

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUAN RODRIGUEZ : CIVIL ACTION
: :
: :
v. : :
: :
: :
JOSEPH V. SMITH, et al. : NO. 03-3675

MEMORANDUM

Padova, J.

June 21, 2005

Plaintiff, Juan Rodriguez, has brought this *pro se* civil rights action against supervisory and medical personnel at FCI-Fairton, FDC-Philadelphia, FMC-Fort Deven, Montgomery County Correctional Facility ("MCCF"), SCI-Camp Hill, and SCI-Dallas for violations of his Eighth Amendment rights while he was incarcerated in each of those facilities. Plaintiff also asserts state law claims for medical malpractice and intentional infliction of emotional distress. Presently before the Court are five Motions to Dismiss the Amended Complaint¹ pursuant to Federal Rule of Civil Procedure 12, which were respectively filed by the following defendants or groups of defendants: (1) Dennis Molyneaux, Assistant Warden at MCCF; (2) SCI-Dallas Superintendent Thomas Lavan, SCI-Camp Hill Superintendent Kenneth Kyler, and SCI-Dallas Corrections

¹ By separate Order this date, the Court granted Plaintiff leave to file a Second Amended Complaint and ordered the Clerk of Court to docket Plaintiff's Second Amended Complaint. Because the Court construes the Second Amended Complaint as a supplemental pleading, it will consider the allegations of both the First Amended Complaint and the Second Amended Complaint in ruling on the instant Motions. For ease of reference, and unless otherwise noted, the Court will collectively refer to the allegations of Plaintiff's First Amended Complaint, Second Amended Complaint, and all of the documents attached thereto, as the "Amended Complaint."

Health Care Administrator Patricia Ginocchetti (collectively, "the Commonwealth Defendants"); (3) Dr. Martin Laskey of SCI-Dallas; (4) Dr. Stanley Bohinski of SCI-Dallas; and (5) Dr. Stanley Stanish, Dr. Bohinski,² and Physician Assistant Kelly Gallagher of SCI-Dallas (collectively, "the Medical Defendants").³ For the reasons that follow, the Motions to Dismiss filed by Molyneaux, Dr. Laskey, and the Commonwealth Defendants are granted in their entirety; the Motion to Dismiss filed the Medical Defendants is granted in part and denied in part; and the Motion to Dismiss filed by Dr. Bohinski is denied.

I. BACKGROUND

The Amended Complaint alleges the following pertinent facts. In 1999, while in federal custody, Plaintiff suffered a blow to his head. (1st Am. Compl. ¶ 5.) After Plaintiff was transferred to FCI-Loretto in "the beginning of 1999," he was diagnosed with a fractured skull. (Id.) Plaintiff also suffered extreme pain in the entire left side of his body and chest, and the left side of

² Two Motions to Dismiss, each raising separate arguments for dismissal, were filed by two different law firms on behalf of Dr. Bohinski. Both Motions were untimely filed. On March 30, 2005, the Court ordered Dr. Bohinski to file a single, consolidated Motion to Dismiss by April 4, 2005. Dr. Bohinski has not, to date, filed a consolidated Motion to Dismiss in response to the Court's March 30, 2005 Order. Nevertheless, because the Court subsequently permitted Plaintiff to file a Second Amended Complaint, the Court will treat Dr. Bohinski's Motions as timely filed. Furthermore, because Dr. Bohinski's Motions raise different arguments for dismissal, the Court will consider the Motions separately.

³ The remaining named Defendants in this action have either filed an answer, failed to file an answer or to otherwise respond, or not yet been served with the Amended Complaint.

his face "dropped." (Id.) On February 19, 1999, Plaintiff was placed in the custody of MCCF. (Id.) Plaintiff informed MCCF's medical department of his medical conditions upon his arrival. (Id.) On April 7, 2000, Plaintiff spoke about his medical conditions with Dennis Molyneaux, MCCF's Assistant Warden, and Mary Canan, MCCF's Medical Director. Canan told Plaintiff that, according to Dr. Carrollo of MCCF, he had "no medical problems to worry about." (Id. ¶ 11.) Plaintiff was placed in solitary confinement for complaining. (Id.) By Order dated April 5, 2001, Judge Fullam, who was presiding over a federal criminal action brought against Plaintiff in the United States District Court for the Eastern District of Pennsylvania, committed Plaintiff to "FMC Deven, Mass., for a complete medical and psychological evaluation and report." (04/05/01 Order.)

