UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOSHUA LEE SMOLA,

Plaintiff,

v. CASE NO. 8:19-cv-2938-T-23AAS

DR. OGAGA,

Defendant.
_________________________________/

ORDER

Smola's original complaint alleges that the defendants violated his civil rights by failing to provide proper medical care for a growth on his finger. An earlier order (1) advises Smola that he can pursue a claim against neither "Hillsborough County Sheriff's Office" nor "Naphcare Medical Department, Clinic B [of the] Hillsborough County Sheriff's Office," (2) directs Smola to file an amended complaint, and (3) cautions Smola that he "must both identify the persons who failed to provide adequate medical care and allege facts showing their personal involvement in the denial of medical care." (Doc. 4 at 2) In his amended complaint (Doc. 5) Smola continues to name the defendants listed in the original complaint but adds doctors Mitchell and Ogaga as defendants. Because he asserted no fact showing the personal involvement of Dr. Mitchell, an earlier order (Doc. 6) dismisses all defendants except Dr. Ogaga.

Pending is Dr. Ogaga's motion under Rule 12(b)(6), Federal Rules of Civil Procedure, to dismiss this action, or alternatively a motion under Rule 56 for summary judgment. (Doc. 14) An earlier order both explains the differences between the two motions and cautions Smola that "the granting of either of the defendant's requests could result in a final adjudication in the defendant's favor." (Doc. 16 at 1) Additionally, the order both directs Smola to oppose the motions and cautions him that his failing to oppose the motions "will not preclude the district court from considering and possibly granting the motions, which could result either in a dismissal of this action with prejudice or in summary judgment for the defendant." (Doc. 16 at 5) The docket shows that Smola has neither opposed the motions nor otherwise contacted the clerk about this action. Moreover, the last order sent to Smola was returned as undeliverable, and the clerk's attempt to re-send the order was likewise unsuccessful.

As explained in the earlier order, on a motion to dismiss under Rule 12 "the allegations in the complaint are viewed in the light most favorable to the plaintiff" and on a motion for summary judgment under Rule 56 the facts are "[v]iewed in the light most favorable to the non-moving party . . . ." (Doc. 16 at 1 and 3) Because the moving party under either motion has the burden of proof, Smola is entitled to this beneficial review even though he offers no opposition to either motion.

When reviewing a motion to dismiss under Rule 12(b)(6), the reviewing court is limited to the facts and allegations asserted in the complaint to determine whether to grant or deny the motion to dismiss. When reviewing a motion for summary

judgment under Rule 56, the reviewing court may consider affidavits, exhibits, or other papers beyond the complaint to determine whether to grant or deny the motion for summary judgment. Lastly, under Rule 12(d) when a defendant moves to dismiss under Rule 12(b) and attaches affidavits, exhibits, or other papers to the motion, the motion to dismiss is converted into a motion for summary judgment unless the reviewing court excludes consideration of the attached papers. Dr. Ogaga has filed under seal (Doc. 18) Smola's medical records relevant to this action. Because the district court chooses to consider those records as permitted under Rule 12(d), this action proceeds under the pending motion (Doc. 14) as a motion for summary judgment.

STANDARD OF REVIEW

Under Rule 56 summary judgment is proper "if 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." *See In re Optical Technologies, Inc.*, 246 F.3d 1332, 1334 (11th Cir. 2001). The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Johns v. Jarrard*, 927 F.2d 551, 555 (11th Cir. 1991). Viewed in the light most favorable to the non-moving party, the papers must show the absence of a genuine issue of material fact and the moving party's entitlement to judgment as a matter of law. *See generally, Allen v. Tyson Foods, Inc.*, 121 F.3d 642 (11th Cir. 1997); *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590 (11th Cir. 1995). Even though allegations in a *pro se* complaint are

held to a less stringent standard than a formal pleading drafted by a lawyer, *Haines v. Kerner*, 404 U.S. 519 (1972) (*per curiam*), *Tannenbaum v. United States*, 148 F.3d 1262 (11th Cir. 1998), the plaintiff's allegation must have factual support. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1321 (11th Cir.) *reh'g and suggestion for reh'g en banc denied*, 182 F.3d 938 (11th Cir.), *cert. dismissed*, 528 U.S. 948 (1999).

