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

GEOFFREY WILLARD ATWELL	:	CIVIL ACTION
V.	:	NO. 1:CV-03-1728
KELLY GALLAGHER, P.A., et al.	:	

**BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS,
STANLEY STANISH, M.D. AND STANLEY BOHINSKI, D.O.**

I. PROCEDURAL HISTORY

Plaintiff, Geoffrey Willard Atwell ("Atwell") commenced this action with the filing of a Complaint, on or about September 30, 2003. (Docket No. 1)

On January 20, 2004, Atwell filed an Amended Complaint (Docket No. 18), a true and correct copy of which is attached hereto as Ex. "A".

On March 7, 2006, moving defendant, Bohinski, filed his Answer with Affirmative Defenses to Atwell's Amended Complaint. (Docket No. 102)[1]

On August 26, 2006, pursuant to leave granted by the Court, the discovery deposition of Plaintiff, Atwell, was taken. (A true and correct copy of the transcript of the deposition of Plaintiff, Atwell, is attached hereto as Ex. "B")

In a Report and Recommendation dated September 28, 2006, the Court recommended that Stanish's motion to dismiss be granted as to Atwell's conspiracy claim, but denied as to the claim of deliberate indifference. (Docket No. 169)

On November 2, 2006, over Atwell's objections, the Court adopted the Report and Recommendation, and dismissed Atwell's conspiracy claim. (Docket No. 171)

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[1] Moving Defendant, Bohinski, is represented in this matter by counsel from two firms: Alan S. Gold, Esquire, of Gold & Robins, P.C.; and Anthony J. Piazza, Esquire, of Murphy, Piazza & Genello, who are cooperating in the defense of this matter. This Motion for Summary Judgment, and this brief in support, are submitted on behalf of Dr. Bohinski by both counsel, and on behalf of moving defendant, Dr. Stanish, who is represented solely by Gold & Robins.

On November 10, 2006, defendant, Stanish, filed his Answer with Affirmative Defenses to Atwell's Amended Complaint. (Docket No. 172)

In his Amended Complaint, Plaintiff, Atwell, asserts a variety of, as this Court correctly noted earlier in this matter, largely unrelated claims among numerous unrelated defendants. One area of complaint by the Plaintiff relates to his belief that he was "illegally" held in prison beyond the date upon which he believes he should have been released. This assertion is made as to all defendants, including the moving *medical* defendants, Drs. Bohinski and Stanish. (See Ex. "A", generally)

Atwell also alleges, in extremely vague terms, that moving defendants acted with deliberate in difference by failing to treat certain medical conditions. (See Ex. "A", generally)

With respect to moving defendant, Stanley Bohinski, D.O., the entirety of Plaintiff claims against him appear in paragraph PP of his Amended Complaint:

> Stanley Bohinski, M.D. . . . who has since November, 2002, acted in deliberate indifference responding to Plaintiff's serious medical needs and condition with a reckless disregard and failure to prescribe a medical diet for Plaintiff's medical conditions, failed to treat Plaintiff's skin rash and defective submandibular gland and failed to regularly monitor Plaintiff's hypertension and diabetes. Reference if grievance no. 50246 for which this cruel and unusual punishment has occurred after completion of Plaintiff's judicially imposed sentence on/or about May 22, 2002.

Ex. "A", at ¶PP; Ex. "B", at 54-55.

Atwell's sole claims as against moving defendant, Stanley Stanish, M.D., which appear in paragraph QQ of the Amended Complaint, are almost identical to those as to Dr. Bohinski:

> Stan Stanish, . . . supervisory physician for SCI facilities Eastern Pennsylvania area including SCI Dallas . . . who was advised by Plaintiff during December 2002 medical check-up that Plaintiff's judicially imposed sentencing was completed on/or about May 22, 2002, but Plaintiff's serious medical conditions are not monitored for which Plaintiff avers decrease of life expectancy, that Plaintiff defective submandibular gland and skin rash were not treated by acting with deliberate indifference to a reckless disregard to Plaintiff's life threatening serious medical indications, which is a conspiracy to murder Plaintiff and , defendant also fails to provide medical diet pursuant to grievance no. 50246.

Ex. "A", at ¶QQ; Ex. "B", at 53.

No further allegations as to either Dr. Bohinski or Dr. Stanish are contained in Atwell's Amended Complaint.

II. STATEMENT OF FACTS

See moving defendants' Statement of Uncontested Facts (referred to herein as "SUF"), filed contemporaneously with this Brief, which is incorporated by reference as if set forth fully herein at length.

III. STATEMENT OF THE QUESTIONS PRESENTED

1. Has Plaintiff, Atwell, failed to demonstrate (1) that the medical care and treatment rendered by moving defendants, Drs. Bohinski and Stanish, constituted deliberate indifference to a serious medical need, and (2) that moving defendants had subjective knowledge that their actions presented a substantial risk of serious harm to Atwell, and therefore failed to demonstrate that moving defendants acted with deliberate indifference, as required by 42 U.S.C. §1983, and should his claims against Drs. Bohinski and Stanish therefore be dismissed with prejudice? **Suggested Answer: Yes**.

2. Has Plaintiff, Atwell, at best, shown the existence of a disagreement between himself and moving defendants, Drs. Bohinski and Stanish, as to the choice of course of medical treatment, and has he therefore failed as a matter of law to establish any claim pursuant to 42 U.S.C. §1983, and should his claims against Drs. Bohinski and Stanish therefore be dismissed with prejudice? **Suggested Answer: Yes**.

3. Has, Plaintiff, Atwell, failed to exhaust his available administrative remedies, pursuant to Pennsylvania Department of Corrections policy, DC-ADM804, as required pursuant to the Prison Litigation Reform Act, 42 U.S.C. §1997e(a), and should his claims against Drs. Bohinski and Stanish therefore be dismissed with prejudice? **Suggested Answer: Yes**.

IV. ARGUMENT

A. STANDARD ON SUMMARY JUDGMENT

In 1986 the Supreme Court of the United States radically changed the standard for summary judgment and in effect issued a directive to district courts to be more assertive in using this procedural tool to eliminate cases prior to trial. As the Supreme Court indicated in Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) once the party seeking summary judgment has pointed out to the court the absence of a fact issue:

> ...its opponent must do more than simply show that there is a metaphysical doubt as to the material facts...In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial'...where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'. 475 U.S. at 586-87.

Summary judgment must be granted unless the evidence construed in favor of the non-moving party is sufficient for a reasonable jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 243, 249-50 (1986). Granting summary judgment is appropriate 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." Celotex Corp. v. Catrett, 106 S. Ct. at 2553.

The United States Court of Appeals for the Third Circuit in Williams v. Borough of West Chester, Pa., 891 F.2d 458 (3d Cir. 1989) recognized this drastic change in the standard for summary judgment when it stated:

> Since the Supreme Court decided its summary judgment trilogy, appellate courts have increasingly been called upon to engage in difficult line-drawing exercises to determine whether a non-moving party has adduced sufficient evidence to defeat a motion for summary judgment. (Id. at 459)

The Court in that case was faced with a situation where the plaintiff had established a dispute as to a genuine issue of material fact. The Court of Appeals upheld the district court's granting of summary judgment for the defendants. The Court stated that although a dispute had been established plaintiff had failed to show that he could produce sufficient evidence to support

a jury verdict in his favor. In that case the plaintiff claimed that the decedent had committed suicide while in the custody of the West Chester police. The decedent had previously been in the custody of the West Chester police on prior occasions. A police sergeant of the West Chester police testified at his deposition that the decedent's suicidal tendencies were widely known at the West Chester police department. The specific defendants who were charged with not taking appropriate precautions to prevent decedent's suicide denied knowing of the tendencies. No direct evidence was established that they did know of his suicidal tendencies. The defendant officers had served on a squad that had recorded the bizarre behavior of the decedent. The Court indicated that the question was whether given the propensity of human beings to talk about bizarre behavior, a reasonable jury could find that the defendant officers knew about decedent's suicidal tendencies and whether the jury could find that they acted with deliberate indifference to the decedent's psychological condition by not following the West Chester's police's normal policy regarding belt removal.

The United States Court of Appeals for the Third Circuit held that although the case was extremely close it had to conclude that no reasonable jury could so find. The court indicated that circumstantial evidence could not support the plaintiff's case concerning a constitutional violation. The court concluded:

> Although the line we draw today is, as I have said, not easy to place, the line must be drawn somewhere, and somewhere that adequately protects the salutary policies underlying Rule 56. Of course the right to present one's claims to a jury provides competing, no less important policies to be considered, but the upshot of the Supreme Court's summary judgment trilogy is the former must not be sacrificed entirely to the latter. The old scintilla rule, although it would make cases like this one far easier to decide, did just that. I concede, as I must, that plaintiffs have adduced some circumstantial evidence tending to show deliberate indifference. However, because the line we must draw depends entirely on context and differences in degree, 'some evidence is not necessarily enough to survive summary judgment.

Id. at 891 F.2d at 466 (Emphasis added).

Plaintiff, Atwell, has failed to meet this burden. He has failed to submit evidence sufficient to support a jury verdict in his favor as to his claims against moving defendants,

Stanley Bohinski, D.O. and Stanley Stanish, M.D., and for the reasons discussed following, his claims as against moving defendants should be dismissed with prejudice.

B. PLAINTIFF, ATWELL, HAS FAILED TO DEMONSTRATE THAT MOVING DEFENDANTS, DRS. BOHINSKI AND STANISH, ACTED WITH DELIBERATE INDIFFERENCE TO A SERIOUS MEDICAL NEED, AND WITH THE SUBJECTIVE KNOWLEDGE THAT THEIR ACTIONS PRESENTED A SUBSTANTIAL RISK OF HARM, PURSUANT TO 42 U.S.C. §1983, AND HIS CLAIMS AGAINST MOVING DEFENDANTS SHOULD THEREFORE BE DISMISSED WITH PREJUDICE.

To defeat moving defendants', Drs. Bohinski and Stanish, Motion for Summary Judgment, Atwell must show that he has sufficient evidence to support a jury verdict in his favor on both the objective and subjective prongs of the deliberate indifference standard. That is, Atwell must be able to demonstrate both that the actions or omissions of Bohinski and Stanish in responding to his medical conditions were objectively deliberately indifference to a serious medical need, and that they had actual knowledge that their alleged actions or omissions presented a substantial risk of harm to Atwell. Atwell must make this showing in order to establish deliberate indifference to a serious medical need. The evidence in this matter, demonstrates that Atwell has failed to do so.

The United States Supreme Court in Estelle v. Gamble, 429 U.S. 97 (1976) has set forth the elements of a cause of action brought by a prisoner pursuant to 42 U.S.C. §1983 raising allegations of the infliction of cruel and unusual punishment based on medical care. In upholding summary judgment in favor of the defendant/doctor in that case the Supreme Court stated:

> It suffices to note that the primary concern of the drafters was to prescribe 'tortures' and other 'barbarous methods of punishment'... it is safe to affirm that punishments of tortures...and all others in the same line of unnecessary cruelty, are forbidden by that amendment...We therefore conclude that deliberate indifference to the serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'. (citations omitted.)

Id. at 102-104.

Examples of the "unnecessary and wanton infliction of pain", which constitute deliberate

indifference provided by the Supreme Court consists of the following:

> ...doctors choosing the easier and less efficacious treatment of throwing away the prisoner's ear and stitching the stump may be attributable to deliberate indifference... rather than an exercise of professional judgment...injection of penicillin with knowledge that prisoner was allergic, and refusal of doctor to treat allergic reaction ...prison physician refuses to administer the prescribed pain killer and renders leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon. (citations omitted.)

Id. at 104 f.n. 10.

In Estelle v. Gamble, supra, the United States Supreme Court rejected a Constitutional claim based on medical malpractice, stating:

> Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute an 'unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind'. Thus 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. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment. Id. at 106.

The United States Supreme Court has also defined the deliberate indifferent standard in its opinion in Farmer v. Brennan, supra, 114 S.Ct. 1970 (1994). According to the Supreme Court, deliberate indifference now requires a showing that prison medical staff were "subjectively" aware of a substantial risk of harm to the prisoner. Justice Souter, writing for the Court, stated:

> We reject [the] invitation to adopt an objective test for deliberate indifference. We hold...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 be both aware of facts from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw the inference. ... [A]n official's failure to alleviate a significant risk that he should have perceived but did not...cannot under our cases be condemned as the infliction of punishment.

Id. at 114 S.Ct. at 1979. (Emphasis added).

Thus, under Farmer, supra, 114 S.Ct. at 1979, Atwell must show that Drs. Bohinski and Stanish knew that their alleged actions would cause serious harm to him.

An examination of the record in this matter establishes that Atwell has failed to produce sufficient evidence to support a jury verdict as to both the objective and subjective prongs of deliberate indifference.

As an objective matter, the evidence in this matter fails to support the conclusion that Drs. Bohinski and Stanish acted with deliberate indifference. The medical records pertaining to the time period at issue in this matter amply demonstrate that Atwell received medical care and treatment on a continuous and consistent basis, for his chronic diabetes and hypertension conditions. (See Exs. "C" and "D", throughout; SUF at ¶¶27-28, 30-31, 33, 59, 67, 69, 72-76, 78) The records demonstrate that Atwell's blood pressure and glucose levels were extensively and regularly monitored throughout his stay at SCI-Dallas. (See glucose and blood pressure monitoring sheets, attached as Ex. "I"). Throughout the relevant time period, Atwell's medical records amply demonstrate that Atwell received medication for these conditions - Glucotrol, Capoten, Vasotec. (SUF, at ¶¶28, 31, 44, 57, 59, 62, 64, 66, 69, 71, 73, 78; Ex. "D", throughout) In addition, throughout his time at SCI-Dallas, Atwell was provided with the medication Allopurinol, for treatment of his gout. (See SUF, at ¶¶31, 44, 62, 64, 69, 71, 73, 77-78; Ex. "D", throughout)

Likewise, the record in this matter is replete with evidence establishing that Atwell was provided with medical care and treatment throughout his stay at SCI-Dallas for his "defective submandibular gland". Atwell asserts that defendants were deliberately indifferent because they failed to have the gland removed. The record demonstrates, however, that every occurrence of Atwell's Sialadenitis was dealt with, treated medically, and resolved.

Atwell himself admitted in his deposition testimony that his submandibular gland "flared up and swelled up" on two occasions since his arrival at SCI-Dallas, and that on both occasions he was treated with medication. (SUF, at ¶20)

On October 22, 2001, Atwell complained of a "flare up of submandibular gland

swelling," at which time Dr. Bohinski placed him on a 14-day course of Erythromycin. (SUF, at ¶34) On November 2, 2001, his symptoms were had "improved." (SUF, at ¶38)

Atwell was seen in consultation with an ENT physician, Dr. Stec on November 27, 2001, following the second occurrence of submandibular gland swelling, at which time a CT scan was ordered, as well as a 10-day course of Augmentin. (SUF, at ¶39, 41) Results of the CT scan performed December 13, 2001 showed "no evidence for mass" and "no significant inflammatory change" around his submandibular gland. (SUF, at ¶42)

On January 7, 2002, Atwell discussed with P.A. Wisniewski and Dr. Bohinski his desire to have the gland removed, at which time he was told that a further consultation at that time was not indicated as the inflammation/infection of the submandibular gland had resolved, and because the "mass" seen previously was gone. (SUF, at ¶47) A few days later, Dr. Bohinski confirmed these conclusions with Dr. Stec, and noted that because Atwell's condition at that time was asymptomatic, and the CT scan negative, there was no indication for surgery to be scheduled at that time. (SUF, at ¶48)

In his evaluative report issued January 12, 2002, Dr. Stec noted that surgical intervention for Atwell's chronic Sialadenitis warranted consideration, and that Atwell "will be given the option for surgical intervention and excisional biopsy of the L-submandibular gland as an alternative to continued medical therapy." (SUF, at ¶49) Atwell, however, had no further bouts of Sialadenitis during the remainder of his incarceration at SCI-Dallas, and was released from prison on May 22, 2004.

That Atwell was provided at all times with treatment for his submandibular gland Sialadenitis is without dispute: Atwell, however, disagrees with the course of treatment. Atwell preferred that the gland be removed immediately upon having his first "flare-up" at SCI-Dallas. Moving defendants exercised their medical judgment and provided Atwell with medication in treatment of the "flare-ups," ordered diagnostic testing, and referred him to an ENT, Dr. Stec, who *likewise* ordered medication in treatment of his condition. And while Dr. Stec later noted in his January, 2002, report that he considered offering Atwell the option of surgical excision of the

gland "as an alternative" to further medical therapy, Atwell had no further occurrence of the condition which warranted treatment during the remainder of his time at SCI-Dallas.

Atwell has also claimed that moving defendants were deliberately indifference to his various medical conditions by failing to provide him with a "proper medical diet." This assertion lacks any factual support whatsoever. The record amply demonstrates that at all times, Atwell's dietary needs were addressed, and at most times, a diabetic diet was ordered and provided for him. On October 12, 2001, when Atwell was temporarily transferred to Adams County prison, his transfer sheet noted that he was on a 2500Kcal ADA (American Diabetes Association) diet. (SUF, at ¶31) On October 29, 2001, Atwell was placed on a full liquid diet for 3 days, because of a sore throat condition, and on November 2, 2001, he was returned to his previous diabetic diet, of 2500Kcal, with no expiration date. (SUF, at ¶¶36-38)

On April 30, 2002, Dr. Bohinski ordered that Atwell be provided with skim milk in his diabetic diet. (SUF, at ¶53) When temporarily transferred again to Adams County, Atwell's 2500Kcal diabetic diet was again noted on the transfer sheet (SUF, at ¶57), and it is again noted on a July 2, 2002, transfer sheet. (SUF, at ¶62)

Finally, Atwell also seems to claim that he was denied treatment for a skin rash. Again, the records in this matter belie Atwell's claim, and amply demonstrate that he received treatment for his "rash." On October 4, 2001, Atwell was first treated for "dermatitis," for which he was prescribed Hydrocortisone 1% ointment. (SUF, at ¶29) The hydrocortisone was reordered on November 2, 2001; January 7, 2002, May 13, 2002. (SUF, at ¶¶38, 46, 54-55)
Atwell was also provided with moisturizing lotion for his dermatitis, on July 17, 2002 (SUF, at ¶58), and A&D Ointment on June 21, 2002. (SUF, at ¶60) Hydrocortisone was again ordered on July 28, 2003 (SUF, at ¶70) On March 1, 2004, Atwell was prescribed Nystatin/Triamcinolone cream for treatment of his dermatitis. (SUF, at ¶79)

It is clear from the record in this matter that Atwell has received medical care and treatment throughout his stay at SCI-Dallas, for each of the medical conditions about which he bases his complaint. His diabetes was treated. His hypertension was treated. His gout was

treated. His submandibular swelling (Sialadinitis) was treated. His dermatitis was treated. He was provided throughout with a diabetic diet. Whether and to what extend Atwell *agrees or disagrees* with the course of treatment provided to him is irrelevant. 42 U.S.C. §1983 does not require that an inmate *agree* with the treatment being rendered. Only that medical personnel not act with deliberate indifference in treating an inmate's medical conditions. In Mr. Atwell's case, there can be no question but that he received regular medical care and treatment for his various medical conditions. The undisputable fact that he was provided this treatment requires the dismissal of his claims as against Drs. Bohinski and Stanish.

Atwell challenges solely the *appropriateness* of the care he received with regard to various medical conditions - not *whether* he was provided with medical care and treatment. It is clear and undisputable that Atwell, throughout his stay at SCI-Dallas, received regular and continuous treated for each of his conditions. He merely disagrees with the course of treatment provided.

As such, Plaintiff, Atwell, has failed to state a cause of action based upon Eighth Amendment deliberate indifference, under 42 U.S.C. §1983, and his Amended Complaint against Drs. Bohinski and Stanish should be dismissed with prejudice.

C. AT BEST, ATWELL HAS ALLEGED OR SHOWN THE EXISTENCE OF A DISAGREEMENT BETWEEN HIMSELF AND DRS. BOHINSKI AND STANISH AS TO THE CHOICE OR COURSE OF MEDICAL TREATMENT, WHICH FAILS TO ESTABLISH ANY CLAIM PURSUANT TO 42 U.S.C. §1983, AND ACCORDINGLY HIS CLAIMS AS AGAINST MOVING DEFENDANTS SHOULD BE DISMISSED WITH PREJUDICE

At best, Atwell has alleged the existence of a disagreement, between himself and moving defendants, Drs. Bohinski and Stanish, as to the course of his medical treatment. Such a disagreement as to the course or selection of medical treatment, never suffices to establish a claim of deliberate indifference under 42 U.S.C. §1983. At best, it bespeaks a claim of medical negligence which, likewise, does not support a claim under §1983.

The Supreme Court of the United States had expressly held that negligent conduct never

supports a cause of action based on 42 U.S.C. §1983. Daniels v. Williams, 474 U.S. 327 (1986). Complaints as to the quality or appropriateness of the medical care never support a claim of an Eighth Amendment violation. Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987) cert. den., 486 U.S. 106 (1988). In Holly v. Rapone, 476 F.Supp. 226 (E.D. Pa. 1979), Senior Judge Davis held:

> Denying plaintiff's Eighth Amendment claim I remain consistent with the ruling '[W]here the plaintiff has received some care, inadequacy or impropriety of the care that was given will not support an Eighth Amendment claim'. Roach v. Kligman, 412 F.Supp. 421, 525 (E.D. Pa. 1976). Quoting approvingly in Norris v. Frame, supra, 585 F.2d at 1185.

Id. at 231.

The United States District Court for the Middle District of Pennsylvania in Farmer v. Carlson, 685 F.Supp. 1335 (M.D. Pa. 1988), held that questions regarding the timeliness of the treatment or the provision of medication were based on negligence or malpractice and must be dismissed:

> Thus, 'the key question...is whether defendants have provided plaintiff with some type of treatment regardless of whether it is what the plaintiff desires'. (Citations omitted).

Id. at 1339. See, also, In Smith v. Marcantonio, 910 F.2d 500 (8th Cir. 1990) (mere disagreement as to course of medical care fails to state claim of deliberate indifference). .