Plaintiff was in perfect health when he arrived at SCI-Camp Hill in or about July 2001. (Id. ¶ 8.) In September 2001, he was given a CAT scan and told that everything was fine. (Id.) Plaintiff was subsequently transferred to SCI-Dallas. (Id. ¶ 9.) Since being transferred to SCI-Dallas, Plaintiff has experienced difficulty walking; his neck, chest and back are "bent"; the left side of his face is partially paralyzed; and his vision is impaired. (Id.) On many occasions, Plaintiff signed up for sick call for pain in his head and in the left side of his body. (1st Am. Compl. ¶ 25.) Plaintiff was given Tylenol and told that nothing was wrong. (Id.) On or about April 8, 2002, Plaintiff submitted a written request to Patricia Ginocchetti, the

Corrections Health Care Administrator at SCI-Dallas, in which he complained that Kelly Gallagher, a physician assistant, "refuses to assist me with medical treatment, or allow me to speak with a doctor." (04/08/02 Inmate Request Form.) On April 18, 2002, Ginocchetti advised Plaintiff in writing that "[o]n 4/8/02 you were thoroughly evaluated at sick call. Medication was ordered. If you continue to experience symptoms, return to sick leave and report them." (Id.) On or about May 21, 2002, Plaintiff's mother sent a letter to Thomas Lavan, Superintendent of SCI-Dallas, advising him that her son "has signed up for sick call a number of times, only to be refused the required medical attention for his illness." (05/21/02 Letter from L. Rodriguez to T. Lavan.) Plaintiff's mother also requested a full medical exam for her son. (Id.)

On or about July 9, 2002, Plaintiff submitted an official inmate grievance to Kenneth Burnett, the Department of Corrections' (DOC) Grievance Coordinator. (07/09/02 Official Inmate Grievance.) In his grievance, Plaintiff complained that he had suffered a stroke which paralyzed the left side of his body. (Id.) He admitted that "before my arrest . . . I received extensive care and treatment," and that "[w]hen I was arrested, at Montgomery County my treatment continued." (Id.) However, "while within the DOC I have not received injury-related care and treatment"; "the type of medication I am taking isn't working"; and "[f]or the last six months Dr. Stanish has been harassing me and refusing to treatment [sic] me." (Id.) In response to Plaintiff's grievance, Burnett advised Plaintiff in writing that "[a]ccording to Mr. Thomas Ohl,

Registered Nurse Supervisor, the medical doctor is the ultimate authority concerning the necessity of treatment. You are not a credentialed, licensed doctor; therefore, you do not have the expertise or the academic credentials to diagnose your health care problems." (07/23/02 Official Inmate Grievance Initial Review Response.) Burnett also advised Plaintiff that "[b]y way of this grievance response, I am requesting that Ms. Ginocchetti and/or Mr. Ohl review your medical record and your complaints for the purpose of ensuring you are receiving proper medical care according to established protocols." (Id.) Plaintiff thereafter appealed Burnett's decision to Lavan. By letter dated August 1, 2002, Lavan denied Plaintiff's grievance appeal. (08/01/02 Denial of Grievance Appeal.) In the letter, Lavan stated that "[a]ccording to the medical department you are being treated appropriately. The medical department is in the best position to assess your medical needs." (Id.) Plaintiff thereafter sought final review of his grievance by the DOC. By letter dated December 17, 2002, Thomas James, Chief Grievance Coordinator for the DOC, advised Plaintiff that "it is the decision of this office to refer this grievance to the Bureau of Health Care Services for review." (12/17/02 Letter from T. James to J. DeJesus.)⁴ By letter dated May 5, 2003, James advised Plaintiff that "[o]ur medical staff reviewed your records and determined that the care and treatment being provided is appropriate. Based upon this review, this office concurs with the

⁴ "Jose DeJesus" is Plaintiff's alias.

decision of Superintendent Lavan." (05/05/03 Letter from T. James to J. DeJesus.)

On or about November 20, 2002, Plaintiff submitted a written request to Dr. Bohinski of SCI-Dallas in which he complained that "I've been denied the opportunity to see and speak with you to explain that the medication you prescribed for me is not working at all for my medical problem." (11/20/02 Inmate Request Form.) On or about November 22, 2002, Dr. Bohinski advised Plaintiff in writing that he should "[b]ring [the written request form] to sick call and the PA's can refer you to me." (Id.) On or about November 25, 2002, Plaintiff submitted an official inmate grievance to Burnett, in which he complained that, when "I gave [Kelly Gallagher] the inmate request [form] as I was instructed to do by Mr. Bohinski, . . . [h]er response was send him a request slip now get your ass out of here before I call a[n] officer to take you out." (11/25/02 Official Grievance.) By written response dated December 5, 2002, Burnett advised Plaintiff as follows: "According to Ms. Ginocchetti, Health Care Administrator, a review of your medical record reveals that you requested Sick Call services on 11/25/02. After careful consideration of the circumstances, your account will be credited \$2.00. I consider your grievance resolved." (12/5/02 Official Inmate Grievance Initial Review Response.) Plaintiff's thereafter appealed Burnett's decision to Lavan. By letter dated December 16, 2002, Lavan denied Plaintiff's appeal. (12/16/02 Denial of Grievance Appeal.) In the letter, Lavan stated that the "[r]ecords and the Grievance Coordinator's

response indicate[] your account will be credited \$2.00 for a co-payment. The record also indicates you are being treated appropriately. The medical department is in the best position to assess your medical needs." (Id.)

