STATE OF VERMONT
WINDSOR COUNTY, SS

Ryan Morrissey Plaintiff v. Andrew Pallito, Comm. Vermont Department of Corrections; Anita Carbonell, Superintendent; and Prison Health Services Defendants	SUPERIOR COURT Docket No. 463-7-09 Wrcv

DECISION ON MOTION FOR SUMMARY JUDGMENT

Defendants have moved for summary judgment in this 42 U.S.C § 1983 action filed by Plaintiff, pro se. Plaintiff alleges violation of his civil rights as a result of inadequate medical care from a blister bursting on Plaintiff's foot. Specifically, Plaintiff alleges the Defendants failed to take action to protect him from harm they knew was imminent. Plaintiff seeks compensatory and punitive damages. The actions Defendants should have taken are not specified in the complaint.

Defendants have moved for summary judgment in a pleading filed March 15, 2010. Plaintiff has not opposed the summary judgment motion. Defendants claim Plaintiff lacks the necessary expert testimony to support his claim, that the claims against the State defendants, Pallito and Carbonell are barred by the Eleventh Amendment, and that vicarious liability is not an available theory under 42 USC § 1983.

Discussion

On August 8, 2009, Defendants Pallito and Carbonell waived service in their official capacities only. An answer was filed by all Defendants on September 16, 2009. On that same date, Defendants propounded requests for admission and expert interrogatories and requests to produce upon Plaintiff. The expert interrogatories sought the expert disclosures available under V.R.C.P. 26. The requests to produce sought production of any expert reports. The requests for admission sought admissions that Plaintiff had no medical expert to support his claim or that was expected to testify on his behalf. On November 7, 2009, Defendants' counsel wrote to Plaintiff reminding him of the obligation to respond to the requested discovery and informing him that a motion for summary judgment would be filed if no responses were made. To date no answers to the discovery have been served.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. *Price v. Leland*, 149 Vt. 518, 521 (1988). However, summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to his or her case, and on which she has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

In this case, Pallito and Carbonell have waived service of process in their official capacities only. They have never been served in their individual capacities, if in fact the complaint is construed to make such allegations, a proposition which is far from certain.

Neither the State of Vermont, nor an employee of the State sued in their official capacity, are "persons" under 42 U.S.C.A. §1983, the statute authorizing claims for deprivation of civil rights under the United States Constitution. *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989); *Heleba v. Allbee*, 160 Vt .283 (1992). Therefore, when a state official is sued solely in an official capacity, monetary damages are ordinarily unavailable. *Shields v. Gerhart*, 155 Vt. 141 (1990). Such is the case here.

Because the claims against Pallito and Carbonell in their official capacities are treated as claims against the State and because the State is not a "person" for purposes of claims for money damages arising pursuant to 42 U.S.C.A. §1983, those claims must fail. Plaintiff's claims for monetary damages based upon violations of the 8th and 14 Amendments to the United States Constitution are improper as a matter of law.

Plaintiff alleges what appears to be a claim for medical malpractice against the Defendants. Plainitiff does not rely upon the Eight Amendment in support of his claims but does allege vaguely the failure to take proper medical steps to deal with his condition. Giving the Plaintiff the benefit of all doubt, the Court will consider the Eighth Amendment implicated by Plaintiff's complaint.

To establish an Eighth Amendment violation, the Plaintiff must show the Defendant's acts or omissions were sufficiently harmful to evidence deliberate indifference to serious medical needs. *Estelle v. Gamble*, 29 U.S. 97 (1976). Plaintiff has made absolutely no showing sufficient to meet this standard and his possible Eighth Amendment complaints are completely unsupported.

In a claim of medical malpractice, the burden is on the Plaintiff to establish that malpractice has been committed. *Senesac v. Associates in Obstetrics and Gynecology*, 141 Vt. 310 (1982). It is the Plaintiff's burden to establish the proper standard of medical skill and care, a departure from that standard by the Defendant(s), and that such departure

was the proximate cause of harm to the Plaintiff. *Utzler v. Medical Center Hospital of Vermont*, 149 Vt. 126 (1987).

Here, Plaintiff has made no showing of the proper standard of medical skill and care, a departure from that standard or any resulting harm. Plaintiff has had adequate time to develop this evidence, having had many months post-filing to provide this information. There has been an adequate time for discovery in this matter; and despite the discovery requests from Defendants including requests for admission, a written reminder, and despite the filing of a motion for summary judgment by Defendants, Plaintiff has failed to produce evidence upon which he bears the burden of proof at trial.

V.R.C.P. 56 permits the moving party to point to an absence of evidence to support an essential element of the nonmoving party's claim. *Bay v. Times Mirror Magazines, Inc.*, 936 F.2nd 112 (2d Cir. 1991). Since the Plaintiff has failed to make a showing sufficient to establish the existence of several elements essential to his case, including the standard of care, breach of that standard and resulting harm, summary judgment on medical issues is appropriate in this instance.

Further, the Plaintiff's complaint against Pallito and Carbonell does not allege any direct participation by them in the provision (or failure to provide) of medical services. Supervisory employees can not be sued under § 1983 solely because an alleged injury was inflicted by a subordinate employee or an agent. *Richardson v. Goord*, 347 F. 3d. 431 (2d Cir 2003). To establish liability under § 1983, a plaintiff must show defendant's personal involvement in the wrong giving rise to the claim. *Green v. Bauvi*, 46 F. 3d 189 (2d. Cir 1995). Such a showing is completely absent here.

This court is mindful that Plaintiff is proceeding pro se. However, Plaintiff's status as a pro se litigant does not excuse him from the obligation to support his claims. Plaintiff has had adequate time to do so here and has failed to produce evidence essential to his claims.

For the foregoing reasons, Defendants' motion for summary judgment is **GRANTED**.

Dated at Woodstock this 3rd day of May, 2010.

Harold E. Eaton, Jr.
Superior Court Judge