

KENNETH T. DEPUTY,)
)
Plaintiff,)
)
v.) C.A. No. N12C-05-163 MMJ
)
DR. J. CONLAN,)
)
Defendant.)

Upon Defendant's Motion for Summary Judgment
DENIED

Scott G. Wilcox, Esq., Whiteford, Taylor & Preston, L.L.C., Attorney for Defendant.

JOHNSTON, J.

FACTS

This case arises out of a shoulder injury sustained by Plaintiff Kenneth T. Deputy, an inmate at Delaware Correctional Center (“DCC”). Plaintiff claims that he received inadequate care and that his constitutional rights were violated because Defendant Dr. James Conlan, the Medical Director at DCC, acted with deliberate indifference in the treatment of Plaintiff’s shoulder injury.

In October 2001, Plaintiff injured his shoulder while playing basketball at DCC. Plaintiff sought relief for the injury from the DCC medical staff, who were employed by Correctional Medical Services (“CMS”). On December 18, 2001, an X-ray was taken, which revealed that there was no fracture or dislocation in his left shoulder. A CMS physician diagnosed Plaintiff with a “probable strain” and recommended that Plaintiff take ibuprofen and attend physical therapy. The CMS physician also recommended that Plaintiff cease engaging in strenuous physical activities that involved his shoulder. Nonetheless, Plaintiff continued to play basketball and do push-ups.

On October 30, 2002, the Kent General Hospital Diagnostic Imaging Department administered an MRI of Plaintiff’s shoulder. The interpreting radiologist described the results as “[n]ormal MRI of the left upper extremity.” On March 25, 2005, Mid-Delaware Imaging administered a second MRI. The results indicated that Plaintiff’s condition had worsened. The interpreting radiologist

diagnosed Plaintiff with tendonitis and a partial tendon tear.

On June 16, 2005, after reviewing Plaintiff's March 25, 2005 MRI and examining his shoulder, Dr. R. P. DuShuttle¹ noted a "fraying of the rotator cuff" and that there was no evidence of a tear. His note offered two treatment options: (1) Plaintiff could "live with" the issue; or (2) surgery could be performed. Dr. DuShuttle remarked that surgery was recommended.

Over the next several years, CMS treated Plaintiff's shoulder by prescribing anti-inflammatory medication, physical therapy, and administering a cortisone shot—a course of care that Plaintiff claims was inadequate. Until 2010, CMS refused Plaintiff's requests for shoulder surgery. On December 8, 2010, surgery was performed on Plaintiff's left shoulder.

PROCEDURAL CONTEXT

The 2007 Lawsuit

On January 18, 2007, Plaintiff brought suit against Dr. James Conlan, DCC Health Administrator, and Thomas Carroll, DCC Warden. Plaintiff claimed that he received inadequate care and Defendants acted with deliberate indifference toward his injury.

On March 3, 2007, the Superior Court dismissed the case, finding that the complaint was legally frivolous and that Plaintiff failed to file an Affidavit of

¹ Dr. DuShuttle is a board certified orthopaedic surgeon who practices in Delaware. He is not employed by CMS.

Merit, as required by 18 *Del. C.* § 6853. Plaintiff appealed. On October 22, 2007, the Delaware Supreme Court remanded the case to address the Plaintiff's 8th and 14th Amendment claims. On remand, the Superior Court reinstated the Plaintiff's 8th and 14th Amendment claims. On August 21, 2009, Plaintiff filed a Motion for Summary Judgment.

On September 23, 2010, the Court issued an opinion denying Plaintiff's Motion. The Court found that Plaintiff's injury was sufficiently serious as a matter of law. It is undisputed that a physician diagnosed Plaintiff's injury as requiring treatment. However, the Court found that genuine issues of material fact—regarding whether Defendants acted with deliberate indifference—precluded summary judgment. Viewing the facts in the light most favorable to the nonmoving party, it appeared that Defendants believed that surgery was elective based on Dr. DuShuttle's October 21, 2009 letter. Further, the Court found genuine issues of material fact existed as to the reasonableness of Plaintiff's medical treatment. The Court denied Plaintiff's Motion for Summary Judgment.

On September 30, 2010, Plaintiff filed a Motion for Reargument. Plaintiff contended that CMS's medical treatment—the x-ray, MRIs, ibuprofen, and cortisone shot—afforded no relief. The Court held that Plaintiff failed to demonstrate that the Court overlooked a controlling precedent or legal principle, or misapprehended the law or facts in a manner that would affect the outcome of the

decision. The Court denied Plaintiff's Motion for Reargument of the Court's September 23, 2010 Decision Denying Plaintiff's Motion for Summary Judgment.

Between 2007 and 2011, Plaintiff filed numerous motions, including: a motion to compel; two motions for discovery; two motions for summary judgment; a motion for recusal; two motions for reargument; a motion for transcripts; and four motions for appointment of counsel. Additionally, Plaintiff filed two appeals and two petitions for writ of mandamus to the Delaware Supreme Court.

On February 7, 2011, Dr. Conlan filed a Motion to Dismiss. By Order dated August 15, 2011, the Court granted Dr. Conlan's Motion, and dismissed all claims, without prejudice, against Dr. Conlan pursuant to Superior Court Civil Procedure Rule 4(j).²

The 2012 Lawsuit

On May 18, 2012, Plaintiff filed the Complaint in this action against Dr. Conlan. The allegations in this action are virtually identical to those in the 2007 lawsuit. Plaintiff's 8th and 14th Amendment claims in this 2012 lawsuit were brought by Plaintiff in his 2007 lawsuit.