On February 20, 2003, Dr. Solomon of SCI-Dallas examined Plaintiff and told him that the September 2001 CAT scan revealed that he had a tumor on the left side of his brain. (1st Am. Compl. ¶ 8.) Dr. Solomon ordered an MRI for Plaintiff, which revealed that he has two tumors behind his left eye. (2d Am. Compl. Ex. C.) On April 28, 2003, Judge Fullam wrote Lavan a letter in which he requested that Lavan "check[] into the situation and make sure that Mr. Rodriguez receives whatever medical attention he needs." (2d Am. Compl. Ex. B.) By letter dated May 2, 2003, Lavan advised Judge Fullam that "our Health Care Administrator . . . has assured me that [Plaintiff] is being treated according to proper medical protocol." (Id.) Since Dr. Solomon's diagnosis of the brain tumors, Plaintiff has been examined by Dr. Sedor, a neurologist, on at least two occasions. (Id.) During an examination performed on July 10, 2003, Dr. Sedor advised Plaintiff that his tumors could not be treated with medication and that the only solution was surgery. (Id.) On August 15, 2003, however, Dr. Bohinski, who does not specialize in the treatment of brain tumors, decided to treat Plaintiff's tumors with a medication called "Dostinex," without consulting Dr. Sedor. (Id.) On September 22, 2003 and October 22, 2003, Dr. Stanish, who does not specialize in the treatment of brain tumors, told Plaintiff that he had no right to

receive any kind of surgery and that Dr. Sedor only recommended surgery because he is a surgeon. (Id.) On November 12, 2004, Dr. Berbano, who is an endocrinologist, informed Plaintiff that Drs. Bohinski and Stanish were wrong in assuming that Dostinex would eliminate his tumors. (Id.) Dr. Stanish told Dr. Berbano to continue prescribing Dostinex to treat Plaintiff's tumors since Plaintiff is scheduled to be released from SCI-Dallas in February 2006. (Id.)

In Count I, the Amended Complaint alleges that all of the named Defendants acted with deliberate indifference to his serious medical needs, in violation of the Eighth Amendment. In Count II, the Amended Complaint alleges that the Medical Defendants, as well as several of the non-moving Defendants, committed medical malpractice under state law. In Count III, the Amended Complaint alleges a state law claim for intentional infliction of emotional distress against all of the named Defendants.

II. LEGAL STANDARD

When determining a Motion to Dismiss pursuant to Rule 12(b)(6),⁵ the court must accept as true all well pleaded

⁵ Dr. Bohiniski also seeks dismissal of the Amended Complaint on the basis of improper venue under Rule 12(b)(3). Dr. Bohinski argues that venue lies only in the Middle District of Pennsylvania because the bulk of the events giving rise to Plaintiff's claims took place at SCI-Dallas, which is located in the Middle District. The Court summarily rejects this argument because a substantial part of the events giving rise to Plaintiff's claims took place at FDC-Philadelphia and MCCF, which are located in this judicial district. See 28 U.S.C. § 1391(b)(2); Morris v. Genmar Indus., Inc., Civ. A. No. 91-5212, 1993 WL 217246, at *5 (N.D. Ill. July 18, 1993) ("It is irrelevant that a more substantial part of the

allegations in the complaint and view them in the light most favorable to the Plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). Allegations in a *pro se* complaint are held to less stringent standards than formal pleadings drafted by lawyers. Henderson v. Fisher, 631 F.3d 1115, 1117 (3d Cir. 1980) (citing Haines v. Kerner, 404 U.S. 519 (1972)). A Rule 12(b)(6) motion will be granted when a Plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). In ruling on a Rule 12(b)(6) motion, the court may consider documents which the plaintiff has attached to or submitted with the complaint, as well as any other documents which are integral to or explicitly relied upon in the complaint. Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002); see also Fed. R. Civ. P. 10(c) ("A copy of a written instrument which is an exhibit to a pleading is a part thereof for all purposes.").

III. DISCUSSION⁶

A. Exhaustion of Administrative Remedies

Dr. Bohinski seeks dismissal of the Amended Complaint on the ground that Plaintiff has failed exhaust available administrative remedies. The Prison Litigation Reform Act of 1995 ("PLRA")

events took place in another district, as long as a substantial part of the events took place in [this] district as well.").

⁶ The Court summarily grants Dr. Laskey's Motion to Dismiss because the Amended Complaint is devoid of any allegations against him.

provides that “[n]o action shall be brought with respect to prison conditions under . . . 42 U.S.C. § 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Failure to exhaust administrative remedies under the PLRA is an affirmative defense that must be pleaded and proven by the defendant. Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002). Affirmative defenses may only be considered on a Rule 12(b)(6) motion “where the defect appears on the face of the pleading.” Flight Sys., Inc. v. Elec. Data Sys. Corp., 112 F.3d 124, 127 (3d Cir. 1997) (citation omitted).

