

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

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|--------------------------------|---|----------------------------|
| <b>JAMES H. SIMONSON,</b>      | ) |                            |
|                                | ) |                            |
| <b>Plaintiff</b>               | ) |                            |
|                                | ) |                            |
| <b>v.</b>                      | ) | <b>Civil No. 96-0129-B</b> |
|                                | ) |                            |
| <b>BRYAN LAMOREAU, et al.,</b> | ) |                            |
|                                | ) |                            |
| <b>Defendants</b>              | ) |                            |

***RECOMMENDED DECISION***

Plaintiff brings this Complaint pursuant to 42 U.S.C. § 1983 and alleges excessive use of force by prison officials while he was a pretrial detainee at the Kennebec County Jail. He further alleges inadequate medical care for injuries he allegedly received during the altercation. Remaining as named Defendants following dispositive motions previously resolved are four corrections officers alleged to have been involved in the altercation, and the physician's assistant who directed Plaintiff's treatment. These Defendants have filed Motions for Summary Judgment on the entirety of Plaintiff's Complaint. Plaintiff has filed a cross-Motion for Summary Judgment as to the "Kennebec Defendants."

***Discussion***

Summary judgment is appropriate only 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). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views

the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

Summary judgment is, however, 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*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

***1. The Corrections Officers.***

Defendants Veilleux, Hatch, Skidgel and Skawinski move for summary judgment on the grounds of qualified immunity, as well as on the substantive allegations of Plaintiff's Complaint. In support of their Motion, they refer to their own Interrogatory Answers, in which they describe the incident in Plaintiff's Complaint as having been provoked by Plaintiff's refusal to remain in a particular cell block. In support of his cross-Motion, Plaintiff has provided his own Affidavit, as well as the Affidavits of two witnesses, one of whom testifies that he saw Plaintiff talking with Officer Hatch when Officer Hatch attacked Plaintiff without warning.<sup>1</sup>

In light of this factual dispute, Defendants are not entitled to judgment as a matter of law on the merits of Plaintiff's Complaint. Nor are they entitled to judgment on the basis of qualified immunity. As Defendants' note in their Memorandum, the doctrine of qualified immunity shields state actors from suit as long as their actions do not violate "clearly established . . . rights of which

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<sup>1</sup> The other witness does not claim to have seen anything prior to the alleged assault. Accordingly, this witness's testimony does little to counteract Defendants' assertion that the use of force was provoked.

a reasonable person would have known." As Defendants note, there is a slight lack of clarity as to the standard under which we analyze excessive force claims for those persons not yet convicted of a crime.<sup>2</sup> In the arrest context, the claim falls under the Fourth Amendment prohibition against unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Fourth Amendment claims are analyzed in terms of "whether the use of force to effect a particular seizure is 'reasonable'" under the circumstances. *Id.* at 396.

Pretrial detainees, on the other hand, are protected from the use of excessive force by the Due Process Clause, which prohibits "punishment" prior to a conviction obtained by valid process. *Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979). The question whether a particular action is "punishment" turns on "whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. . . . [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Bell v. Wolfish*, 441 U.S. 520, 538-39 (1989), *quoted in Collazo-Leon v. United States*, 51 F.3d 315, 317 (1st Cir. 1995).

The lack of clarity arises because the Supreme Court has not yet determined whether individuals are still protected by the Fourth Amendment after they cease being arrestees and become pretrial detainees. *Graham*, 490 U.S. at 396, n.10. The question need not be resolved in this context, however, because a resolution of the factual dispute in Plaintiff's favor would entitle him to judgment under either the Fourth Amendment or Due Process analyses. According to Plaintiff and his witnesses, Plaintiff was attacked by Defendants for no reason whatsoever. Under this factual

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<sup>2</sup> In a post-conviction setting, such claims may be brought under the Eighth Amendment's prohibition against cruel and unusual punishment. *Whitley v. Albers*, 475 U.S. 312, 327 (1986).

scenario, Defendants neither used "reasonable force" under the circumstances, nor were their actions "reasonably related to a legitimate governmental objective."

In light of this factual dispute, Plaintiff's Motion for Summary Judgment as to the Corrections Officers is also properly denied. Just as a factual resolution in Plaintiff's favor would entitle him to relief, a resolution in Defendants' favor may absolve them of liability.