Defendant filed a Motion to Dismiss based on the statute of limitations. On August 6, 2013, the Court issued an opinion denying the motion. The Court found

² Service was not made timely, and the Court noted that good cause did not appear to extend the time for service of process.

that the 2012 Constitutional violation claims relate back to the 2007 Complaint and are not barred from this action.

Plaintiff is seeking:

Monetary damages in the amount of \$100,000.00 dollars from defendant for compensation and punitive damages for violations and deprivations of his 8th and 14th amendment rights as well as violations of state tort laws under title 11 § 6536. All of which has resulted in unnecessary and unwarranted infliction of pain and needless suffering. Deliberate indifference to serious medical needs, which if adequately administered as recommended by his surgeon would have ended Plaintiff's suffering. Instead defendant deliberately and intentionally failed and refused to provide adequate medical care in a timely fashion.³

On August 20, 2013, Plaintiff filed a Motion for Summary Judgment. Plaintiff requested that the Court decide only one issue, as a matter of law—whether the prison official had the culpable state of mind of “deliberate indifference” toward the Plaintiff's health. On June 5, 2014, the Court issued an opinion denying the motion. The Court held that genuine issues of material fact existed as to “the reasonableness of medical treatment provided to plaintiff; and whether Defendant had the culpable state of mind of deliberate indifference toward Plaintiff's health.”⁴

On December 31, 2015, Defendant filed a Motion for Summary Judgment. Defendant argues that Plaintiff has not and cannot present any evidence that

³ Complaint, at 8 (Trans. ID 44338632).

⁴ *Deputy v. Conlan*, 2014 WL 2581596, at *4 (Del. Super.).

Defendant acted with deliberate indifference in his treatment of Plaintiff's shoulder injury. Defendant also contends that Plaintiff has failed to demonstrate that he has exhausted his administrative remedies prior to filing this suit.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.⁵ All facts are viewed in a light most favorable to the non-moving party.⁶ Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to specific circumstances.⁷ When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.⁸ If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.⁹

ANALYSIS

Defendant contends that Plaintiff has failed to present evidence demonstrating that he has exhausted his administrative remedies prior to filing this

⁵ Super. Ct. Civ. R. 56(c).

⁶ *Hammond v. Colt Indus. Operating Corp.*, 656 A.2d 558, 560 (Del. Super. 1989).

⁷ Super. Ct. Civ. R. 56(c).

⁸ *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

⁹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

suit. This argument is without merit. Plaintiff attached to his Complaint numerous grievance reports and appeals in which he complained about the inadequate care he was receiving for his shoulder injury. The grievances attached to the Complaint date back to March 2005. The Court is satisfied that Plaintiff exhausted his administrative remedies prior to initiating this suit.

Defendant next contends that Plaintiff cannot present evidence that Defendant acted with deliberate indifference in his treatment of Plaintiff's shoulder injury. Deliberate indifference requires that a prison official: (1) must be aware of facts from which an inference reasonably could be drawn that a substantial risk of serious harm exists; and (2) must actually perceive the risk.¹⁰ An act or omission unaccompanied by knowledge of a significant risk of harm does not constitute cruel and unusual punishment as outlawed by the 8th Amendment.¹¹ Choosing a treatment plan different from that requested by an inmate does not amount to deliberate indifference, provided that the treatment plan is reasonable.¹²

The Court determined in its September 23, 2010 Opinion that Plaintiff's injury is "sufficiently serious" as a matter of law. Further, the Court found in its June 5, 2014 that this case cannot be dismissed on the basis of summary judgment because genuine issues of material fact still exist as to the reasonableness of

¹⁰ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

¹¹ *Id.* at 837–38.

¹² *Diaz v. Carroll*, 570 F.Supp. 2d 571, 578 (D.Del. 2008) (citing *Harrison v. Barley*, 219 F.3d 132, 138–40 (2d Cir. 2000)); *see also Stilner v. Rhay*, 371 F.3d 420, 421 (9th Cir. 1967) (Prison officials have "wide discretion" in providing medical treatment to inmates.).

medical treatment provided to plaintiff and whether Defendant had the culpable state of mind of deliberate indifference towards Plaintiff's health. These genuine issues of material fact still remain at issue.

Defendant argues:

In this case, the undisputed evidence shows that Dr. Conlan appropriately care[d] for and treated Mr. Deputy's shoulder injury from the time he was first seen in 2007 through and after his surgery in 2010. Mr. Deputy has not and cannot present any evidence that the medical treatment he received was deliberately indifferent and violated his constitutional rights.¹³

Defendant is partially incorrect. Plaintiff vigorously disputes the adequacy of his medical care. However, Plaintiff has not presented expert medical testimony that his care was improper.

The Court already has ruled that as the record presently stands, genuine issues of material fact exist. In order to obtain summary judgment, Defendant must at least present: (1) an expert medical opinion that Plaintiff received adequate medical care; and (2) an affidavit refuting the factual allegations of a state of mind of deliberate indifference towards Plaintiff's health. At that point, Plaintiff would bear the burden of producing rebuttal evidence, or risk dismissal pursuant to Superior Court Rule 56(e). Therefore, Defendant's Motion for Summary Judgment must be denied at this time.

¹³ Defendant Dr. J. Conlan's Opening Brief in Support of Motion for Summary Judgment, at 7 (Trans. ID 58361448).

CONCLUSION

Trial in this case was scheduled to begin May 2, 2016. Trial will be rescheduled to begin on March 27, 2017. Genuine issues of material fact remain unresolved.

THEREFORE, Defendant's Motion for Summary Judgment is hereby **DENIED**, without prejudice.

IT IS SO ORDERED.

A handwritten signature in blue ink, appearing to read "Mary M. Johnston", is written over a horizontal line.

The Honorable Mary M. Johnston