall's assertion that the Griffith letter confirms the propriety of a conservative course of treatment. Noting that the letter references a conversation between Coggeshall and Griffith, Alexandré states: "Anyone reading that letter can tell that defendant Coggeshall did not want to send Plaintiff for his follow up treatment and persuaded Dr. Griffith to accept his recommendation."

In his motion to strike this submission (Docket No. 45), Coggeshall notes that Alexandré had filed his first reply to all three motions on March 17, 2004, and that this second response targeting only Coggeshall's motion was docketed on April 2, 2004. Coggeshall argues that the Federal Rules of Civil Procedure and the District of Maine Local Rules do not permit a non-moving party to file multiple oppositions to motions for summary judgment. He also points out that the factual statements are not supported by record citations and should be disregarded for that reason.

Although Coggeshall's complaints are legitimate, I **DENY** the motion to strike. Alexandré is proceeding pro se and I do not want to treat his pleadings in a manner that might appear to be unduly harsh on an attorney-less party trying to feel his way through the complexities of summary judgment, especially in a case where three defendants, each represented by separate counsel, have filed three separate motions for summary judgment with attendant statements of material fact. So I discuss the contents of Alexandré's response to the Coggeshall motion but only to the extent that the facts relied on are those

of which Alexandré could have personal knowledge[4] and those the cognizability of which are not dependent on record support.

Resolution of Summary Judgment Motion

Based on the supported material facts presented by Coggeshall, and left almost entirely uncontested by Alexandré, I conclude that, there being no genuine dispute as to any of the material facts, Coggeshall is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c) (emphasis added). It is evident that, from the material facts properly before me, Coggeshall responded to Alexandré's request for care with prompt evaluations, prescriptions, and outside medical evaluations and services. Alexandré articulated his discontent with some of the medical choices made at the jail at the time and the medical staff responded, although not always in a manner to his liking.

Even crediting the unsworn (first-hand) factual assertions by Alexandré in response to Coggeshall's motion, Alexandré has not generated a genuine dispute of material fact. Alexandré states that he did not injure his shoulder logging, however the root cause of the shoulder injury is not material in light of the other undisputed material facts. Coggeshall does not contest that Alexandré was injured at the jail and experienced shoulder pain during his detention at the jail. Coggeshall is not arguing that he did not need to treat the injury because it was preexisting. Rather, the undisputed facts demonstrate a persistent effort to diagnose (including the use of x-rays) the shoulder and to treat it with medication and physical therapy.

And, Coggeshall does not dispute that he canceled the follow-up visit with Doctor Griffith; what is important (and undisputed) is that this visit was cancelled because of the

[4] I have indulged Alexandré on this score, as he has not filed a proper affidavit to support his first-person contentions. If this were a closer call, I might not take this approach out of fairness to the movants.

note penned by Griffith recommending a hiatus in orthopedic treatment until Alexandré's "social situation" was settled. Alexandré's assertion that the letter by Griffith was a product of Coggeshall's manipulation in the hopes of foreclosing the follow-up, and not a reaffirmation of the Coggeshall's conservative treatment approach, is unsubstantiated and it would not be a reasonable inference to draw based solely on the letter's prefatory reference to a phone conversation between Coggeshall and Griffith. Rosenfeld v. Egy, 346 F.3d 11, 17 (1st Cir. 2003) (restating that a court deciding motions for summary judgment need not embrace inferences that are "wildly improbable," based on "tenuous insinuation," or "unsupported speculation.").

Vis-à-vis the temporary lull in the prescription of Percocet, Coggeshall claims that this prescription was initially ordered for four days ending June 6, 2003, that it was not renewed during a June 7 visit to the medical department per Cichon's order, but that Coggeshall did order the prescription on June 9, 2003. Alexandré counters that he had to beg for its reinstatement and was forced to file two grievances on this score. Furthermore, he asserts that the initial prescription from EMMC was for sixty pills and when his Percocet was stopped, he had only taken thirteen. Even if the initial prescription provided for a sixty-pill fill, this is not evidence that the order was to make sure that the entire prescription was completed (as is often the case with a course of antibiotics). Even if Coggeshall's renewal of the medication order only followed Alexandré's grievances and begging, such a scenario does not support a reasonable inference that Coggeshall deliberately interfered with the course of treatment in a manner that arises to deliberate indifference. Id.

Finally, I can not identify any materiality to Alexandré's dispute with Coggeshall's representation that during the May 16, 2003, visit with Alexandré he learned that Alexandré had not been taking his Ibuprofen. As Alexandré's use of Ibuprofen is but a blip on the radar screen in terms of his treatment, crediting Alexandré's position does not even begin to suggest that Coggeshall was anything more than careless in taking notes.

Perhaps something more or different could have been done for Alexandré's shoulder condition,[5] but even if Alexandré had established a factual basis for concluding that Coggeshall made a mistake in judgment in treating his shoulder, this would not form a factual basis for concluding that this was deliberately indifferent care within the meaning of Farmer. Giving Alexandré the benefit of all reasonable inferences, Alexandré has not generated a genuine dispute of material fact to form the bases for a conclusion that the medical staff acted with a culpable state of mind. Farmer, 511 U.S. at 834. Coggeshall's course of treatment amounts, at the most, to no more than negligence. See Daniels, 474 U.S. at 335-36; Estelle, 429 U.S. at 105-06.

Conclusion

For the reasons stated above I recommend that the Court **GRANT** Coggeshall's motion for summary judgment, Docket No. 36.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

[5] Not surprisingly as a pro se incarcerated litigant, Alexandré has provided no record evidence in the nature of a professional medical opinion that the course of treatment afforded him was inadequate or misguided.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

May 6, 2004.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

ALEXANDRE v. CICHON et al
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 08/07/03
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

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