Once the movant presents evidence that, if not controverted, would entitle the movant to judgment as a matter of law, the burden shifts to the non-moving party to assert specific facts demonstrating a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Pennington v. City of Huntsville*, 261 F.3d 1262 (11th Cir. 2001). If one party's claim is implausible, that party must present more persuasive facts than necessary to show merely that a genuine factual issue exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 58–-87 (1986); *Wood v. City of Lakeland*, 203 F.3d 1288 (11th Cir. 2000). *See also Cuesta v. School Bd. of Miami-Dade County*, 285 F.3d 962, 970 (11th Cir. 2002) ("A court need not permit a case to go to a jury, however, when the inferences that are drawn from the evidence, and upon which the non-movant relies, are 'implausible.'"). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *Anderson*, 477 U.S. at 248.

DENIAL OF ADEQUATE MEDICAL CARE

Smola alleges that Dr. Ogala failed to provide adequate medical care for a growth on his finger. A state has the constitutional obligation to provide adequate medical care — not mistake-free medical care — to those in confinement. *Adams v. Poag*, 61 F.3d 1537 (11th Cir. 1995), *Mandel v. Doe*, 888 F.2d 783 (11th Cir. 1989). "Accidents, mistakes, negligence, and medical malpractice are not 'constitutional violations merely because the victim is a prisoner.'" *Harris v. Coweta County*, 21 F.3d 388, 393 (11th Cir. 1994), citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). "[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." *Estelle v. Gamble*, 429 U.S. at 106. *Accord Bingham v. Thomas*, 654 F.3d 1171, 1176 (11th Cir. 2011) (applying *Gamble*). "A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice . . . ." 429 U.S. at 107. *Accord Wallace v. Hammontree*, 615 F. App'x 666, 667 (11th Cir. 2015) ("Claims concerning the doctor's medical judgment, such as whether the doctor should have used another form of medical treatment or a different diagnostic test, are inappropriate claims under the Eighth Amendment.").

Instead, an inmate is protected from deliberate indifference to a serious medical need. In analyzing a claim of deliberate indifference to a serious medical need, a court must focus on two components: "whether evidence of a serious medical need exists; if so, whether the defendants' response to that need amounted to

deliberate indifference." *Adams v. Poag*, 61 F.3d at 1543. These two components are explained further in *Gilmore v. Hodges*, 738 F.3d 266, 274 (2013):

> A plaintiff must first show an objectively serious medical need that, if unattended, posed a substantial risk of serious harm, and that the official's response to that need was objectively insufficient. *See Bingham v. Thomas*, 654 F.3d 1171, 1175–76 (11th Cir. 2011). Second, the plaintiff must establish that the official acted with deliberate indifference, *i.e.*, the official subjectively knew of and disregarded the risk of serious harm, and acted with more than mere negligence.

See also Clas v. Torres, 549 F. App'x 922 (11th Cir. 2013)[*] ("For a prisoner to state an Eighth Amendment inadequate medical treatment claim under § 1983, the allegations must show (1) an objectively serious medical need; (2) deliberate indifference to that need by the defendant; and (3) causation between the indifference and the plaintiff 's injury."); *Wallace*, 615 F. App'x at 667 (11th Cir. 2015) ("Medical treatment violates the Eighth Amendment only when it is 'so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.'") (quoting *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991)). *Brennan v. Comm'er, Ala. Dep't of Corr.*, 626 F. App'x 939, 943 (11th Cir. 2015) ("Brennan's allegation that Oakes and Dr. Talley were aware that he needed treatment, including surgery, but that he did not get that treatment for nearly four months, stated a plausible claim for relief.").

[*] "Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. Rule 36-2.

DISCUSSION

Based on both the allegations in the complaint and the medical records attached to the motion for summary judgment, Smola was a detainee in the Hillsborough County jail when, on September 8, 2019, he submitted a "sick call" request to the medical department in which he complained about "a hole in [his] finger." A nurse examined Smola later that day and recorded that Smola's pain was at the bottom of a one-to-ten scale. A week later Smola submitted another sick call request and, later that same day, the doctor excised an abnormal growth on Smola's finger. A re-examination the following week disclosed that the growth had returned. Over the course of the following four months (October to January), Dr. Ogaga (1) performed or supervised many examinations and medical procedures, including submitting a sample of tissue for a biopsy, (2) prescribed medications for the condition, and (3) ordered Smola's examination by a dermatologist not affiliated with the county jail. Smola was released from the jail at the end of the four months of treatment. Based on these undisputed facts, no material fact precludes granting the uncontested summary judgment.

Dr. Ogaga's motion (Doc. 14) for summary judgment is **GRANTED**. The clerk must enter a judgment for Dr. Ogaga and close this case.

ORDERED in Tampa, Florida, on July 7, 2020.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE