

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

<b>EDWARD F. GOSNER, SR.</b>	:	<b>CIVIL ACTION</b>
	:	
	:	
<b>v.</b>	:	<b>No. 05-1007</b>
	:	
	:	
<b>ABINGTON POLICE DEPT., ET AL.</b>	:	

**MEMORANDUM and ORDER**

**Savage, J.**

**February 1, 2006**

In this § 1983 action, the plaintiff alleges that a hospital nurse, a private doctor and several unnamed prison medical personnel subjected him to cruel and unusual punishment in violation of the Eighth Amendment.<sup>1</sup> His complaints consist of three separate allegations. First, he claims that a hospital nurse did not follow proper procedures when she drew his blood pursuant to a search warrant. Second, he contends that prison staff failed to provide him necessary medical attention when he was returned to prison after having his blood drawn. Finally, he asserts that the county prison was negligent in failing to diagnose his hepatitis, which was eventually diagnosed 19 months later at a state prison.

The various defendants, in separate motions, have moved to dismiss the complaint. They argue that the plaintiff has failed to state a claim under § 1983.

This action was commenced on March 3, 2005, when the plaintiff sought leave to

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<sup>1</sup> The plaintiff, despite several Orders requesting that he do so, never stated the basis for federal jurisdiction. However, construing the *pro se* complaint liberally and giving the plaintiff the benefit of all doubts, I shall assume that he intended to state a cause of action under the Eighth Amendment for cruel and unusual punishment.

proceed *in forma pauperis*. Because the plaintiff, a state prisoner at SCI-Albion, had not paid the filing fee nor provided security for the fee as required by the Prison Litigation Reform Act, his request was denied without prejudice and the case was provisionally closed.<sup>2</sup> His renewed *in forma pauperis* motion was granted and his complaint formally filed on April 18, 2005.

After reviewing the complaint and the motions, I ordered the plaintiff to file a more definite statement of his claim setting forth the basis for federal jurisdiction and the relief requested.<sup>3</sup> The document that the plaintiff submitted was not responsive, and he was again given an opportunity to file a more definite statement of his claim, in numbered paragraph form, which was to include the basis for federal jurisdiction and the relief requested.<sup>4</sup> Ignoring those directions, the plaintiff submitted a letter. Because the plaintiff is acting *pro se*, I accepted his narrative as an “amended complaint.” The defendants filed supplemental briefs addressing the issues raised in the amended complaint.<sup>5</sup> The plaintiff submitted his response to the motions to dismiss on January 24, 2006.<sup>6</sup>

### **Standard of Review**

In examining motions to dismiss for failure to state a claim under Federal Rule of

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<sup>2</sup> *Memorandum and Order*, Civ. No. 05-1007 (Mar. 16, 2005) (Document No. 2).

<sup>3</sup> *Order*, Civ. No. 05-1007 (Jul. 29, 2005) (Document No. 22).

<sup>4</sup> *Order*, Civ. No. 05-1007 (Sept. 28, 2005) (Document No. 24).

<sup>5</sup> *Order*, Civ. No. 05-1007 (Oct. 28, 2005) (Document No. 25).

<sup>6</sup> In his response, the plaintiff, for the first time, raises new allegations that do not relate to the Eighth Amendment deliberate indifference claims. The plaintiff contests that in a previous rape conviction, DNA evidence was not properly used and that items were removed from his possession when he was transferred to another prison. *Pl. Resp.* at 5-6 (Document No. 30). Because these allegations do not relate to the deliberate indifference claim, they shall not be considered.

Civil Procedure 12(b)(6), we accept all of the well-pleaded allegations in the complaint as true. *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 77 (3d Cir. 2003). Dismissal under 12(b)(6) can be granted only if the plaintiff cannot obtain relief under any set of facts. *Leamer v. Fauver*, 288 F.3d 532, 547 (3d Cir. 2002). Additionally, the plaintiff's *pro se* pleadings must be considered deferentially, affording him the benefit of the doubt where one exists. *Royce v. Hahn*, 151 F.3d 116, 118 (3d Cir. 1998). With these standards in mind, I shall accept as true the facts as they appear in the plaintiff's amended complaint and draw all possible inferences from these facts in his favor.<sup>7</sup>

### **Facts**

According to the plaintiff, he was arrested by Abington Township police officers and taken for questioning in the early morning hours of February 15, 2003. *Am. Compl.* at 2.<sup>8</sup> In the afternoon of February 16, 2003, he was transferred from the police station to the Montgomery County Correction Facility ("MCCF"). *Am. Compl.* at 3.

