

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

PATRICK ALEXANDRÉ, )  
 )  
 Plaintiff )  
 )  
 v. ) Civil No. 03-132-B-W  
 )  
 AL CICHON, et al., )  
 )  
 Defendants )

**RECOMMENDED DECISION ON MOTION  
FOR SUMMARY JUDGMENT BY AL CICHON**

Patrick Alexandré is incarcerated at the Maine State Prison and is the plaintiff in this 42 U.S.C. § 1983 action seeking remedy for the allegedly inadequate medical attention he received when he was at the Penobscot County Jail. (Docket No. 1.) He alleges that the defendants, in contravention of the Eighth Amendment prohibition against cruel and unusual punishment, were deliberately indifferent to his need for treatment of a shoulder injury sustained when he slipped when exiting the shower at the jail. Currently pending are three motions for summary judgment on behalf of the three defendants, Penobscot County Sheriff Glenn Ross (Docket No. 32), and physician assistants Al Cichon (Docket No. 38) and Jonathan Coggeshall (Docket No. 36). In this decision I address Cichon's motion (Docket No. 38) and, concluding that he is entitled to summary judgment, I recommend that the Court **GRANT** the motion.

*Discussion*

While at the jail Alexandré was entitled to "the minimal civilized measure of life necessities." Wilson v. Seiter, 501 U.S. 294, 298 (1991) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). One such necessity is treatment of medical conditions and,

accordingly, the denial of necessary medical care can rise to the level of a constitutional violation, see generally Farmer v. Brennan, 511 U.S. 825 (1994); Estelle v. Gamble, 429 U.S. 97 (1976).<sup>1</sup>

However, deliberate indifference liability attaches only when a state actor "knows of and disregards an excessive risk to inmate health or safety." Farmer, 511 U.S. at 837. The state actor "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837. In other words, a plaintiff with such a claim must not only demonstrate inadequate care, he or she must demonstrate the defendant(s) who deprived the inmate of care did so with a culpable state of mind. Id. at 834.

Related to this state-of-mind requirement are the tenets that inmates do not have a right to limitless doctor visits or their choice of medications, and negligence and medical malpractice are not actionable in 42 U.S.C. 1983 suits. Daniels v. Williams, 474 U.S. 327 (1986) (noting that 42 U.S.C. § 1983 provides a right of action for civil rights violations and cannot be used to sue correctional officials for negligence). "[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

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<sup>1</sup> In terms of the applicable Constitution standard, there is a twist in this case, in that Alexandré was both a convicted prisoner and a pre-trial detainee while at the jail. However, the First Circuit stated in Burrell v. Hampshire County that: "Pretrial detainees are protected under the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment; however, the standard to be applied is the same as that used in Eighth Amendment cases." 307 F.3d 1, 7 (1st Cir. 2002) (citing Bell v. Wolfish, 441 U.S. 520, 545(1979) (the Due Process Clause protections are at least as great as those under the Eighth Amendment); 1 M.B. Mushlin, Rights of Prisoners § 2.02 (2d ed. Supp.2001)"); accord Calderon-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002); Elliott v. Cheshire County, 940 F.2d 7, 10 (1st Cir. 1991); Gaudreault v. Municipality of Salem, 923 F.2d 203, 208 (1st Cir.1990); McNally v. Prison Health Servs., Inc., 28 F.Supp.2d 671, 673 (D. Me.1998).

Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle, 429 U.S. at 106.

Cichon is entitled to summary judgment on Alexandré's Eighth Amendment claim 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 [Cichon] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. I view the record in the light most favorable to Alexandré and I indulge all reasonable inferences in his favor. See Savard v. Rhode Island, 338 F.3d 23, 25 -26 (1st Cir. 2003). However, to the extent that Alexandré has failed to place Cichon's facts in dispute, I deem the properly supported facts as admitted, see Faas v. Washington County, 260 F. Supp. 2d 198, 201 (D. Me. 2003).<sup>2</sup>

### ***Cichon Material Facts***

Al Cichon is a physician assistant under contract to Allied Resources for Correctional Health (Allied) and supervised by Robert Abrahamson, M.D. Pursuant to a contract, Allied provides primary medical care to inmates at the Penobscot County Jail. (Cichon SMF ¶ 1.) Alexandré, an inmate at the jail from May 2002 through October 3, 2003, accumulated a voluminous medical record of his complaints and treatment for various ailments, including psychiatric issues, skin conditions, and food

