

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

RICHARD CHAROWSKY	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
DAVID KURTZ	:	NO. 98-5589
Defendant	:	

MEMORANDUM AND ORDER

YOHAN, J. July , 2000

Plaintiff Richard Charowsky, a prisoner at Schuylkill County Prison [“SCP”] in Pottsville, Pennsylvania, has sued defendant David Kurtz, the warden of SCP, for depriving him of his Eighth Amendment right to be free from cruel and unusual punishment and for negligently supervising a corrections officer and a supervisor at SCP. Pending before the court is the defendant’s motion for judgment on the pleadings, which the court converted to a motion for summary judgment pursuant to Federal Rule of Civil Procedure 12(c). Because the court concludes that the statute of limitations bars the plaintiff’s § 1983 claim, the defendant’s motion will be granted with respect to Count II. Because the plaintiff’s sole federal claim is in Count II, the court will not continue to exercise supplemental jurisdiction over the plaintiff’s state law tort claim in Count I and will dismiss that count for lack of jurisdiction.

I. Background

The plaintiff’s amended complaint contains the following allegations. On June 27, 1995, someone covered the inside of an SCP inmate’s cell with human feces. *See* Pl.’s Am. Compl.

(Doc. No. 33 Ex. A) [“Am. Compl.”] ¶ 6. An SCP corrections officer erroneously suspected that the plaintiff was responsible. *See id.* ¶¶ 8, 9. As a result, the corrections officer’s supervisor ordered the plaintiff to clean the cell. *See id.* ¶ 10. The plaintiff was not, however, provided with the appropriate protective clothing and equipment. *See id.* ¶¶ 14, 16-17. Under protest, he cleaned the cell, becoming covered with feces in the process. *See id.* ¶¶ 12, 14. Soon thereafter, the plaintiff developed a body rash. *See id.* ¶ 15. At the time he was ordered to clean the cell, the plaintiff was aware of the possibility that the feces had come from inmates with AIDS, the HIV virus, or hepatitis C. *See id.* ¶ 11. Therefore, on developing the rash, the plaintiff feared that he had contracted a communicable disease. *See id.* ¶ 15.

Less than one month after the cell-cleaning, on July 24, 1995, the plaintiff filed a § 1983 lawsuit against David Wapinsky and Todd Setlock, the supervisor and corrections officer, respectively, responsible for making the plaintiff clean the cell. *See* Def.’s Designation of Add’l Docs. for Consideration in Def.’s Mot. for Summ. J. (Doc. No. 42) [“Def. Docs.”] Ex. A at 4, 6. Although he did not know that he had contracted hepatitis C at the time he filed that suit, the plaintiff sought damages from Wapinsky and Setlock for injuries stemming from the cell-cleaning.¹ *See* Am. Compl. ¶ 18 (alleging that the plaintiff tested positive for hepatitis C in December 1997); Def. Docs. Ex. A at 6 (describing vomiting and an illness that immediately

¹The plaintiff’s suit against Wapinsky and Setlock went to trial before Magistrate Judge Charles B. Smith. *See Charowsky v. Wapinsky*, No. 97-1875, slip op. at 3 (3d Cir. July 14, 1998). At the close of the plaintiff’s case, Magistrate Judge Smith entered a judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 in favor of Wapinsky and Setlock. *See id.* Specifically, he concluded that although Wapinsky and Setlock may have been negligent, their behavior did not rise to the level of deliberate indifference, as it must to constitute an Eighth Amendment violation. *See id.* at 3-4. The Third Circuit affirmed the judgment, and the Supreme Court declined to hear the plaintiff’s appeal. *See Charowsky v. Wapinsky*, 525 U.S. 1074 (1999); *Charowsky v. Wapinsky*, 159 F.3d 1350 (3d Cir. 1998).

followed the cell-cleaning, as well as the body rash that subsequently developed). In December 1997, while he was in the midst of an unsuccessful appeal from a judgment as a matter of law in favor of Wapinsky and Setlock, the plaintiff tested positive for hepatitis C. *See Charowskyslip op.* at 3-6; Am. Compl. ¶ 18.