The majority of federal courts to consider the issue have concluded that as long as prison authorities provide some treatment to an inmate. even if that treatment constitutes inappropriate care, the required subjective knowledge fails to exist to impose liability upon the healthcare professionals involved. In Rodriguez v. Joyce, 693 F.Supp. 1250 (D.Me. 1988), the court granted a motion for summary judgment in a case in which the plaintiff, a prisoner, alleged that he injured his finger while playing volleyball. When he sought medical treatment from employees of the prison, where he served as an inmate, he received aspirin for the pain. The medical personnel at the prison never took an x-ray. The plaintiff contended that he had fractured his finger. He maintained that the failure of the medical personnel at the prison to take the x-ray resulted in his receiving inadequate medical care. The court, in granting the motion for

summary judgment, stated:

> But, as the Supreme Court clearly stated in Estelle, merely questioning the form of medical treatment does not constitute a cognizable section 1983 claim. Plaintiff has alleged nothing more than negligent diagnosis. A decision whether or not to order an x-ray 'is a classic example of a matter for medical judgment. A medical decision not to order an x-ray, or like measure, does not represent cruel and unusual punishment.' Estelle, (citation omitted.) This is quite apt in the context here, where the claim involves only a mere injury to a finger joint. The failure of the nurses to order an x-ray of plaintiff's injured finger is not cruel and unusual punishment. Our holding here is consonant with the approach towards preventing section 1983 from becoming a national state tort claims act administered in the federal courts. Quoting Estate of Bailey v. County of York, 768 F.2d 503, 513 (3d Cir. 1985) (Adams, J., dissenting).

Id. at 693 F.Supp. at 1253.

Even differing medical opinions among prison doctors does not support a claim of cruel and unusual punishment based on deliberate indifference to a serious medical need. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) cert. den., 450 U.S. 1041 (1981). While evidence of disagreements between outside doctors and prison doctors might be sufficient to overcome a summary judgment motion in a medical malpractice action even if proven such evidence fails to demonstrate deliberate indifference to a serious medical need. Sanders v. Vigil, 917 F.2d 28, 1990 W.L. 160964 *2 (9th Cir. 1990). *Accord*, Cruz v. Ward, 558 F.2d 658, 662 (2nd Cir. 1977) (it is to be expected that prison physicians should sometimes disagree with the opinions of the hospital staff) cert. den., 434 U.S. 1018 (1978). In Gardner v. Zaunbrecher, No. 95-CV-1543, 1996 W.L. 507072 *2 (N.D. N.Y. Sept. 4, 1996) the Court held that a disagreement among an inmate's physicians over a proper course of treatment did not show conscious or callous indifference to a serious medical need.

At best, Atwell disagrees with the course of the medical care and treatment with which he was provided at SCI-Dallas. As a matter of law, such disagreements as to what medical treatment, medication, testing or evaluation, is most appropriate, fails to support any claim under 42 U.S.C. §1983 of deliberate indifference. Plaintiff's claims therefore, as to moving defendants, must fail, and should therefore be dismissed with prejudice.

D. ATWELL HAS FAILED TO EXHAUST HIS AVAILABLE ADMINISTRATIVE REMEDIES, AS REQUIRED BY 42 U.S.C. §1997e(a), AND HIS CLAIMS AGAINST MOVING DEFENDANTS, DRS. BOHINSKI AND STANISH SHOULD THEREFORE BE DISMISSED WITH PREJUDICE

The Congress of the United States enacted 42 U.S.C. §1997e(a) barring any prisoner in any prison in the United States from initiating any action relating to any prison condition, including medical care, without exhausting all available administrative remedies first. That provision states in relevant part as follows:

> No action shall be brought with respect to prison conditions under Section 1979 of the revised statute of the United States (42 U.S.C. §1983) or any other Federal Law by a prisoner confined to any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted. 42 U.S.C. §1997e(a).

The Pennsylvania Department of Corrections at all times relevant to Atwell's Complaint and Amended Complaint had in effect a Consolidated Inmate Grievance Review Procedure, DC-ADM804, effective January 3, 2005. (See copy attached hereto as Ex. "K")

Atwell failed to exhaust his available administrative remedies prior to the filing of t his civil action. Atwell filed his original Complaint in this matter on September 30, 2003. (SUF, at ¶1) He filed his Amended Complaint on January 20, 2004. (SUF, at ¶2) Atwell was released from prison on May 22, 2004. (SUF, at ¶81) At no time prior to the filing of *either* his original Complaint on September 30, 2003, or his Amended Complaint on January 20, 2004, did Atwell exhaust his available administrative remedies as against either Dr. Bohinski or Dr. Stanish. During the time period at issue in this matter, Atwell filed a total of ten (10) grievances. (SUF, at ¶82) None of the grievances address either Dr. Stanish or Dr. Bohinski. (SUF, at ¶83) Five relate to the inmate mail system (SUF, at ¶84), one alleges he was ridiculed and intimidated by a nurse (SUF, at ¶85); one alleges that "Donald Jones" violated his due process rights (SUF, at ¶86); one that a guard made false accusations about him (SUF, at ¶87); and one that the prison failed to stop inmates from smoking, and that he was sexually "harassed" because there were female staff at the all-male prison. (SUF, at ¶88)

His final grievance alleged that his sentence was "illegally increased" by 12 months, as to which he accuses six staff and/or officials at SCI-Dallas, but not either Dr. Bohinski or Dr. Stanish. No mention of either in contained in this grievance. (SUF, at ¶89)

In any event, Atwell has presented no basis for concluding that moving defendants, as *medical* personnel providing *medical treatment* to inmates at SCI-Dallas, have any duties or responsibilities pertinent to a determination as to when an inmate's "judicially-imposed" sentence expires. Even if the Plaintiff were correct that he had been held in prison beyond the expiration of any sentence, for any liability to attach to moving defendants, Bohinski and Stanish.[2] Accordingly, Plaintiff claim relating to the term of his incarceration, must fail.

Consequently, Atwell has failed to exhaust his administrative remedies. In Woodford, et al. v. Viet Mike Ngo, 126 S.Ct. 2378 (June 22, 2006) the Supreme Court of the United States held that the Prison Litigation Reform Act requires a prisoner to exhaust any available administrative remedies *before* instituting a challenge to prison conditions in federal court. The Supreme Court held that the failure to file a timely appeal provided by the administrative remedies barred a prisoner from proceeding with a cause of action pursuant to 42 U.S.C. §1983. That analysis constitutes binding authority upon this Court and requires the granting of summary judgment in favor of moving defendants, Drs. Bohinski and Stanish.

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[2] The issues concerning Atwell's term of imprisonment are more reasonably address by the Commonwealth defendants, who have filed a Motion for Summary Judgment which addresses these claims in detail. The Court is referred to that motion and supporting brief and exhibits - which is incorporated herein by reference, to the extent that this Court deems the issue relevant as to moving defendants.

V. CONCLUSION

WHEREFORE, and for the reasons discussed herein, and in this Motion for Summary Judgment, and for good cause shown, it is respectfully requested that this Honorable Court grant the motion of moving defendants, Stanley Bohinski, D.O. and Stanley Stanish, M.D., and dismissed Plaintiff's, Geoffrey Willard Atwell's Amended Complaint with prejudice.

GOLD, BUTKOVITZ & ROBINS, P.C.

BY: /s/ Alan S. Gold
ALAN S. GOLD
SEAN ROBINS
Attorneys for Defendants,
Stanley Bohinski, D.O. and
Stanley Stanish, M.D.

DATE: April 5, 2007

CERTIFICATE OF SERVICE

The undersigned does hereby certify, that true and correct copies of moving defendants', Stanley Bohinski, D.O. and Stanley Stanish, M.D.'s, Brief in Support of Motion for Summary Judgment, Statement of Uncontested Facts, and Exhibits, were served, as indicated, upon the following individuals on this date:

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DATE: April 5, 2007

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

GEOFFREY WILLARD ATWELL	:	CIVIL ACTION
V.	:	NO. 1:CV-03-1728
KELLY GALLAGHER, P.A., et al.	:	

STATEMENT OF UNCONTESTED FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS, STANLEY STANISH, M.D. AND STANLEY BOHINSKI, D.O.

Moving defendants, Stanley Stanish, M.D. and Stanley Bohinski, D.O., by and through their attorneys, Gold & Robins, P.C., hereby submit the following Statement of Uncontested Facts, in support of their Motion for Summary Judgment:

1. Plaintiff, Geoffrey Willard Atwell ("Atwell") commenced this action with the filing of a Complaint, on or about September 30, 2003. (Docket No. 1)

2. On January 20, 2004, Atwell filed an Amended Complaint (Docket No. 18), a true and correct copy of which is attached hereto as Ex. "A".

3. On March 7, 2006, moving defendant, Bohinski, filed his Answer with Affirmative Defenses to Atwell's Amended Complaint. (Docket No. 102)[3]

4. On August 26, 2006, pursuant to leave granted by the Court, the discovery deposition of Plaintiff, Atwell, was taken. (A true and correct copy of the transcript of the deposition of Plaintiff, Atwell, is attached hereto as Ex. "B")

5. In a Report and Recommendation dated September 28, 2006, the Court recommended that Stanish's motion to dismiss be granted as to Atwell's conspiracy claim, but denied as to the claim of deliberate indifference. (Docket No. 169)

6. On November 2, 2006, over Atwell's objections, the Court adopted the Report

[3] Moving Defendant, Bohinski, is represented in this matter by counsel from two firms: Alan S. Gold, Esquire, of Gold & Robins, P.C.; and Anthony J. Piazza, Esquire, of Murphy, Piazza & Genello, who are cooperating in the defense of this matter. This Motion for Summary Judgment, and this brief in support, are submitted on behalf of Dr. Bohinski by both counsel, and on behalf of moving defendant, Dr. Stanish, who is represented solely by Gold & Robins.

and Recommendation, and dismissed Atwell's conspiracy claim. (Docket No. 171)

7. On November 10, 2006, defendant, Stanish, filed his Answer with Affirmative Defenses to Atwell's Amended Complaint. (Docket No. 172)

8. In his Amended Complaint, Plaintiff, Atwell, asserts a variety of, as this Court correctly noted earlier in this matter, largely unrelated claims among numerous unrelated defendants. One area of complaint by the Plaintiff relates to his belief that he was "illegally" held in prison beyond the date upon which he believes he should have been released. This assertion is made as to all defendants, including the moving *medical* defendants, Drs. Bohinski and Stanish. (See Ex. "A", generally)

9. Atwell also alleges, in extremely vague terms, that moving defendants acted with deliberate in difference by failing to treat certain medical conditions. (See Ex. "A", generally)

10. With respect to moving defendant, Stanley Bohinski, D.O., the entirety of Plaintiff claims against him appear in paragraph PP of his Amended Complaint:

> Stanley Bohinski, M.D. . . . who has since November, 2002, acted in deliberate indifference responding to Plaintiff's serious medical needs and condition with a reckless disregard and failure to prescribe a medical diet for Plaintiff's medical conditions, failed to treat Plaintiff's skin rash and defective submandibular gland and failed to regularly monitor Plaintiff's hypertension and diabetes. Reference if grievance no. 50246 for which this cruel and unusual punishment has occurred after completion of Plaintiff's judicially imposed sentence on/or about May 22, 2002.

Ex. "A", at ¶PP; Ex. "B", at 54-55.

11. Atwell's sole claims as against moving defendant, Stanley Stanish, M.D., which appear in paragraph QQ of the Amended Complaint, are almost identical to those as to Dr. Bohinski:

> Stan Stanish, . . . supervisory physician for SCI facilities Eastern Pennsylvania area including SCI Dallas . . . who was advised by Plaintiff during December 2002 medical check-up that Plaintiff's judicially imposed sentencing was completed on/or about May 22, 2002, but Plaintiff's serious medical conditions are not monitored for which Plaintiff avers decrease of life expectancy, that Plaintiff defective submandibular gland and skin rash were not treated by acting with deliberate indifference to a reckless disregard to Plaintiff's life threatening serious medical indications, which is a conspiracy to murder Plaintiff and , defendant also fails to provide

medical diet pursuant to grievance no. 50246.

Ex. “A”, at ¶QQ; Ex. “B”, at 53.

12. No further allegations as to either Dr. Bohinski or Dr. Stanish is contained in Atwell’s Amended Complaint.

13. Atwell was incarcerated at SCI-Dallas from August 1, 2000 until his release on May 22, 2004. (Ex. “B”, at 10, 63)

14. As Plaintiff, Atwell, filed his original complaint in this matter on September 30, 2003, pursuant to the applicable statute of limitations, he is precluded from asserting allegations of conduct occurring more than two (2) prior to that date. Accordingly, Atwell is precluded from asserting in support of his claims in this matter, any conduct which he alleges occurred prior to September 30, 2001.

15 Atwell admitted that he knows of no legal authority which would have required either Dr. Bohinski or Dr. Stanish to have taken action in regard to his allegedly “illegal” sentence. (Ex. “B”, at 55-56)

16 Atwell testified that his medical claim against Dr. Stanish is that he was deliberately indifferent to the treatment of his hypertension, diabetes, gout and failed submandibular gland. (Ex. “B”, at 59)

17 Atwell testified that his medical claim against Dr. Bohinski is that he was deliberately indifference to the treatment of his hypertension, diabetes, gout and his submandibular gland. (Ex. “B”, at 60)

18 Atwell testified that Dr. Stanish failed to properly treat his hypertension by failing to provide him with a proper medical diet. (Ex. “B”, at 61) Likewise, testified Atwell, Dr. Stanish failed to properly treat his diabetes by failing to provide him with a proper medical diet. (Ex. “B”, at 62)

19. Atwell testified that Dr. Stanish failed to properly treat his submandibular gland problem by failing to have it removed. (Ex. “B”, at 62) Atwell testified that three other doctors had recommended that it be removed, but he could not identify who these doctors were. (Id.)

20. Atwell testified that his submandibular gland "flared up and swelled up" on two occasions since coming to SCI-Dallas, and that he was placed on medication. (Ex. "B", at 63)

21. Atwell testified that that in the two years since his release from prison, neither his treating physician nor any other physician has ordered or scheduled him for surgical removal of his submandibular gland. (Ex. "B", at 75) Atwell testified that his submandibular problem was not something that he or his treating physician considered "a priority" during the two years since his release from prison. (Ex. "B", at 78)

22. Atwell testified that "Dr. Bohinski and Dr. Stanish didn't provide me treatment. All they did was prescribe medicine and do medical checkups. They didn't do any surgical procedures, didn't make any specific recommendations." (Ex. "B", at 88)

23. Atwell testified that he has not discussed the treatment rendered for him by Dr. Bohinski and Dr. Stanish with any other physicians. (Ex. "B", at 102-103)

24. Atwell testified that he does not know what Dr. Bohinski or Dr. Stanish believed should have been the proper treatment for his submandibular gland problem. (Ex. "B", at 104-106)

25. Atwell testified that he does not know whether he ever grieved his complaint about the treatment for blood pressure or diabetes, as against either Dr. Bohinski or Dr. Stanish. (Ex. "B ", at 108-109) Atwell testified that he did not grieve his complaint concerning treatment of gout. (Ex. "B", at 109)

26. On October 1, 2001, the records indicate that Atwell was confined to the RHU (Restricted Housing Unit), at which time it was noted that psychiatric and sick call services were explained to him, that he stated his understanding, and that Atwell was adjusting to his RHU confinement. (Ex. "C", at 10/1/01)

27. On October 2, 2001, Dr. Bohinski ordered that Atwell's blood pressure be checked. (Ex. "C", at 10/2/01)

28. On October 3, 2001, at mandatory sick call, Dr. Bohinski and P.A. Gallagher, reviewed Atwell's glucose levels ("Accucheck"), and his blood pressure levels, and noted his

complaints of cough and cold symptoms. (Ex. “C”, at 10/3/01) Dr. Bohinski ordered a 14-day course of antibiotic erythromycin 500mg, glucotrol, 100mg for 28 days, for his diabetes, as well as Captopril 50mg through 12/31/01, as Tylenol, 325mg as needed. (Ex. “D”, at 10/3/01) A diabetic testing panel was ordered for 12/1/01 for the diabetic clinic. (Id.)

29. On October 4, 2001, Atwell was seen at sick call for dermatitis by P.A. Gallagher, and Dr. Bohinski renewed his prescription for hydrocortisone (HCT) 1% ointment. (Ex. “C”, at 10/4/01; Ex. “D”, at 10/4/01)

30. On October 10, 2001, at mandatory sick call, Dr. Bohinski and P.A. Gallagher reviewed Atwell’s glucose levels and his blood pressure levels. (Ex. “C”, at 10/10/01) Atwell stated at that time that “he feels well now - no complaints.” (Id.) Dr. Bohinski ordered that blood pressure checks be made of Mr. Atwell four times per day (QID) for the next 7 days. (Ex. “D”, at 10/10/01)

31. On October 12, 2001, Atwell’s Transfer Order Form - for a transfer from SCI-Dallas to Adams County - noted his medications as: Glucotrol, Allopurinol, Capoten; that he was being seen at chronic diabetes and hypertension clinics; and that he was on a 2500 Kcal ADA Diet. (Ex. “E”, at 10/12/01)

32. On October 17, 2001, Atwell’s return to SCI-Dallas and the RHU is noted, at which time he had no complaints. (Ex. “C”, at 10/17/01)

33. On October 18, 2001, at sick call, Atwell was in no apparent distress, and denied any complaints. (Ex. “C”, at 10/18/01) Dr. Bohinski ordered that Atwell have blood pressure checks four times daily for the next five days; and he ordered that Atwell’s medications be resumed as previously ordered. (Ex. “D”, at 10/18/01)

34. On October 22, 2001, Atwell complained at sick call of a “flare up of submandibular gland swelling,” through it was noted at that time that he was in no apparent distress (NAD), and had a history of Sialadenitis - L. (Ex. “C”, at 10/22/01) Dr. Bohinski ordered a 14-day course of Erythromycin, 500 mg, for Atwell. (Ex. “D”, at 10/22/01)

35. On October 26, 2001, Atwell presented at sick call with complaints of a sore

throat, and swelling in his submandibular glands. The treatment note indicates an assessment of Sialadenitis, recurrent. (Ex. "C", at 10/26/01)

36. On October 29, 2001, Atwell presented at sick call with a sore throat and a hoarse voice. (Ex. "C", at 10/29/01) Dr. Bohinski ordered a 7-day course of Clindamycin 150 mg (antibiotic), 4-times per day; and placed him on a full liquid diet for 3 days. (Ex. "D", at 10/29/01; Ex. "F", at 10/29/01)

37. On October 29, 2001, Dr. Bohinski referred Atwell to see Dr. Olegenski, for an ENT (ear, nose and throat) consultation, which was scheduled for November 27, 2001. (Ex. "G", at 10/29/01)

38. On November 2, 2001, P.A. Gallagher noted that Atwell had "improved throat/neck symptoms," and that there was "decreased tenderness but persistent enlargement of L-neck gland." (Ex. "C", at 11/2/01) Dr. Bohinski renewed Atwell's order for Hydrocortisone ointment, and ordered that he resume his diabetic diet." (Ex. "C", at 11/2/01) Atwell's 2500 Kcal diabetic diet was reordered, with no expiration date. (Ex. "F", at 11/2/01)

39. On November 27, 2001, Atwell was taken to see the ENT physician, Dr. Stec. (Ex. "C", at 11/27/01; Ex. "D", at 11/27/01) Dr. Stec examined Atwell, and concluded that he had a Left submandibular gland sialadenitis; and ordered a CT scan of his nect to rule out a mass. (Ex. "G", Consultation report, at 11/27/01) Dr. Stec also ordered a 10-day course of Augmentin, 875 mg, to treat the sialadenitis. (Id.)

40. Upon Atwell's return to the prison, and review of Dr. Stec's report, Dr. Bohinski ordered the course of Augmentin, and the CT scan of Atwell's neck. (Ex. "D", at 11/27/01)

41. On December 10, 2001, Atwell was seen at sick call by P.A. Wisniewski, at which time it was noted that he was taking Avelox for his sialadenitis, and was to be sent for a CT scan. (Ex. "C", at 12/10/01)

42. On December 13, 2001, Atwell had a CT scan of his L submandibular gland was obtained (Ex. "C", at 12/13/01), and the results received the next day. The CT scan results revealed "no evidence for mass within the region of L submandibular gland; no significant

inflammatory change in soft tissues surrounding submandibular gland." (Ex. "H", at 12/14/01)

43. On December 21, 2001, following receipt of the CT scan report, a copy was faxed to the consulting ENT physicians. (Ex. "D", at 12/21/01)

44. On December 27, 2001, Atwell was seen by Dr. Akberzie, who noted his history of sialadenitis L-side submandibular; and ordered 6-month courses of Allupurinol 300 mg, Glucotrol 5 mg, Aspirin 325 mg, and Capoten 50 mg, as well as a diabetic testing panel. (Ex. "C", at 12/27/01; Ex. "D", at 12/27/01)

45. On January 3, 2002, Atwell was transferred (temporarily) from SCI-Dallas to Adams County prison. (Ex. "E", at 1/3/02)

46. On January 7, 2002, Atwell was seen at sick call by P.A. Wisniewski, at which time he as for a renewal of his Hydrocortisone prescription, and told her that he wanted his L-submandibular gland removed. (Ex. "C", at 1/7/02) At that time, Wisniewski noted that Atwell's recent CT-scan was negative for any masses or lesions. (Id.) Dr. Bohinski ordered a renewal of Hydrocortisone ointment for Atwell. (Ex. "D", at 1/7/02)

47. On January 7, 2002, Atwell was called to the dispensary, and discussed with P.A. Wisniewski and Dr. Bohinski the question of whether his L-submandibular gland should be removed. Wisniewski noted:

> Inmate to dispensary to discuss L-sialadenitis of submandibular gland - discussed with (D/W) D.r Bohinski who recommended not sending inmate to ENT at present time because mass is gone and CT scan is negative to masses/lesions. If inflammation/infection develop, then inmate will be sent to ENT. Swelling decreased since November 2001.

Ex. "C", at 1/7/02). Wisniewski noted that when she informed Atwell of the decision, that he "got angry and threatened a lawsuit. . ." (Id.)

48. On January 11, 2002, Dr. Bohinski noted that he had reviewed a written request from Atwell "demanding" surgery on his throat, and threatening a law suit. Dr. Bohinski noted that:

> I spoke with Dr. Stec [the ENT] - since patient is assymptomatic - CT of neck negative - there is no indication to do surgery expeditiously. Dr. Stec told me that the inmate told him that he's

> getting out of prison soon and it can be taken care of then.

Ex. "C", at 1/11/02.

49. On January 12, 2002, Dr. Stec issued an evaluation report in which he noted that at that time Atwell had a chronic case of L-sided sialadenitis, which had been successfully treated with medication, and that there was no evidence of any mass or leasion:

> History of acute recurrent sialadenitis, enough to warrant consideration of surgical intervention. Impression: Chronic L-sided sialadenitis of the submandibular gland.
>
> Patient will be given the option for surgical intervention and excisional biopsy of the L-submandibular gland as an alternative to continued medical therapy with antibiotics, sialogogues and analgesics.

Ex. "G", Report of Dr. Stec, January 12, 2002.

50. Atwell next presented at sick call on March 11, 2002, at which time he asked for a renewal of Hydrcoritsone ointment, which was ordered by Dr. Bohinski. (Ex. "C", at 3/11/02; Ex. "D", at 3/11/02) Atwell made no complaints at that time about his submandibular gland.

51. On April 22, 2002, Atwell was seen by P.A. Wisniewski at sick call with complaints of rash on his forearms over the prior month, which Wisniewski noted as "erythema, edematous rash," and that it might be dermatitis. (Ex. "C", at 4/22/02) Bohinski ordered a Medrol dose pack, and a 10-day course of Lasix for Atwell. (Ex. "D", at 4/22/02)

52. On April 29, 2002, Plaintiff presented to P.A. Wisniewski at sick call for followup on his complaints of rash, at which time he reported that his rash (dermatitis) "looks better," and Wisniewski noted that the swelling had decreased in his legs. (Ex. "C", at 4/20/02) At that time, Atwell also complained that he was being given 2% milk instead of non-fat milk by the Kitchen. (Id.) Dr. Bohinski reordered Hydrcortisone 1% ointment for Atwell. (Ex. "D", at 4/20/02)

53. On April 30, 2002, Dr. Bohinski wrote an order for Atwell to receive skim milk with his diabetic diet. (Ex. "D", at 4/30/02)

54. On May 8, 2002, Atwell presented to P.A. Wisniewski at sick call, at which time she noted that his leg swelling had decreased with his use of Lasix, but that a renewal was

necessary. She also noted that Atwell was not using the Hydrocortisine ointment as directed. (Ex. “C”, at 5/8/02) Dr. Bohinski reordered a 30-day course of Lasix 20 mg for Atwell, and instructed that he use the Hydrocortisone cream on the affected areas. (Ex. “D”, at 5/8/02)

55. On May 13, 2002, Atwell was seen at sick call by P.A. Wisniewski, at which time he asked for a renewal of the Hydrocortisone cream - “has noticed some improvement” - and told her that he was not always getting skim milk with his meals. (Ex. “C”, at 5/13/02) Dr. Bohinski reordered Hydrocortisone 1% cream for Atwell. (Ex. “D”, at 5/13/02)

56. On May 14, 2002, Dr. Stanish saw Atwell, and performned an annual physicial examination. (Ex. “E”, Physician Examination, at 5/14/02)

57. On June 6, 2002, Atwell was temporarily transferred from SCI-Dallas to Adams County prison, at which time his medications were noted as: Zyloprim, Glucotrol, Asprin (ASA), Lasix, 2500 Kcal diabetic diet. (Ex. “E”, at 6/6/02)

58. On June 17, 2002, Atwell was seen again at sick call by P.A. Gallagher, at which time she advised Atwell that after using Hydrocortisone cream for more than a year on his right ankle, and that long-term use can have side-effect. According to Gallagher, Atwell became argumentative, and complained “I am indigent.” Atwell also told her: “That’s a law suit - deliberate indifference.” (Ex. “C”, at 6/17/02) Dr. Bohinski ordered a 2-week course of “moisturizing lotion” for Atwell. (Ex. “D”, at 6/17/02)

59. On June 17, 2002, Dr. Akberzie reordered Atwell’s chronic medications for an additional 180 days: Allopuinol 300 mg, Glucotrol 5 mg, Aspiron 325 mg, and Capoten 50 mg. (Ex. “D”, at 6/17/02) A diabetic testing panel was also ordered. (Id.) The test results were reviewed by Dr. Bohinski on June 20, 2002. (Ex. “C”, at 6/20/02)

60. On June 21, 2002, Dr. Bohinski discontinued the order for moisturizing lotion for Atwell, and instead ordered a 2-week course of A&D ointment. (Ex. “D”, at 6/21/02)

61. On June 26, 2002, Atwell was examined by Dr. Stanish at chronic clinic, for hypertension and diabetes, at which time he also performed an “Over 50" examination of Atwell. (Ex. “C”, at 6/26/02) Dr. Stanish found Atwell’s examination to “essentially normal” and

otherwise unremarkable. (Id.) Dr. Bohinski also reviewed the results of the examination. (Id.) Dr. Stanish ordered a diabetic eye examination for Atwell when he was to return to the clinic on September 25, 2002. (Ex. "D", at 6/26/02)

62. On July 2, 2002, Atwell was transferred from SCI-Dallas to Adams County temporarily, at which time it is noted that his medications were: Allopurinol, Glucotrol, Aspirin, Capoten, and that he was on a diabetic diet. (Ex. "E", at 7/2/02)

63. On July 22, 2002, Atwell was seen at sick call by P.A. Gallagher, at which time he complained that he was supposed to have been seen by "someone" about the rash on his wrists. When Gallagher informed Atwell that he would be scheduled for the August clinic, Atwell complained that he would be out of prison ("on a writ") in August, and that "I'll just put it in the law suit." (Ex. "C", at 7/22/02) Dr. Bohinski wrote an order fro Atwell to be seen by Dr. Moyer 8/02. (Ex. "D", at 7/22/02)

64. On August 7, 2002, Atwell was again temporarily transferred from SCI-Dallas to Adams County, at which time his medications were noted as: Allopurinol, Glucotrol, Aspirin, Capoten, and that he had chronic diabetes and hypertension. (Ex. "E", at 8/7/02)

65. On November 27, 2002, Atwell refused to take the flu vaccine when offered to him. (Ex. "E", Release from Responsibility form, 11/27/02)

66. On December 19, 2002, Atwell presented at sick call to P.A. Gallagher, complaining that his medications had run out - although, noted Gallagher, Atwell had failed to come to sick call for their renewal *prior* to running out. (Ex. "C", at 12/19/02) Atwell "left the dispensary muttering about 'a federal judge will take care of it.'" (Id.) On December 19, 2002, Dr. Bohinski renewed Atwell's orders for Allopurinal, Glucotrol, Aspirin and Capoten for 180-days. (Ex. "D", at 12/19/02)

67. On December 20, 2002, Atwell was seen by Dr. Akberzie at the chronic illness clinic, for his diabetes and hypertension, at which time he noted that Atwell's blood sugar was "mildly elevated", and that his blood pressure was "good." (Ex. "C", at 12/20/02) Dr. Akberzie also ordered a diagnostic testing panel to be obtained in May, 2003.

68. On May 2, 2003, results of the diagnostic testing panel ordered on December 20, 2002 by Dr. Akberzie, were received and reviewed. (Ex. "C", at 5/2/03)

69. On June 16, 2003, Atwell was seen again at the chronic illness clinic, by Dr. Salomon, at which time his glucose and blood pressure results were reviewed. (Ex. "C", 6/16/03) Dr. Salomon ordered a followup appointment for Atwell in the "derm clinic," and ordered glucose fasting tests and blood pressure checks each month for 6 months. (Ex. "D", at 6/16/03) Dr. Salomon also reordered Atwell's medications for an additional 6 months: Allopurinol, Glucotrol, Aspirin (ASA) and Capoten. (Id.)

70. On July 28, 2003, Atwell was seen at sick call by P.A. Hock, at which time he complained of cold symptoms for 3 weeks, eczena and irritation in the armpits. (Ex. "C", at 7/28/03) Dr. Bohinski ordered a 7-day course of Bactrim DS, a 5-day course of CTM 4mg, and 30-day courses of Mycolog cream for his armpits, and Hydrocortisone 1% ointment for his outer ears and ankles. (Ex. "D", at 7/28/03)

71. On September 4, 2003, Atwell returned from a temporary transferr to Adams County, at which time he had been on medications: Allopurinol, Glucotrol, Aspirin and Capoten. (Ex. "C", at 9/4/03)

72. On September 9, 2003, Atwell was seen at sick call by P.A. Cain, at which time he complained that "they lost my meds" - referring to when he was on trasfer to Adams County. (Ex. "C", at 9/9/03) Cain examined Atwell, and checked his blood pressure. (Id.)

73. On September 9, 2003, Dr. Bohinski reordered Astwell's medications, through 12/31/03: Allopurinol 300 mg, Glucotrol 5 mg, Aspirin 325 mg, and Vasotec 10 mg. He discontinued the order for Capoten. (Ex. "D", at 9/9/03)

74. On September 19, 2003, Atwell was seen at sick call by P.A. Cain, who check his blood pressure, and recommended an increase in his Vasotec. (Ex. "C", at 9/19/03) Dr. Stanish ordered Atwell's Vasotic increased to 20 mg, and ordered blood pressure checks 3 times daily, commencing 10-days after the increase in Vasotec (9/29, 9/30 and 10/1/03). (Ex. "C", at 9/19/03)

75. On October 2, 2003, Atwell's was seen at sick call by P.A. Cain, who checked his blood pressure, and noted to "continuie treatment (tx) plan." (Ex. "C", at 10/2/03)

76. On December 8, 2003, after having not presented to sick call since October 2, 2003, Atwell was placed on "mandatory sick call". (Ex. "C", at 12/8/03) Atwell was seen this date by P.A. Wisniewski who obtained an "accucheck" (glucose levels), and noted to "continue current treatment plan." (Ex. "C", at 12/8/03)

77. On December 12, 2003, Atwell presented to P.A. Wisniewski at sick call and complained that he had not received his Allopurinol, and one was provided to him. (Ex. "C", at 12/12/03) Wisniewski noted that a supply of Allopurinol was expected at the prison by that evening. (Id.)

78. On December 15, 2003, Atwell was seen at the chronic illness clinic by Dr. Stanish, who examined him, and noted that his hypertension and diabetes were "controlled." (Ex. "C", at 12/15/03) Dr. Stanish noted to "continue presented treatment," and reordered Atwell's medications for an additional 6 months: Allopurinol 100 mg, Glucotrol 15 mg, Aspirin 325 mg, and Vasotec 20 mg. (Ex. "D", at 12/15/03) Dr. Stanish also ordered accuchecks (glucose) and blood pressure checks each month, for 6 months. (Id.)

79. On March 1, 2004, Atwell was seen at sick call by P.A. O'Brien, complaining of rash on his right ankle and armpits, which O'Brien noted as dermatitis, and recommended the use of Nystatin/Triamcinolone cream for treatment. (Ex. "C", at 3/1/04) Dr. Bohinski ordered a 10-day course of Nystatin/Triamcinolone cream, HIV/Hepatitis C testing, and an optomotry consult. (Ex. "D", at 3/1/04)

80. On March 17, 2004, Atwell was counseled by P.A. Opachko as to the results of the recently obtained HIV and HCV testing. (Ex. "C", at 3/17/04)

81. On May 22, 2004, Atwell was released from SCI-Dallas. (Ex. "C", at 5/22/04)

82. During the applicable time period, Atwell filed a total of ten (10) inmate grievances with officials at SCI-Dallas. (See copies of these grievances and their administrative responses attached hereto as Ex. "J")

83. None of the grievances filed by Atwell address either moving defendant Dr. Bohinski or Dr. Stanish. Their names appear in none of Atwell's grievances. None of Atwell's grievances refer, relate or pertain to the medical treatment at issue in this matter. Only one grievance is arguably related to any claim against moving defendants in this matter - the allegation that Atwell remained incarcerated beyond his maximum date, and as discussed herein, no such claim can be maintained against either moving defendant. Further, even in the case of this one grievance, no mention of the alleged actions or inactions of moving defendants is made. (See Ex. "J", throughout)

84. Five (5) of the ten (10) grievances alleges claims concerning problems with the inmate mail system at SCI-Dallas. See Grievances #11546 (1/8/02), #11875 (1/12/02), #12443 (1/19/02), #12836 (1/25/02), and #19322 (4/25/02) (Ex. "J").

85. One grievance alleges that Atwell was ridiculed and intimidated by a nurse. See Grievance #5325 (10/19/01) (Ex. "J").

86. One grievance alleges that a Donald Jones violated his due process and other constitutional rights. See Grievance #6199 (10/13/01) (Ex. "J").

87. One grievance alleges that a guard named Morris false accused him of refusing to obey an order, and did other things to violate his rights. See Grievance #6169 (10/19/01) (Ex. "J").

88. Another grievance a claim by Atwell that his rights were violated because prison officials did nothing to stop other inmates from smoking in his cell block; and alleges that he was "sexually harassed" because there were female staff members at SCI-Dallas, an all male inmate prison. See Grievance #8515 (11/10/01) (Ex. "J").

89. Finally, as noted above, one grievance alleges that Atwell's sentence was "illegally increased" by twelve (12) months, as to which Atwell accuses G. Leachey (Records Supervisor), C. Zalavonis, P. Blizzaro (Parole Supervisor), and Agents Myers, Labrosky and Dougherty. No mention is made as to either Dr. Bohinski or Dr. Stanish. See Grievance #40189 (1/2/03) (Ex. "J").

90. A review of the evidence in this matter, and the undisputed facts, shows that the Plaintiff has failed to prove that moving defendants, Drs. Bohinski and Stanish, had subjective knowledge that their actions in treating the Plaintiff medical needs presented a substantial risk of harm to him, as required by Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970 (1994), in order to prevail in a claim under 42 U.S.C. §1983. Accordingly, Plaintiff's claim for deliberate indifference as against moving defendants, Drs. Bohinski and Stanish, must fail.

91. Plaintiff's further claim concerning his term of imprisonment, likewise, must fail. Plaintiff alleges that he should have been released from prison on or about May 22, 2002, and that he was not. While it is largely unclear exactly upon what basis the Plaintiff comes to this conclusion, what is crystal clear absent anything further, is that moving defendants, as *medical* personnel providing *medical treatment* to inmates at SCI-Dallas, have no duties or responsibilities pertinent to a determination as to when an inmate's "judicially-imposed" sentence expires. As discussed further in the brief to follow, there exists no basis, as a matter of law, even if the Plaintiff were correct that he had been held in prison beyond the expiration of any sentence, for any liability to attach to moving defendants, Bohinski and Stanish.[4] Accordingly, Plaintiff claim relating to the term of his incarceration, must fail.

GOLD & ROBINS, P.C.

BY: /s/ Alan S. Gold
ALAN S. GOLD
SEAN ROBINS
Attorneys for Defendants,
Stanley Bohinski, D.O. and
Stanley Stanish, M.D.

DATE: April 5, 2007

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[4] The issues concerning Atwell's term of imprisonment are more reasonably address by the Commonwealth defendants, who have filed a Motion for Summary Judgment which addresses these claims in detail. The Court is referred to that motion and supporting brief and exhibits - which is incorporated herein by reference, to the extent that this Court deems the issue relevant as to moving defendants.