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<sup>2</sup> Alexandré's pro se status does not relieve him of his duty to respond, see Parkinson v. Goord, 116 F.Supp.2d 390, 393 (W.D.N.Y 2000) ("[P]roceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment"), nor does it mitigate this Court's obligation to fairly apply the rules governing summary judgment proceedings, see Fed. R. Civ. P. 56; Dist. Me. Loc. R. Civ. P. 56.

allergies. (Id. ¶ 2.) Pursuant to Allied's contract with the jail, Allied maintains medical records for all inmates. Records of treatment are made at or near the time of treatment by, or from information transmitted by, a person with knowledge of the treatment; they are kept in the course of regularly conducted activities as a regular practice. (Id. ¶ 3.) Allied does not provide medical care to inmates at the Maine State Prison, so Allied's treatment of Alexandré and medical records of Alexandré's treatment terminate with Alexandré's transfer to the Maine State Prison on October 3, 2003. (Id. ¶ 4.)

Alexandr  claims he injured his right shoulder in a fall in the shower on March 10, 2003, but he did not report the injury or any pain to his shoulder at that time. (Id. ¶ 5.) Alexandr 's first complaint about his shoulder was not made until more than three weeks after the alleged injury, when on March 27, 2003, he completed an Inmate Medical Request (IMR) seeking treatment for a painful shoulder. (Id. ¶ 6.) In response to that IMR, Alexandr  was seen the following day, March 28, 2003, by Jonathan Coggeshall, P.A., who is also contracted to Allied to provide patient care to inmates. (Id. ¶ 7.) Coggeshall examined the shoulder, finding it nontender on palpation and tender to rotation. He diagnosed right shoulder tendinitis and prescribed rest. (Id. ¶ 8.)

Alexandr  next sought treatment for his shoulder on April 9, 2003, when he filed an IMR seeking treatment for right shoulder pain and unrelated abdominal pain. (Id. ¶ 9.) In response to that IMR, Alexandr  was seen two days later by Coggeshall on April 11, 2003. Coggeshall's diagnosis remained right shoulder tendinitis and he prescribed further rest. (Id. ¶ 10.) On April 14, 2003, Alexandr  filed another IMR seeking additional treatment for his shoulder pain, which he said was more severe. In response, Coggeshall prescribed Ibuprofen and Lortab, a painkiller. (Id. ¶ 11.) On April 29, 2003,

Alexandré filed another IMR seeking additional treatment for his shoulder pain, specifically requesting a consultation with a shoulder specialist. (Id. ¶12.) In response, Coggeshall arranged for an x-ray of Alexandré's shoulder. The x-ray revealed no acute fracture or dislocation, but did find some chronic deformity consistent with an old, healed clavicle fracture, as well as degenerative changes consistent with arthritis. The right shoulder was otherwise negative. (Id. ¶ 13.)

On May 11, 2003, and May 15, 2003, Alexandré filed additional IMR's seeking an MRI test and suggesting that he might have a torn rotator cuff injury. (Id. ¶ 14.) In response, Coggeshall again examined Alexandré on May 16, 2003. He noted that a new rotator cuff injury would not be consistent with the original fall described by Alexandré, and he noted that Alexandré has a long history of shoulder injuries. He recommended a conservative course of physical therapy for treatment and prescribed non-steroidal, anti-inflammatory drugs. (Id. ¶ 15.)

On May 18, 2003, Alexandré filed another IMR and complained to a nurse, whose progress note indicates Alexandré's complaints were reported to Coggeshall, who prescribed a pain medication, Hydrocone. (Id. ¶ 16.) On May 23, 2003, Coggeshall again examined Alexandré, who seemed set on seeing an orthopedic specialist and perhaps having surgery. Coggeshall referred Alexandré to the Eastern Maine Medical Center (EMMC) Orthopedic Clinic. (Id. ¶ 17.) On May 27, 2003, an appointment was made for Alexandré at the EMMC Orthopedic Clinic for June 2, 2003. (Id. ¶ 18.) On June 2, 2003, Alexandré was seen at the EMMC Orthopedic Clinic, where Rajendra Tripathi, M.D. diagnosed tendinitis of the long head of the biceps tendon, as well as bursitis of the shoulder. (Id. ¶ 19.) The doctor gave Alexandré an injection of Depo-

Medrol and Xylocaine, but the injection afforded no relief. (Id. ¶ 20.) As a result, Tripathi referred Alexandré for an MRI exam and prescribed a four-day course of Percocet for pain relief. (Id. ¶ 21.) The MRI exam was performed the same day and revealed a small rotator cuff tear. (Id. ¶ 22.)