On September 21, 1998, the plaintiff commenced a pro se civil rights action against defendant David Kurtz. *See* Compl. (Doc. No. 1) at 1. Although the defendant was personally served with the complaint, he initially failed to appear, plead, or otherwise defend this action. *See* Return of Service (Doc. No. 8); Aff. for Entry of Default (Doc. No. 11). Consequently, on April 20, 1999, the Clerk of Court entered a default. Charowsky then filed a motion for entry of a default judgment, which I denied in order to hold a hearing on damages. *See* Mot. for Default J. (Doc. No. 12); Order of June 1, 1999 (Doc. No. 13). Immediately thereafter, the Assistant Solicitor for Schuylkill County filed a motion to set aside the default on behalf of the defendant, claiming that the County Solicitor's Office was not aware of the existence of the suit until it received notice of the upcoming damages trial. *See* Mem. of Law in Supp. of Def.'s Mot. to Set Aside Entry of Default under Fed. R. Civ. P. 55(c) (Doc. No. 15) at 1. Eventually, the court set aside the entry of default. *See* Order of Feb. 1, 2000 (Doc. No. 28). The defendant then filed an answer to the plaintiff's complaint and a motion for judgment on the pleadings, to which the plaintiff responded. *See* Answer to Compl. (Doc. No. 29); Mot. of Def. for J. on the Pleadings (Doc. No. 30); Pl.'s Resp. to Def.'s Mot. for J. on the Pleadings (Doc. No. 31) ["Pl. Resp."]. Roughly three weeks later, the court granted the plaintiff's motion for leave to file an amended complaint and ordered the complaint filed. *See* Order of Apr. 6, 2000 (Doc. No. 36). The defendant filed an answer to the plaintiff's amended complaint, and the parties reinstated by

letter their filings concerning judgment on the pleadings. *See* Answer to Am. Compl. (Doc. No. 38); *see also* Order of Apr. 6, 2000 (Doc. No. 37) (allowing reinstatement of the filings by letter).

II. Legal Standard

Either party to a lawsuit may file a motion for summary judgment, and it will be granted “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 the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the nonmovant bears the burden of persuasion at trial, the moving party may meet its initial burden and shift the burden of production to the nonmoving party “by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.” *Id.* at 325. Thus, summary judgment will be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Id.* at 322.

When a court evaluates a motion for summary judgment, “[t]he evidence of the nonmovant is to be believed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Additionally, “all justifiable inferences are to be drawn in [the nonmovant’s] favor.” *Id.* At the same time, “an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The nonmovant must show more than “[t]he mere

existence of a scintilla of evidence” for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. Discussion

In the amended complaint, the plaintiff asserts two causes of action. In Count I, he asserts the state law tort of negligent supervision. *See* Am. Compl. ¶¶ 22-31. In Count II, he asserts a claim under 42 U.S.C. § 1983 for being deprived of his constitutional rights.² *See id.* ¶¶ 32-37.

The defendant makes three arguments for a judgment in his favor. First, he contends that the doctrine of collateral estoppel bars the plaintiff’s claims. *See* Br. in Supp. of Def.’s Mot. for J. on the Pleadings (Doc. No. 30) [“Def. Mem.”] at 4-5. Second, he asserts that the statute of limitations bars the plaintiff’s claims. *See id.* at 5-6. Third, he claims that he benefits from Pennsylvania’s governmental immunity statute. *See id.* at 6-7. Because I conclude that the statute of limitations bars the plaintiff’s § 1983 claim, I do not reach the defendant’s other arguments.

Claims under 42 U.S.C. § 1983 are subject to the appropriate state’s statute of limitations for personal injury claims. *See Wilson v. Garcia*, 471 U.S. 261, 276 (1985). Thus, in Pennsylvania, a § 1983 claim is subject to a two-year statute of limitations. *See* 42 Pa. Cons.

²Although the plaintiff does not specify which of his constitutional rights were violated, he appears to be seeking relief for a violation of his Eighth Amendment rights. *See* Am. Compl. ¶¶ 34, 36 (referring to the defendant’s alleged “deliberate indifference”).