On March 4, 2003, the police escorted the plaintiff to Abington Hospital to execute a warrant for samples of his blood.<sup>9</sup> *Am. Compl.* at 3. While blood was being drawn by the defendant nurse, the plaintiff complained of burning pain. *Am. Compl.* at 3. The next thing he recalls after the blood was drawn is waking up on the floor in pain. *Am. Compl.* at 3-4.

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<sup>7</sup> In his original complaint, the plaintiff alleges that he exhausted all administrative remedies. Exhaustion under the Prison Litigation Reform Act, U.S.C. § 1997e, is an affirmative defense, which was not raised by any of the defendants in their motions to dismiss. Therefore, whether the plaintiff properly exhausted under the PLRA is not an issue now at this time.

<sup>8</sup> Because the plaintiff, contrary to Court orders, never submitted his complaint in numbered paragraph form, all citations to the document docketed as the amended complaint (Document No. 26) refer to page numbers.

<sup>9</sup> The plaintiff does not challenge the validity of the search warrant. Thus, there is no allegation of any wrongdoing on the part of defendant Abington Police Department.

He alleges that he suffered cuts, bruises, a chipped tooth and a head injury as a result of collapsing on the floor. *Am. Compl.* at 4-5. The defendant doctor examined him and explained that he had passed out from seeing the needle and the vials of blood. *Am. Compl.* at 4. When the plaintiff was returned to MCCF, he complained to the guards and nurses on duty of his pain and was prescribed Motrin. *Am. Compl.* at 5. He alleges that had he been fully examined by prison medical staff, they would have found that he was suffering from hepatitis, which was diagnosed 19 months later by officials at S.C.I. Albion. *Am. Compl.* at 5.

### **Eighth Amendment**

Under the Eighth Amendment, only claims of unnecessary and wanton infliction of pain or deliberate indifference to a prisoner's serious medical needs rise to the level of a constitutional violation. *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004). Allegations of medical malpractice are not sufficient to establish a constitutional violation. *Id.* Deliberate indifference to serious medical needs is met when (1) a doctor intentionally inflicts pain on a prisoner; (2) a prison authority's denial of reasonable requests for medical treatment exposes the inmate to undue suffering or the threat of tangible residual injury; or, (3) authorities intentionally refuse to provide care even though they are aware of the need for such care. *Id.* A constitutional violation under the Eighth Amendment not only requires deliberate indifference on the part of prison officials but also a showing that the prisoner's medical needs are serious. *Id.* at 235-36 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)).

Not all of the defendants named in the original complaint appear in the narrative amended complaint. Nevertheless, in the event the *pro se* plaintiff may have inadvertently omitted them, I shall analyze the potential liability of the defendants named in the original

complaint but not in the amended complaint to determine whether their conduct, as alleged by the plaintiff, amounts to a constitutional violation under the Eighth Amendment. Those defendants named in the original complaint whose acts or omissions are not described in either the original complaint or the amended complaint must be dismissed.<sup>10</sup>

*The Hospital and The Hospital Nurse*

The plaintiff alleges that Nurse Murphy failed to follow hospital procedures when she drew the plaintiff's blood. There are no allegations that either Abington Hospital or Nurse Murphy are state actors capable of acting under color of state law. Nevertheless, even if they were, the plaintiff fails to allege a cause of action for deliberate indifference against either one. Viewing the allegations in the light most favorable to the plaintiff, Nurse Murphy was negligent in drawing blood and caused the plaintiff discomfort and pain during the process. The plaintiff does not allege that Nurse Murphy intentionally tried to harm him, nor that she was aware that he would have an adverse reaction. In fact, the plaintiff concedes that Nurse Murphy removed the needle when the plaintiff complained of a burning sensation. *Am. Compl.* at 3.

He has not alleged that any other defendant intentionally withheld medical treatment or maliciously inflicted pain upon the defendant. Giving the plaintiff the benefit of the doubt, he states a colorable claim for medical malpractice against Abington Hospital. However, though cognizable as state law claims, allegations of medical malpractice are insufficient to establish a constitutional violation for § 1983 purposes.

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<sup>10</sup> Although named in the original complaint, defendants Nikki Holler and A.J. Ammaturo are not mentioned in the amended complaint and there are no "allegations" of misconduct against Holler and Ammaturo in the original complaint.

### The Hospital Doctor

Although the plaintiff names Dr. Gary Penner, M.D., as a defendant, the only allegation relating to the doctor is that he examined him after he fainted. There is no averment that the doctor failed to treat him adequately. Because he has not alleged that Dr. Penner committed any wrongdoing nor that he was a state actor, the plaintiff has failed to state a cause of action under the Eighth Amendment against the doctor.

### Montgomery County Correctional Facility<sup>11</sup>

According to the plaintiff, when he was returned to MCCF after the hospital incident, he was repeatedly denied treatment for a cut lip, chest congestion, a sore nose, a bruised right knee, a chipped tooth and problems urinating. After the plaintiff was examined by the on-site nurse, he was given a prescription for Motrin.

