

Lycoming County Prison to the custody of the Department of Corrections and housed at SCI-Camp Hill. At the time of his transfer, he was passing blood in his urine and was suffering from lower back pain. Upon arrival, Dr. Vucha, an orthopedic specialist, gave him a walking cane and prescribed him pain medication. Dr. Vucha also scheduled a consult with a neurologist, Defendant Dr. Janton, and arranged for an EMG and a nerve conduction study test to be performed.

He states that, before he could be seen by the neurologist and have the medical tests performed, he was transferred back to Lycoming County Prison. He eventually returned to SCI-Camp Hill. He alleges that, upon his return, he had to wait an unusual amount of time to obtain pain relief. He was seen by Defendant Janton and given the testing but, Plaintiff alleges that Defendant Janton manipulated the results to suggest that the Plaintiff was "faking" his ailment. (Doc. 101, ¶ 3). Defendant Lasky went over the results with the Plaintiff and informed him that they showed that he only had damage to one nerve. The Plaintiff found this to be unbelievable based upon the fact that he was not able to straighten up fully and his spasms were growing more rapid and violent.

Plaintiff again met with Dr. Vucha and he increased the pain medication and scheduled another appointment. He alleges that Defendant Lasky "made sure that meeting did not take place, by taking the Plaintiff off of medical hold for his transfer to take place while still underneath the care of a specialist, and without a definitive cause for the Plaintiff's condition." (Doc. 101, ¶ 4). Shortly thereafter, Plaintiff was transferred to SCI-Graterford.

Plaintiff was evaluated by medical staff at SCI-Graterford and released to general

population. The Plaintiff alleges that he was then taken by stretcher to the prison hospital where he met with Defendant Dr. Baddick. Defendant Baddick informed him that he would see what could be done about his condition but, instead, took away his walking cane. However, Lieutenant Crawford stepped in and allowed the Plaintiff to keep his cane as it was prescribed by a specialist.

The Plaintiff was then transferred back to Lycoming County Prison. He arrived without his medical file. Defendant Solouff asked that he "sign over" his medication file so that pain relief medication could be evaluated. Plaintiff refused to do this because he "had just left the prison sixty days ago." (Doc. 101, ¶ 8). He alleges that his refusal prompted Defendant Solouff to deny him medical care and for Defendant Verzella to "co sign" her actions. (*Id.*). He further states that despite his worsening condition Defendants Verzella and Keenan denied him any further treatment based upon Defendant Janton's non-definitive findings.

He states that he was then returned to SCI-Graterford in a wheelchair with non-stop spasms and the inability to control his legs. Defendant Baddick then allowed him to meet with a neurologist. He was given a second EMG and nerve conduction study test which came back as positive. The neurologist then gave the Plaintiff something to control the spasms. He states that Defendant Baddick took away his wheelchair, except for trips to physical therapy, and forced him to walk with a walker.

The Plaintiff was again sent back to Lycoming County Prison for his trial. During that time period, he was allowed full access to a wheelchair. At the completion of his trial, he was sent back to SCI-Graterford and, when the neurologist finally decided to send the Plaintiff to

an orthopedist, he was transferred to SCI-Mahanoy.

According to the Plaintiff, upon his arrival at SCI-Mahanoy, Defendant Diaz informed him that he had spoken with Defendant Baddick and that he wouldn't be doing anything for the Plaintiff. He states that bringing the problem to the attention of Defendant Cerullo did not help as she, too, denied him medical care and treatment.

He states that once he began to utilize the grievance system, Defendant Cerullo allowed Defendants Rush, Rutt and Diaz to strip him of everything utilized to minimize his pain. Further, Defendants Dragovich and Dotter placed the Plaintiff on grievance restriction for "non-definitive" reasons.

He alleges that he was chased away from the medical department and that he was given the wrong medication. He states that he brought this to the attention of Defendants Connell and Dragovich and that they told him he was only looking to file a lawsuit. Shortly thereafter, he was placed in the hospital due to severe stomach pain and he once again had blood in his urine.