Stat. §§ 5524(1)-(2), (7). This statute of limitations begins to run “as soon as a potential claimant either is aware, or should be aware, of the existence of and source of an injury.” *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994). The discovery rule operates to delay the running of the statute of limitations if a plaintiff exercising reasonable diligence could not know that an injury occurred. *See Baumgart v. Keene Bldg. Prods. Corp.*, 666 A.2d 238, 241 (Pa. 1995). The discovery rule does not, however, delay the running of the statute of limitations if a plaintiff knows she was injured but does not know the full extent of the injury. *See Home Indem. Co. v. Alexander & Alexander, Inc.*, Civ. A. No. 89-7715, 1990 WL 181467, at *4 (E.D. Pa. Nov. 20, 1990) (stating that applying the discovery rule to delay the running of the statute of limitations until the full extent of the injury is known “would be to bend the discovery rule completely out of its original design”); *Jones v. Philpott*, 713 F. Supp. 844, 845, 847 (W.D. Pa. 1989) (answering “no” to the question “does the discovery rule suspend the running of the statute of limitations if the plaintiff is aware of an injury caused by the defendant’s conduct but is unaware of the full extent of that injury”); *Cardone v. Pathmark Supermarket*, 658 F. Supp. 38, 40 (E.D. Pa. 1987) (recognizing that the statute of limitations is not tolled if a plaintiff has knowledge of an injury but is ignorant of the severity of that injury); *Sterling v. St. Michael’s School for Boys*, 660 A.2d 64, 66 (Pa. Super. Ct. 1995) (““A plaintiff need not know the precise extent of her injuries before the statutory period begins to run.” *Bradley v. Ragheb*, 429 Pa. Super. 616, 633 A.2d 192, 196 (1993).”).

The defendant argues that the latest date on which the statute of limitations for the plaintiff’s § 1983 claim could have begun to run is July 24, 1995, when the plaintiff filed his lawsuit against Wapinsky and Setlock. *See* Def. Mem. at 6. According to the defendant, by that

date, at the latest, the plaintiff was aware “of the existence of and source of [his] injury.” *Oshiver*, 38 F.3d at 1386; *see* Def. Mem. at 6. The plaintiff, however, contends that the discovery rule prevented the statute of limitations from beginning to run for his § 1983 claim until December 1997, when he learned that the cell-cleaning had given him not only a body rash but also hepatitis C. *See* Pl. Resp. at 3.

Although I am not pleased to do so, I agree with the defendant’s argument.³ By July 24, 1995, the date on which the complaint was filed in the lawsuit against Wapinsky and Setlock, the plaintiff was clearly aware that he had suffered an injury in the cell-cleaning. *See* Def. Docs. Ex. A at 4, 6. In December 1997, the plaintiff did nothing more than learn the full extent of that injury. As the cases cited herein demonstrate, the statute of limitations for the plaintiff’s § 1983 claim began running when he learned that he had suffered an injury as a result of being made to clean the cell, not when he learned of his injury’s precise extent. Thus, the statute of limitations for the plaintiff’s § 1983 claim against the defendant had begun to run by July 24, 1995, and had run by July 23, 1997. Because the plaintiff did not assert this claim until September 21, 1998, it is barred by the statute of limitations.

For the foregoing reasons, the court will grant the defendant’s motion for summary judgment with respect to Count II.

³In affirming the judgment as a matter of law in favor of Wapinsky and Setlock, the Third Circuit stated: “We do not condone negligence by prison officials nor did the magistrate judge. However, we fail to see any basis to overturn his judgment.” *Charowskyslip* op. at 5. The court feels similarly constrained by the applicable law in the instant matter.

IV. Conclusion

Because the plaintiff's § 1983 claim is time-barred, the court will grant the defendant's motion for summary judgment with respect to Count II. Because Count II contains the only federal claim asserted by the plaintiff, the court will not continue to exercise supplemental jurisdiction over the plaintiff's state law tort claim in Count I and will dismiss that count for lack of jurisdiction. *See* 28 U.S.C. § 1367(c)(3); *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530, 1534-35 (3d Cir. 1992). An appropriate order follows.

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ORDER

YOHN, J.

AND NOW this day of July, 2000, upon consideration of the defendant's motion for summary judgment (Doc. No. 30), the plaintiff's response thereto (Doc. No. 31), and the parties' supplemental documents (Doc. Nos. 41, 42), IT IS HEREBY ORDERED that the defendant's motion for summary judgment is GRANTED with respect to Count II. Judgment is entered in favor of the defendant and against the plaintiff with respect to Count II. IT IS FURTHER ORDERED that Count I is DISMISSED pursuant to 28 U.S.C. § 1367(c)(3) WITHOUT PREJUDICE to the plaintiff's right to assert the claim therein in state court.

The clerk shall mark the case closed for statistical purposes.

William H. Yohn, Jr.