The allegations, while tenuous, make out a *prima facie* claim of deliberate indifference by the medical staff at MCCF. The plaintiff alleges that the medical staff ignored his requests for treatment for twelve days while he suffered during that time. *Am. Compl.* at 5.

Accepting the plaintiff's allegations as true, the medical staff denied his reasonable requests for medical treatment despite his need for medical attention, thus exposing him to undue suffering and the threat of tangible residual injury. *Spruill*, 372 F.3d at 236. Because there are sufficient allegations to make out a claim of deliberate indifference against MCCF, its motion to dismiss must be denied.

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<sup>11</sup> In its motion, MCCF contends that under FED. R. CIV. P. 17(b), it is not a proper party because it is only a department of Montgomery County. However, because the plaintiff is *pro se*, I am obligated to construe the complaint and amended complaint liberally. Therefore, although the plaintiff named MCCF as a defendant, I shall assume he intended to name Montgomery County as the proper defendant and the caption shall be amended to reflect this substitution.

The final claim is against MCCF and Correctional Care, Inc., for failure to diagnose the plaintiff's hepatitis. *Am. Compl.* at 5. The plaintiff asserts that he learned about his hepatitis at S.C.I. Albion, 19 months after entering the prison system. There are no allegations concerning when the plaintiff contracted hepatitis or whether he had the condition prior to his incarceration at MCCF.

Nowhere does the plaintiff allege that any of the defendants knew or should have known that he had hepatitis, assuming it was existent at that time, and refused to treat him. Nor does he allege he unduly suffered as a result of the delay in diagnosis. Viewing the hepatitis allegation in the light most favorable to the plaintiff, MCCF and Correctional Medical Care were negligent in failing to diagnose the condition which he had at the time he was incarcerated at MCCF. As noted earlier, mere allegations of medical malpractice are insufficient to establish a constitutional violation. Therefore, this failure to diagnose claim is not actionable.<sup>12</sup>

### **Conclusion**

The plaintiff has failed to state a federal constitutional claim for deliberate indifference against the defendants, except the Montgomery County Correctional Facility. He has adequately plead a *prima facie* claim of deliberate indifference against Montgomery County, which I shall substitute as the proper defendant in place of the Montgomery County Correctional Facility. Therefore, the complaint against all defendants, except Montgomery County, must be dismissed.

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<sup>12</sup> Although the plaintiff has pled a claim for deliberate indifference against MCCF for its failure to treat him in a timely manner, to the extent the plaintiff claims that MCCF was deliberately indifferent for failing to diagnose his hepatitis, MCCF's motion to dismiss is granted.

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**ORDER**

**AND NOW**, this 1st day of February, 2006, upon consideration of the Motion to Dismiss of Defendants, Abington Memorial Hospital, Cathy Rosato Murphy, R.N., and Gary Penner, M.D., Pursuant to F.R.C.P. 12(b)(6) (Document No. 16), the Defendants, Abington Township Police Department and Detective Anthony Ammaturo's Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Document No. 18), the Defendants Nikki Holler and Correctional Medical Care Inc.'s (Incorrectly Designated as Correctional Care Inc.) Motion to Dismiss (Document No. 19), the Defendant Montgomery County Correctional Facility's Motion to Dismiss Plaintiff's Complaint (Document No. 20), the supplemental motions submitted by the defendants, and the plaintiff's responses, it is **ORDERED** as follows:

1. The Motion to Dismiss of Defendants Abington Memorial Hospital, Cathy Rosato Murphy, R.N., and Gary Penner, M.D., Pursuant to F.R.C.P. 12(b)(6) is **GRANTED**, and Abington Memorial Hospital, Cathy Rosato Murphy, R.N., and Gary Penner, M.D. are **DISMISSED** as defendants;

2. Abington Township Police Department and Detective Anthony Ammaturo's Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) is **GRANTED**, and Abington Township Police Department and Detective Anthony

Ammaturo are **DISMISSED** as defendants;

3. Nikki Holler and Correctional Medical Care Inc.'s Motion to Dismiss is **GRANTED**, and Nikki Holler and Correctional Medical Inc. are **DISMISSED** as defendants;

4. Montgomery County Correctional Facility's Motion to Dismiss is **GRANTED IN PART and DENIED IN PART**. The motion is **GRANTED** with respect to the allegations that the defendant failed to diagnose the plaintiff's hepatitis. In all other respects, the motion is **DENIED**; and,

5. Montgomery County is substituted for the Montgomery County Correctional Facility as a defendant.

/s/ Timothy J. Savage  
TIMOTHY J. SAVAGE, J.