He alleges that he is still in a battle to receive some definitive answers and diagnoses for his spinal injury and blood in his urine. Yet, each time he tries to learn more, Defendants Diaz, Rush, Hall, Connell, Cerullo and Chipriano lie to him. Once he was able to put all the evidence together, Defendants Dotter, Dragovich, Bitner and Brannigan rejected his claim and transferred him to SCI-Albion.

II. Motions to Dismiss.

A. Standard of review.

When evaluating a motion to dismiss, the court must accept all material allegations of

the complaint as true and construe all inferences in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A complaint should not be dismissed for failure to state a claim unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 44-46 (1957); *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988). A complaint that sets out facts which affirmatively demonstrate that the plaintiff has no right to recover is properly dismissed without leave to amend. *Estelle v. Gamble*, 429 U.S. 97, 107-108 (1976).

B. Discussion.

1. Statute of Limitations.

(i) Defendants Verzella, Keenan and Solouff

While incarcerated at the Lycoming County Prison, the Plaintiff claims that Defendants Verzella, Keenan and Solouff denied him adequate medical care. These Defendants argue that the claims lodged against them are barred by the statute of limitations. The Court agrees.

In reviewing the applicability of the statute of limitations to an action filed pursuant to § 1983, a federal court must apply the appropriate state statute of limitations which governs personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985); *Urrutia v. Harrisburg County Police Dept.*, 91 F.3d 451, 457 n. 9 (3d Cir. 1996); *Cito v. Bridgewater Twp. Police Dept.*, 892 F.2d 23, 25 (3d Cir. 1989). The United States Supreme Court clarified its decision in *Wilson* when it held that "courts considering § 1983 claims should borrow the general or residual [state] statute for personal injury actions." *Owens v. Okure*, 488 U.S. 235, 250 (1989); *Little v. Lycoming County*, 912 F. Supp. 809, 814 (M.D. Pa.), *aff'd* 101 F.3d 691 (3d Cir. 1996)

(Table). Pennsylvania's applicable personal injury statute of limitations is two years. See 42 Pa.Cons. Stat. Ann. § 5524(7) (Purdon Supp. 1996); *Kost v. Kozakiewicz*, 1 F.3d 176, 190 (3d Cir. 1993); *Smith v. City of Pittsburgh*, 764 F.2d 188, 194 (3d Cir.), cert. denied, 474 U.S. 950 (1985). Finally, the statute of limitations "begins to run from the time when the plaintiff knows or has reason to know of the injury which is the basis of the Section 1983 action." *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 919 (3d Cir. 1991) (citations omitted).

The Plaintiff alleges in his complaint that he entered the Department of Corrections on July 24, 1997, from the Lycoming County Prison. He alleges that he was transferred back and forth between SCI-Graterford and the Lycoming County Prison prior to eventually being transferred to SCI-Mahanoy. The last time he was incarcerated at the Lycoming County Prison was for his trial. (Doc. 101, ¶ 11). While he doesn't include dates in the Amended Complaint, as aptly noted by the Defendants, the Court disposed of a prior action filed by Mr. Brown against medical personnel at the Lycoming County Prison, and in that record, it is clear that the Plaintiff was last treated at the Lycoming County Prison on September 28, 1998. (Doc. 155, p. 7, and *See Brown v. Poorman*, Middle District of Pa. Case No. 3:CV-98-1180, Doc. 265). Given this fact, of which the Court takes judicial notice, it is clear that the complaint should have been filed at some point prior to September 28, 2000. The original complaint in this action was not filed until February 27, 2001. Further, the Plaintiff did not move to file an Amended Complaint until September 17, 2001. It was at this point that he named Defendants Verzella, Keenan and Solouff for the first time. The motion was granted on June 11, 2002, and the Amended Complaint was filed on August 26, 2002. It is clear from the facts alleged that the

Plaintiff obtained knowledge of the purported violation of his constitutional rights well over two years prior to the time he chose to add these Defendants to the action. Clearly, the complaint is untimely.