On June 9, 2003, Alexandré was seen by Patricia Griffith, M.D. at Orthopedic Associates, on a referral from Dr. Tripathi, for a follow-up visit. (Id. ¶ 23.) Dr. Griffith noted that Alexandré was due to be released or transferred in one month and that his treatment would best be deferred until that time, when he would be in a stable situation where one provider could provide ongoing treatment. (Id. ¶ 24.) On June 13, 2003, Alexandré was again examined by Coggeshall for his continuing shoulder pain and Coggeshall prescribed a 10-day course of Ultram, as well as Percocet for use at night. (Id. ¶ 25.)

On July 4, 2003, Al Cichon examined Alexandré for the first time since his shoulder complaints began, but this exam was for a skin irritation. (Id. ¶ 26.) Alexandré did not raise the issue of his shoulder at this examination, but he was wearing a sling so Cichon reviewed his chart and found the notation of the small rotator cuff tear. (Id. ¶ 27.) Upon questioning, Alexandré reported that he had discontinued the exercises he was doing for his shoulder and Cichon strongly recommended that he resume those exercises to avoid a stiff or frozen shoulder. (Id. ¶ 28.)

On July 16, 2003, Alexandré filed another IMR seeking treatment for his continuing shoulder pain. (Id. ¶ 29.) In response to that request, Cichon met with Alexandré on July 18, 2003. (Id. ¶ 30.) During the July 18 meeting Alexandré was very focused on obtaining treatment for his shoulder and pointed out that even though Dr.

Griffith had recommended deferring treatment, she had believed he would be released or transferred in one month. (Id. ¶ 31.) At this point, about five weeks had passed since that recommendation and no transfer was planned for the immediate future. (Id. ¶ 32.) In light of the above facts, Cichon agreed to review the case. (Id. ¶ 32.)

On July 22, 2003, Alexandre filed another IMR seeking treatment for his continuing shoulder pain. (Id. ¶ 33.) In response to that request, Cichon examined Alexandre on July 25, 2003. (Id. ¶ 34.) Cichon prescribed a series of improved exercises to increase Alexandre's range of motion, recommended he continue other treatments -- including medications -- and decided to look further at a referral for physical therapy. (Id. ¶ 35.)

Per Cichon's referral, Alexandre had his first visit August 7, 2003, at HealthSouth for physical therapy, where he was also assigned exercises to do each day on his own. (Id. ¶ 36.) Alexandre had additional physical therapy appointments at HealthSouth on August 15 and 22, 2003 and on September 4, 2003. (Id. ¶ 37.) On September 12, 2003, after the four scheduled physical therapy visits, Cichon consulted with the physical therapist at HealthSouth and examined Alexandre. In consultation with the physical therapist he decided to extend the physical therapy for several additional sessions to include iontophoresis (ultrasound with steroids to decrease inflammation). (Id. ¶ 39.) Alexandre reported during his visit on that day that his shoulder was improving. (Id. ¶ 40.)

Prior to his October 3, 2003, transfer to the Maine State Prison, Alexandre was on a course of three times weekly physical therapy with iontophoresis, and he was seen at HealthSouth for physical therapy on September 12, 16 and 22, 2003. (Id. ¶ 41.) At the

time of his transfer to the Maine State Prison the Alexandré had multiple conditions of his right shoulder, including arthritis, tendinitis/bursitis, and a small rotator cuff tear. (Id. ¶ 42.) Given his progress in physical therapy, surgical intervention did not appear to be in his best interest at that point. (Id. ¶ 43.)

***Alexandré's Response to Cichon's Motion for Summary Judgment***

In his comprehensive response to the three motions for summary judgment (Docket No. 41), Alexandré states, hyperbolically, that the three defendants have filed untrue statements in their motion for summary judgment and in their affidavits and refers to many inconsistencies in their pleadings that he has not addressed.

As to specific discontents, he asserts that he never suffered injuries to his shoulder while working as a logger, although he did injure his shoulder when he was a child when he fell off his bike and broke his collar bone. This childhood accident resulted in the only injury of Alexandré's shoulder prior to the slip and fall at the jail.

Alexandré further complains about the cancellation of the follow-up appointment with the orthopedist. On this score, Alexandré also disputes Coggeshall's claims that the orthopedic surgeon continued to recommend conservative treatment, asserting that the orthopedic surgeon had recommended a follow-up treatment but that this treatment was cancelled by Coggeshall (and never reinstated by Cichon), in a deliberate indifference to Alexandré's medical needs.

With respect to Alexandré response as it targets Cichon in particular, Alexandré takes Cichon to task for the assertion in his memorandum that there is no allegation or evidence that Cichon had any input in the diagnosis or treatment of Alexandré's shoulder complaints (prior to July 4, 2004). Alexandré claims that he has evidence that Cichon

made decisions on his course of treatment on June 7, 2003, but has not identified what it is or supplied it to the Court. Alexandre also criticizes Cichon for his allegation that Alexandre was receiving physical therapy three times a week. Alexandre claims that his record shows that he only had physical therapy once a week and twice a week for two weeks.

### ***Resolution of Summary Judgment Motion***

Based on the supported material facts presented by Cichon, that remain almost entirely uncontested by Alexandre, I conclude that, there being no genuine dispute as to any of the material facts, Cichon is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c) (emphasis added). It is evident, from the material facts properly before me, that beginning on July 4, 2003, Cichon responded to Alexandre's request for care promptly, undertook evaluations, prescribed prescriptions, and arranged outside physical therapy. Alexandre articulated his discontent with some of the medical choices made at the jail at the time and the medical staff responded, although not always in a manner to his liking.

Even crediting the unsworn (first-hand) factual assertions by Alexandre in response to Cichon's motion, Alexandre has not generated a genuine dispute of material fact. Alexandre states that he did not injure his shoulder logging, however the root cause of the shoulder injury is not material in light of the other undisputed material facts. Cichon does not contest that Alexandre was injured at the jail and experienced shoulder pain during his detention at the jail. Cichon is not arguing that he did not need to treat the injury because it was preexisting. Rather, the undisputed facts demonstrate a persistent effort to diagnose (including the use of x-rays) the shoulder and to treat it with

medication and physical therapy. And there is absolutely no fact, supported by record evidence, that surgery, which seems to be what Alexandré was after, was a preferable intervention while Cichon was on watch.

In addition, there is no factual dispute that Coggeshall canceled the follow-up visit with Doctor Griffith. What is important (and undisputed) is that this visit was cancelled because of the note received from Griffith recommending a hiatus in orthopedic treatment until Alexandré's "social situation" was settled. Cichon reviewed this issue when Alexandré requested he do so and determined that it was appropriate to try physical therapy rather than pursue a follow-up with Griffith.

With respect to Alexandré's Cichon-specific concerns Alexandré has not specified the nature of the evidence he claims to have of Cichon's pre-July involvement. See Rosenfeld v. Egy, 346 F.3d 11, 17, (1st Cir. 2003). Without more on Alexandré's part, I decline to use my imagination to identify a hypothetical factual assertion that might generate a genuine dispute of material fact on Alexandré's behalf. Finally, vis-à-vis Alexandré's disagreement with the assertion by Cichon that Alexandré was receiving physical therapy three times a week, as I read the record, Cichon is not claiming that there were three-times-a-week outpatient visits to HealthSouth. As there is no dispute about the dates of those outpatient visits, the question of whether there were additional in-house therapy sessions on top of the cell exercises is not one that has to be answered given the other facts on this subject that are not in dispute.<sup>3</sup>

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<sup>3</sup> One need only reference the recommended decisions issued on the other two defendants' motions in which this three-time-a-week allegation is absent, to verify this point.

Alexandr  clearly believed at the time and believes now that something different, something more should have been done to treat his shoulder condition.<sup>4</sup> However, even if Alexandr  had established a factual basis for concluding that Cichon made a mistake in judgment in treating his shoulder, this would not form a factual basis for concluding that this was deliberately indifferent care within the meaning of Farmer. Giving Alexandr  the benefit of all reasonable inferences, Alexandr  has not generated a genuine dispute of material fact to form the bases for a conclusion that Cichon acted with a culpable state of mind. Farmer, 511 U.S. at 834. Viewed within the four corners of the summary judgment pleadings, Cichon’s treatment decisions (the most prominent being the pursuit of physical therapy rather than ordering a follow-up with the orthopedic specialist) amounts, at the most, to no more than negligence, see Daniels, 474 U.S. at 335-36; Estelle, 429 U.S. at 105-06.

### **Conclusion**

For the reasons stated above I recommend that the Court **GRANT** Cichon's (Docket No. 38) 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) 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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<sup>4</sup> Not surprisingly as a pro se incarcerated litigant, Alexandr  has provided no record evidence in the nature of a professional medical opinion that the course of treatment afforded him was inadequate or misguided.

May 6, 2004.

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

ALEXANDRE v. CICHON et al  
Assigned to: JUDGE JOHN A. WOODCOCK JR.  
Referred to: MAG. JUDGE MARGARET J.  
KRAVCHUK  
Demand: \$  
Lead Docket: None  
Related Cases: None  
Case in other court: None  
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 08/07/03  
Jury Demand: Plaintiff  
Nature of Suit: 550 Prisoner: Civil  
Rights  
Jurisdiction: Federal Question

**Plaintiff**

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