In this case, the Court cannot conclusively determine from the face of the Amended Complaint, or the attachments thereto (which include some, but not necessarily all, of the grievances pursued by Plaintiff), whether Plaintiff has fully exhausted his administrative remedies, and Dr. Bohinski has offered no proof in support of his exhaustion defense. See Spruill v. Gillis, 372 F.3d 218, 223 & n.2 (3d Cir. 2004) (considering indisputably authentic documents related to inmate’s grievances submitted in connection with defendants’ Rule 12(b)(6) motion for failure to exhaust administrative remedies, even though motion should have been brought pursuant to Rule 12(c)). Accordingly, Dr. Bohinski’s Motion is denied in this respect.⁷

⁷ The only other argument raised Dr. Bohinski’s Motion is that the Amended Complaint should be dismissed on the basis of improper venue. As discussed *supra* note 3, venue properly lies in this judicial district pursuant to 28 U.S.C. § 1391(b)(2). As both of

B. Eighth Amendment Claim

Plaintiff alleges that Defendants violated his rights under the Eighth Amendment by failing to provide him with adequate medical care. The Supreme Court has determined that failure to provide adequate treatment is a violation of the Eighth Amendment when it results from "deliberate indifference to a prisoner's serious illness or injury." Estelle v. Gamble, 429 U.S. 97, 105 (1976). In order to state a claim that the medical care provided by Defendants violated his constitutional rights, Plaintiff must allege that his medical needs were serious⁸ and that prison officials were deliberately indifferent to those needs. Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979).

The Supreme Court has held that:

[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from

the arguments raised in Dr. Bohinski's Motion lack merit, the Motion is denied in its entirety.

⁸ Although the Commonwealth Defendants concede for purposes of their Motion that Plaintiff's medical needs were serious, the Medical Defendants argue that the Amended Complaint fails to allege a serious medical need. A medical need is serious if it is "one that 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." Woloszyn v. County of Lawrence, 396 F.3d 314, 320 (3d Cir. 2005) (citation omitted). "Conditions which have been held to meet the constitutional standard of serious medical need include a brain tumor" Smith v. Montefiore Med. Ctr.-Health Servs. Div., 22 F. Supp. 2d 275, 280 (S.D.N.Y. 1998) (citation omitted). The Court concludes, therefore, that Plaintiff has sufficiently pled a serious medical need.

which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer v. Brennan, 511 U.S. 825, 837 (1994). In order to state a claim for deliberate indifference, Plaintiff has to allege more than medical malpractice. See Estelle, 429 U.S. at 105 (“[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.”); Parham v. Johnson, 126 F.3d 454, 458 n. 7 (3d Cir. 1997) (“We recognize the well-established law in this and virtually every circuit that actions characterizable as medical malpractice do not rise to the level of ‘deliberate indifference’ under the Eighth Amendment.”). As the United States Court of Appeals for the Third Circuit acknowledged in Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987), deliberate indifference may be established in a variety of circumstances, including where prison officials: (1) deny reasonable requests for medical treatment and such denial exposes the inmate to undue suffering or the threat of tangible physical injury; (2) intentionally refuse to provide needed medical care; (3) delay necessary medical care for non-medical reasons; (4) erect arbitrary and burdensome procedures that result in interminable delays and outright denials of medical care to suffering inmates; (4) opt for an easier and less efficacious treatment of the inmate’s illness; (5) condition the provision of needed medical

services on the inmate's ability or willingness to pay; (6) prevent an inmate from receiving recommended treatment for serious medical needs; and (7) deny access to a physician capable of evaluating the need for medical treatment. Id. at 346-47.

The Medical Defendants contend that the allegations of the Amended Complaint reflect nothing more than Plaintiff's mere disagreement with the course of his medical treatment, which is insufficient as a matter of law to establish deliberate indifference under the Eighth Amendment. Read liberally, however, the allegations of the Amended Complaint amount to more than an attempt by Plaintiff to second-guess the propriety or adequacy of his prescribed treatment. See Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir. 1996) ("[W]hile mere medical malpractice is not tantamount to deliberate indifference, certain instances of medical malpractice may rise to the level of deliberate indifference"). The essence of Plaintiff's Eighth Amendment claim is that the Medical Defendants knew that Plaintiff was suffering serious pain as a result of a brain tumor, which first appeared on a 2001 CAT scan,⁹ yet they refused to treat him with anything more than

⁹ Although the 2001 CAT scan was performed at SCI-Camp Hill, and the Medical Defendants are all employees of SCI-Dallas, it is fair to assume at this juncture that Plaintiff's medical records were forwarded from SCI-Camp Hill to SCI-Dallas. Indeed, the Amended Complaint alleges that Dr. Solomon of SCI-Dallas relied on the 2001 CAT scan in initially detecting the brain tumor. Furthermore, while Plaintiff does not allege specific facts to support the mental states of the Medical Defendants, the Amended Complaint at least suggests that these Defendants were aware of the brain tumor that appeared on the 2001 CAT scan. No more is required of Plaintiff to plead deliberate indifference with respect

