IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

Submitted: March 30, 2017
Decided: June 20, 2017

On Defendant's Motion for Summary Judgment
GRANTED

ORDER

This case has a lengthy and complicated procedural history. The underlying facts and procedural context are set forth in this Court's Memorandum Opinion decided April 19, 2016.[1]

In the Memorandum Opinion, the Court found:

> 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).

[1] *Deputy v. Conlan*, Del. Super., C.A. No. N12C-05-063, Johnston, J (April 16, 2016) (Mem. Op.).

Defendant Conlon[2] has filed two affidavits. The Affidavit of Richard P. DuShuttle, M.D. provides sworn testimony that he was Plaintiff's treating physician. Dr. DeShuttle confirms his alternative recommendations that "(1) Mr. Deputy could live with the injury or (2) surgery could be performed." Dr. DuShuttle further stated that he will not provide expert testimony on behalf of Plaintiff in this litigation.

The Affidavit of Dr. J. Conlon, M.D. opines that "the treatment was in accordance with the care recommended by Dr. DuShuttle." Dr. Conlon further states that there is "no evidence that any of the medical staff was deliberately indifferent to Mr. Deputy's medical condition....There is no evidence that anyone (including me) failed to, consciously or otherwise, provide appropriate medical treatment to Mr. Deputy at any time."

In response to Defendant's submissions, Plaintiff reiterated previous factual allegations and arguments. Additionally, Plaintiff directs the Court's attention to "the consultation of Dr. DuShuttle filed on June 16, 2005." It appears that Plaintiff intends that this "consultation" serve as rebuttal evidence in opposition to Defendant's Motion for Summary Judgment.

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.[3] All facts are viewed in a light most favorable to the non-moving

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[2] Although the caption refers to Defendant as "Conlan," the correct spelling is "Conlon."
[3] Super. Ct. Civ. R. 56(c).

party.[4] 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.[5] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[6] 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.[7]

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.[8] 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.[9] Choosing a treatment plan different from that requested by an inmate does not amount to deliberate indifference, provided that the treatment plan is reasonable.[10]

Defendant now has presented expert medical testimony that Plaintiff received adequate medical care. Further, Defendant has filed a sworn affidavit refuting

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[4] *Hammond v. Colt Indus. Operating Corp.*, 656 A.2d 558, 560 (Del. Super. 1989).
[5] Super. Ct. Civ. R. 56(c).
[6] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[8] *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).
[9] *Id.* at 837–38.
[10] *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.).

Plaintiff's factual allegations of the state of mind of deliberate indifference towards Plaintiff's health.

Superior Court Civil Rule 56(e) provides: "When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment if appropriate, shall be entered against the adverse party."

Having reviewed all submissions, the Court finds that Defendant has failed to demonstrate that there are genuine issues for trial. Defendant has presented unrebutted sworn testimony that Defendant did not fail to take reasonable steps to avoid Plaintiff's substantial risk of serious harm, and that Defendant did not manifest deliberate indifference by intentionally denying or delaying access to medical care.

THEREFORE, Defendant's Motion for Summary Judgment is hereby **GRANTED.**

IT IS SO ORDERED.

The Honorable Mary M. Johnston