**2. Defendant Cichon.**

The facts relevant to Defendant Cichon's Motion for Summary Judgment, which Plaintiff does not dispute, are as follows<sup>3</sup>:

1. Alfred B. Cichon is a physician's assistant duly licensed by the Maine Board of Medicine and the Maine Board of Osteopathic Health. Affidavit of Alfred B. Cichon, paragraph 1.

2. In 1994 and 1995, Alfred B. Cichon worked under a contract between Allied Resources for Correctional Health (ARCH) and the Kennebec County Jail to provide health services to its inmates. *Id.* at para. 4.

3. The services provided by ARCH to the Kennebec County jail included, but were not limited to, Mr. Cichon's on-site provision of health care services to inmates under the on and off-site supervision of a licensed osteopathic physician. *Id.* at para. 6.

4. Mr. Cichon's supervising physician, Kenneth J. Gallant, D.O., reviewed all records and reports of inmate examinations and treatment plans prepared by Mr. Cichon. *Id.* at para. 7; and Affidavit of Kenneth J. Gallant, D.O., para. 6.

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<sup>3</sup> Because the Plaintiff does not dispute the Defendant's version, the facts recited by the Court are taken verbatim from the Defendant's statement of material facts.

5. Dr. Gallant and Mr. Cichon periodically would discuss issues related to examination and treatment and the patient's care in general. Cichon Affidavit at para. 7; and Gallant Affidavit at para. 7.

6. As part of these conferences, Dr. Gallant and Mr. Cichon would refine or settle on a treatment plan for the patient. Cichon Affidavit at para. 7.

7. On August 24, 1994, Mr. Simonson first presented himself to Mr. Cichon with physical complaints arising from an altercation with jail officials. *Id.* at para. 8.

8. Based on his examinations and the history given to him by Mr. Simonson, by September 28, 1994, Mr. Cichon had concluded that Mr. Simonson suffered from either a rotator cuff injury or shoulder impingement syndrome. *Id.* at para. 10.

9. Based upon Mr. Cichon's examinations of Mr. Simonson up to, and including, October 26, 1994, Mr. Cichon referred Mr. Simonson to Jose A. Ramirez, M.D., an orthopedic surgeon in Waterville, Maine, for further evaluation of Mr. Simonson's complaints regarding his shoulder. *Id.* at para. 11.

10. In a telephone conversation on or about December 21, 1994, Dr. Ramirez advised Mr. Cichon that Mr. Simonson was not a surgical candidate and that the care he had rendered to that date was appropriate and should be continued. Dr. Ramirez gave no indication that he wished to see Mr. Simonson for follow-up care, and therefore, Mr. Cichon did not refer Mr. Simonson to Dr. Ramirez for further follow-up care. *Id.* at para.12.

11. Dr. Gallant agreed with the treatment plan for Mr. Simonson developed by Mr. Cichon. Gallant Affidavit, para. 6.

Plaintiff asserts in response to the Motion for Summary Judgment that the care described in Defendant's Statement of Material Facts amounted to a "denial of medical attention for [his] serious medical problem." Plaintiff's Objection at 2 (docket no. 46). Plaintiff refers to the standard for medical care set forth in *Estelle v. Gamble*, 429 U.S. 97 (1976). Specifically, Plaintiff's claim rises to the level of a constitutional violation only if Defendants exhibited "deliberate indifference to serious medical needs." *Watson v. Caton*, 984 F.2d 537, 540 (1st Cir. 1993) (quoting *Estelle*, 429 U.S. at 106). What this standard means, however, is that "[t]he courts have consistently refused to create constitutional claims out of disagreements between prisoners and doctors about the proper course of a prisoner's medical treatment, or to conclude that simple medical malpractice rises to the level of cruel and unusual punishment." *Id.* This type of disagreement is precisely what Plaintiff is alleging against Defendant Cichon in this case. Accordingly, Defendant Cichon's Motion for Summary Judgment is appropriately granted.

### ***Conclusion***

For the foregoing reasons, I hereby recommend the Court **DENY** Defendants Veilleux, Hatch, Skidgel and Skawinski's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment as to these Defendants. I recommend the Court **GRANT** Defendant Cichon's Motion for Summary Judgment.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated this 2d day of May, 1997.