Tylenol until Dr. Solomon informed Plaintiff about the tumor in February 2003. See White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990) (noting that deliberate indifference can be inferred from "persistent conduct in the face of resultant pain and risk of permanent injury"); Mandel v. Doe, 888 F.2d 783, 789 (11th Cir. 1989) ("When the need for treatment is obvious, medical care which is so cursory as to amount to no treatment at all may amount to deliberate indifference."); West v. Keve, 571 F.2d 158, 162 (3d Cir. 1978) (reversing dismissal of Eighth Amendment claim where plaintiff's serious medical needs were treated with aspirin). The Amended Complaint also alleges Gallagher prevented Plaintiff from speaking with Dr. Bohinski about his medical concerns, and Dr. Stanish verbally abused Plaintiff and refused to treat him altogether. See, e.g., Spruill v. Gillis, 372 F.3d 218, 237 (3d Cir. 2004) (holding that *pro se* plaintiff stated Eighth Amendment claim against prison doctor and his assistant based on allegations that the defendants refused to examine plaintiff on multiple occasions and accused plaintiff of playing games); Scantling v. Vaughn, Civ. A. No. 03-67, 2004 WL 306126, at *7-*8 (E.D. Pa. Feb. 12, 2004) (denying medical staff's motion to dismiss Eighth Amendment claim on similar grounds). Furthermore, the Amended Complaint alleges that the treatment prescribed by Drs. Bohinski and Stanish since Dr. Solomon's diagnosis of the brain tumor in February 2003 has been ineffective, and Drs. Bohinski and Stanish

to the Medical Defendants. See Alston v. Parker, 363 F.3d 229, 233-34 & n.6 (3d Cir. 2004).

have prevented Plaintiff from receiving the treatment recommended by specialists. See, e.g., Stires v. Zettlemyer, Civ. A. No. 98-1472, 1998 WL 744100, at *3 (E.D. Pa. Oct. 23, 1998) (denying motion to dismiss where plaintiff alleged that prison doctor failed to schedule recommended surgery and persisted in prescribing ineffective treatment). If proven, the allegations of the Amended Complaint could support a finding that each of the Medical Defendants acted with deliberate indifference by, *inter alia*, denying reasonable requests for medical treatment that exposed Plaintiff to undue suffering, and opting for an easier and less efficacious treatment of Plaintiff's brain tumor. Accordingly, the Medical Defendants' Motion to Dismiss is denied.

Molyneaux and the Commonwealth Defendants, each of whom are supervisory employees, argue that the Amended Complaint fails to sufficiently allege that they acted with deliberate indifference to Plaintiff's serious medical needs under the Eighth Amendment. The Third Circuit has recently stated that "[i]f a prisoner is under the care of medical experts . . . , a non-medical prison official will generally be justified in believing that the prisoner is in capable hands." Spruill, 372 F.3d at 236. Thus, "absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference." Id.; see also Durmer v. O'Carroll, 991 F.2d 64, 69 (3d Cir. 1993) (holding that non-medical prison officials cannot be considered

deliberately indifferent "simply because they failed to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor").

The Amended Complaint merely alleges that Molyneaux was present during a meeting at which MCCF's medical director advised Plaintiff that he had no medical problems to worry about. Plaintiff has admitted that he received medical treatment while incarcerated at MCCF. Assuming the truth of the allegations in the Amended Complaint and viewing them in the light most favorable to Plaintiff, the Court cannot reasonably infer that Molyneaux had actual knowledge or reason to believe that the medical staff at MCCF was mistreating or not treating Plaintiff. Accordingly, Molyneaux's Motion to Dismiss is granted with respect to the Eighth Amendment claim.

The Amended Complaint alleges only that Ginocchetti received a written request from Plaintiff concerning Gallagher's refusal to address his medical concerns. Ginocchetti promptly responded to Plaintiff's request, pointing out that he had been "thoroughly evaluated at sick call" and "medication [had been] ordered" on or about the date on which he submitted his request. Ginocchetti also advised Plaintiff to return to sick call if his symptoms persisted. Assuming the truth of the allegations in the Amended Complaint and viewing them in the light most favorable to Plaintiff, the Court cannot reasonably infer that Ginocchetti had actual knowledge or reason to believe that the medical staff at SCI-Dallas was mistreating or not treating Plaintiff. See Hussmann v. Knauer,

Civ. A. No. 04-2776, 2005 WL 435231, at *5 (E.D. Pa. Feb. 23, 2005) (dismissing Eighth Amendment claim against health care administrator where administrator responded to each of plaintiff's grievances and instructed him to return to sick call if symptoms persisted). Accordingly, the Commonwealth Defendants' Motion to Dismiss is granted with respect to the Eighth Amendment claim against Ginocchetti.

Lavan's alleged involvement in the Eighth Amendment violation was essentially limited to entertaining Plaintiff's grievance appeals concerning mistreatment by the SCI-Dallas medical staff. Plaintiff does not so much as suggest that Lavan was aware that the 2001 CAT scan had revealed a brain tumor. The allegations of the Amended Complaint, coupled with the documents attached thereto, instead simply establish that Lavan promptly investigated Plaintiff's grievances, and that Lavan deferred to the expertise of the medical professionals at SCI-Dallas who were responsible for Plaintiff's treatment in rejecting his grievances. Assuming the truth of the allegations in the Amended Complaint and viewing them in the light most favorable to Plaintiff, the Court cannot reasonably infer that Lavan had actual knowledge or reason to believe that the medical staff at SCI-Dallas was mistreating or not treating Plaintiff. See, e.g., King v. Leftridge-Byrd, Civ. A. No. 04-495, 2005 WL 102934, at *1 (E.D. Pa. Jan. 14, 2005) (granting motion to dismiss Eighth Amendment claim against defendants whose only involvement was denying inmate's grievances or upholding such denials on appeal); Scantling, 2004 WL 306126, at *9 (same); see

also Foreman v. Goord, Civ. A. No. 02-7089, 2004 WL 1886928, at *7 (S.D.N.Y. Aug. 23, 2004) (rejecting contention that an inmate can state Eighth Amendment claim against supervisory official by merely alleging that the official denied grievances because “[w]ere it otherwise, virtually every inmate who sues for Constitutional torts . . . could name the Superintendent as a defendant since the plaintiff must pursue his prison remedies and invariably the plaintiff’s grievance will have been passed upon by the Superintendent.”) (citation omitted). Accordingly, the Commonwealth Defendants’ Motion to Dismiss is granted with respect to the Eighth Amendment claim against Lavan.¹⁰

C. Medical Malpractice Claim¹¹

The Medical Defendants seek dismissal of Plaintiff’s medical malpractice claim because he has failed to properly file a certificate of merit pursuant to Pennsylvania Rule of Civil Procedure 1042.3 (“Rule 1042.3”), which provides in pertinent part:

(a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by

¹⁰ The Court summarily grants the Commonwealth Defendants’ Motion to Dismiss with respect to Defendant Kyler because the Amended Complaint fails to allege that Kyler had any personal involvement in the deprivation of Plaintiff’s medical care.

¹¹ The Court need not address the arguments made by Molyneaux and the Commonwealth Defendants for dismissal of Plaintiff’s medical malpractice claim because Plaintiff does not assert his medical malpractice claim against these Defendants.

the attorney or party that either
(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or . . .
(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or . . .
(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

Pa. R. Civ. P. 1042.3.¹²

The Medical Defendants note that Plaintiff did not file a certificate of merit within sixty days after the filing of his original Complaint on August 26, 2003. Instead, Plaintiff filed a document styled as "Certificate of Merits as to the Court Appointed Licensed Professional Expert" (hereinafter, "the Certificate") as an exhibit to his response in opposition to the Medical Defendants' Motion to Dismiss, which was filed on April 13, 2005. The Certificate states in part as follows:

I, Juan Rodriguez, certify that:

An appropriated [sic] court appointed licensed professional Expert Doctor will be supplied a written statement to the Understanding that there is a basis to conclude that the care, still [sic] or knowledge exercised or exhibited by this Defendant in the treatment,

¹² Rule 1042.3 was adopted, and made immediately effective, on January 27, 2003, nearly four months before Plaintiff commenced the instant action.

practice or work that is the subject of the .
. . . complaint, fell outside acceptable
professional standards and that such conduct
was caused [sic] on bringing about the harm.

(Pl.'s Resp. Ex. A.) The Medical Defendants argue that, even if Plaintiff had complied with the time requirements of Rule 1042.3(a) in filing the Certificate, the Certificate would still be fatally defective. Indeed, Plaintiff concedes in the Certificate that a licensed professional has not yet supplied him with the written statement required under Rule 1042.3(a)(1).

At the threshold, the Court agrees with other district courts in this Circuit that Rule 1042.3 should be applied by federal courts as controlling substantive law under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), and its progeny. See, e.g., Schwalm v. Allstate Boiler & Const., Inc., Civ. A. No. 04-593, 2005 WL 1322740, at *1 (M.D. Pa. May 17, 2005); Scaramuzza v. Sciolla, 345 F. Supp. 2d 508, 510 (E.D. Pa. 2004).¹³ Nevertheless, the Court finds that Plaintiff's failure to timely file a certificate of merit is excusable, particularly in light of his *pro se* status, because the Third Circuit itself has not yet expressly determined that Rule 1042.3, a procedural rule on its face, should be construed as substantive state law under the Erie doctrine. See Scaramuzza, 345 F. Supp. 2d at 511 (excusing counseled litigant's failure to timely file certificate of merit in part on this

¹³ Although Schwalm and Scaramuzza were diversity actions, the Erie doctrine applies equally to state law claims over which federal courts exercise supplemental jurisdiction. See generally Houben v. Telular Corp., 309 F.3d 1028 (7th Cir. 2002).

ground). The Certificate attached to Plaintiff's response brief is still deficient under Rule 1042.3(a)(1),¹⁴ however, because Plaintiff has not yet obtained the requisite written statement from a licensed professional.¹⁵ Although Plaintiff has not filed a formal motion for the appointment of a medical expert, it appears from his Certificate that he is hopeful that the Court will provide him with such assistance. The Court, however, lacks authority to appoint a medical expert for Plaintiff at the public's expense. See Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987). Because Plaintiff has failed to fully comply with the requirements of Rule 1042.3, the Medical Defendants' Motion to Dismiss his medical malpractice claim is granted without prejudice.¹⁶

C. Intentional Infliction of Emotional Distress Claim

¹⁴ Plaintiff cannot proceed under Rule 1042.3(a)(2) because his medical malpractice claims against the Medical Defendants are not based solely on the alleged malpractice of "other licensed professionals for whom [any of the Medical Defendants are] responsible." Pa. R. Civ. P. 1042.3(a)(2). Plaintiff cannot proceed under Rule 1042.3(a)(3) because expert testimony is necessary for the prosecution of his medical malpractice claim.

¹⁵ The Certificate also fails to comply with Rule 1042.3(b), which provides that "[a] separate certificate of merit shall be filed as to each licensed professional against whom a claim is asserted." Pa. R. Civ. P. 1042.3(b).

¹⁶ Should Plaintiff independently obtain a medical expert who is willing to supply the written statement required under Rule 1042.3(a)(1), Plaintiff may file a motion for leave to reinstate his medical malpractice claim against the Medical Defendants within thirty (30) days of the date of the Order accompanying this Memorandum. Certificates of merit which fully comply with the requirements of Rule 1042.3(a)(1) and (b) must be attached to any such motion.

The Commonwealth Defendants seek dismissal of Plaintiff's state law claim for intentional infliction of emotional distress on the basis of sovereign immunity. Under Pennsylvania law, "the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign . . . immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity." 1 Pa. Cons. Stat. Ann. § 2310. Because the Pennsylvania General Assembly has waived sovereign immunity for only nine categories of claims which arise out of negligent conduct, see 42 Pa. Cons. Stat. Ann. § 8522, courts have consistently recognized that sovereign immunity applies to intentional torts. See, e.g., Watkins v. Pa. Bd. of Prob. & Parole, Civ. A. No. 02-2881, 2002 WL 32182088, at *8 (E.D. Pa. Nov. 25, 2002) (holding that sovereign immunity barred plaintiff's intentional infliction of emotional distress claim); Frazier v. Southeastern Pa. Trans. Auth., 868 F. Supp. 757, 762 (E.D. Pa. 1994) (same). In this case, there is no dispute that the Commonwealth Defendants are employees of the Commonwealth of Pennsylvania. Furthermore, the allegations against the Commonwealth Defendants exclusively involve acts within the scope of their duties. As the Commonwealth Defendants are entitled to sovereign immunity, their Motion to Dismiss Plaintiff's intentional infliction of emotional distress claim is granted.

Molyneaux argues that Plaintiff's intentional infliction of emotional distress claim should be dismissed as time-barred under Pennsylvania's two-year statute of limitations. See 42 Pa. Cons.

Stat. Ann. § 5524. Molyneaux notes that the conduct that forms the basis for Plaintiff's intentional infliction of emotional distress claim against him took place in April 2000, over three years before Plaintiff commenced the instant action. "While the language of Fed. R. Civ. P. 8(c) indicates that a statute of limitations defense cannot be used in the context of a Rule 12(b)(6) motion to dismiss, an exception is made where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 n.1 (3d Cir. 1994) (citations omitted). As the allegations of the Amended Complaint and the documents attached thereto facially demonstrate that Plaintiff's intentional infliction of emotional distress claim is barred by the two-year limitations period,¹⁷ Molyneaux's Motion to Dismiss is granted in this respect.

The Medical Defendants seek dismissal of Plaintiff's intentional infliction of emotional distress claim for failure to state a claim upon which relief can be granted. To state a claim for intentional infliction of emotional distress, a plaintiff must allege intentional or reckless conduct by the defendants which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as

¹⁷ The pendency of administrative proceedings under the PLRA does not toll the statute of limitations with respect to state law claims. See Johnson v. Rivera, Civ. A. No. 98-3907, 2002 WL 31012161 (N.D. Ill. Sept. 6, 2002) (analyzing analogous Illinois statute).

atrocious, and utterly intolerable in a civilized community." Lane v. Cole, 88 F. Supp. 2d 402, 406 (E.D. Pa. 2000) (citation omitted). The plaintiff must also allege "some physical injury, harm, or illness caused by the defendant's conduct." Corbett v. Morgenstern, 934 F. Supp. 680, 684 (E.D. Pa. 1996) (citations omitted).

The Amended Complaint alleges that, over the course of several years, the Medical Defendants deliberately refused to provide Plaintiff with necessary medical treatment for a brain tumor, and that the Medical Defendants verbally abused him when he sought treatment. Such conduct, if proven, is sufficiently extreme and outrageous to support an intentional infliction of emotional distress claim. See Miller v. Hoffman, Civ. A. No. 97-7987, 1999 WL 415397, at *9 (E.D. Pa. June 22, 1999) (holding that deliberate deprivation of necessary medical care by prison doctor may be sufficiently extreme and outrageous to support intentional infliction of emotional distress claim); see also Williams v. Guzzardi, 875 F.2d 46, 52 (3d Cir. 1989) ("Pennsylvania courts have . . . indicated that they will be more receptive [to intentional infliction of emotional distress claims] where there is a continuing course of conduct.") (citations omitted). Furthermore, Plaintiff's allegations that he has suffered "extreme anxiety and distress" as a result of the Medical Defendants' conduct sufficiently raises an inference of emotional distress. See, e.g., Lane, 88 F. Supp. 2d at 407 (holding that allegations of anxiety and stress were adequate to defeat motion to dismiss). Assuming

the truth of the allegations of the Amended Complaint and viewing them in the light most favorable to Plaintiff, the Court cannot conclude that Plaintiff will be unable to prove any set of facts which entitles to him to relief against the Medical Defendants for intentional infliction of emotional distress. Accordingly, the Medical Defendants' Motion to Dismiss is denied in this respect.

IV. CONCLUSION

For foregoing reasons, the Motions to Dismiss filed by Molyneaux, Dr. Laskey, and the Commonwealth Defendants are granted in their entirety; the Motion to Dismiss filed the Medical Defendants is granted in part and denied in part; and the Motion to Dismiss filed by Dr. Bohinski is denied.¹⁸

An appropriate Order follows.

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- ¹⁸ In sum, the following claims survive the Motions to Dismiss:
1. Plaintiff's Eighth Amendment claim in Count I against Dr. Bohinski, Dr. Stanish, and Kelly Gallagher.
 2. Plaintiff's intentional infliction of emotional distress claim in Count III against Dr. Bohinski, Dr. Stanish, and Kelly Gallagher.

The following claims also remain against the non-moving Defendants:

1. Plaintiff's Eighth Amendment claim in Count I against Joseph V. Smith, Dr. Karl Bernhard, Dr. Carrollo, MCCF Medical Director Conane, and Medical Defendants of FMC-Fort Deven, FDC-Philadelphia, and FIC-Fairton.
2. Plaintiff's medical malpractice claim in Count II against Dr. Karl Bernhard and Medical Defendants of FMC-Fort Deven, FDC-Philadelphia, and FIC-Fairton.
3. Plaintiff's intentional infliction of emotional distress claim in Count III against Joseph V. Smith, Dr. Karl Bernhard, Dr. Carrollo, MCCF Medical Director Conane, and Medical Defendants of FMC-Fort Deven, FDC-Philadelphia, and FIC-Fairton.
4. An unspecified claim against "C/O Briston," who was added as a defendant in this action by separate Order entered this date.

2. The Commonwealth Defendants' Motion to Dismiss (Doc. No. 16) is **GRANTED**, and all claims against the Commonwealth Defendants are **DISMISSED**.
3. Dr. Laskey's Motion to Dismiss (Doc. No. 18) is **GRANTED**, and all claims against Dr. Laskey are **DISMISSED**.
4. Dr. Bohinski's Motion to Dismiss (Doc. No. 19) is **DENIED**.
5. The Medical Defendants' Motion to Dismiss (Doc. No. 41) is **GRANTED IN PART** and **DENIED IN PART** as follows:
 - a. The Medical Defendants' Motion to Dismiss is **GRANTED** with respect to Plaintiff's medical malpractice claim in Count II, and this claim is **DISMISSED WITHOUT PREJUDICE**.¹
 - b. The Medical Defendants' Motion is **DENIED** with respect to Plaintiff's Eighth Amendment claim in Count I and Plaintiff's intentional infliction of emotional distress claim in Count III.

BY THE COURT:

s/ John R. Padova
John R. Padova, J.

¹ Should Plaintiff independently obtain a medical expert who is willing to supply the written statement required under Rule 1042.3(a)(1), Plaintiff may file a motion for leave to reinstate his medical malpractice claim against the Medical Defendants within thirty (30) days of the date of the Order accompanying this Memorandum. Certificates of merit which fully comply with the requirements of Rule 1042.3(a)(1) and (b) must be attached to any such motion.