With regard to the Plaintiff's attempt to invoke the protection of the discovery rule, the Court finds this argument to be without merit. As noted by the Defendants, prior to the initiation of this action, the Plaintiff had been litigating another action concerning the adequacy of the medical treatment he was receiving at Lycoming County Prison for these same ailments. (See *Brown v. Poorman*, Middle District of Pa. Case No. 3:CV-98-1180). Therefore, the Court would be hard pressed to accept the Plaintiff's argument that he was not aware of his injury until the date upon which he sought to amend his complaint. The Motions to Dismiss filed on behalf of Defendants Verzella and Keenan (Doc. 117) and Defendant Solouf (Doc. 129), will be granted.

(ii) Defendant Lasky

Defendant Lasky contends that it is readily apparent from the face of the Amended Complaint that the Plaintiff's claims against him are barred by the statute of limitations. He argues that he became involved in the Plaintiff's medical care on July 24, 1997, when the Plaintiff was transferred to SCI-Camp Hill. While incarcerated at SCI-Camp Hill, the Plaintiff was referred to Dr. Janton, an outside neurologist, for consultation and neurological testing. Plaintiff was briefly transferred back to Lycoming County Prison. Thereafter, the Plaintiff returned to SCI-Camp Hill and Defendant Lasky reviewed Dr. Janton's findings with him. The Plaintiff was then transferred to SCI-Graterford. Defendant Lasky points out that the Plaintiff

does not allege any further involvement in his medical care beyond this time period.

While the Plaintiff does not provide the exact date on which he was transferred from SCI-Camp Hill, and thus afford the Court a definitive date for purposes of setting a statute of limitations cut off, exhibits attached to the Plaintiff's Amended Complaint provide guidance. The Court can conclude that he was transferred some time prior to July 17, 1998, as that is the date the neurological consultation that was ordered by the SCI-Graterford medical department took place. (Doc. 101, Exhibit B-1). Thus, the Plaintiff would have had to commence the action against Defendant Lasky no later than July 17, 2000. As noted above, the original complaint in this action was not filed until February 27, 2001, and the Amended Complaint, wherein Defendant Lasky was named for the first time, was filed on August 26, 2002. Clearly, the complaint against Defendant Lasky is untimely. The Court rejects the Plaintiff's discovery rule argument for the same reasons set forth above. Defendant Lasky's Motion to Dismiss the Amended Complaint (Doc. 132) will be granted.

2. Personal Involvement.

Brown included in his complaint, the following Corrections Defendants: Deputy Secretary Brannigan, Superintendent Assistant at SCI-Mahanoy, Dotter; Chief Hearing Examiner Bitner; SCI-Camp Hill Superintendent Dragovich; SCI-Mahanoy Corrections Health Care Administrator Cerullo; SCI-Mahanoy Nurse Supervisor Connell; SCI-Mahanoy Nurse Supervisor Chipriano and typist Holden. In order to state an actionable claim under Section 1983, the plaintiff must allege that a person has deprived him or her of a federal right and, that the person who caused the deprivation acted under color of state or territorial law. *West v.*

Atkins, 487 U.S. 42, 48 (1988). Furthermore, "[a] defendant in a civil rights action must have personal involvement in the alleged wrongs Personal involvement may be shown through allegations of personal direction or actual knowledge and acquiescence." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207-08 (3d Cir.1988). Also, it is well established that claims brought under § 1983 cannot be premised on a theory of *respondeat superior*. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). Rather, each named defendant must be shown, *via* the complaint's allegations, to have been personally involved in the events or occurrences which underlie a claim. See *Rizzo v. Goode*, 423 U.S. 362 (1976); *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077 (3d Cir. 1976). As explained in *Rode*:

A defendant in a civil rights action must have personal involvement in the alleged wrongs. . . . [P]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity.

Rode, 845 F.2d at 1207.

As concerns "typist Holden" there is not a single allegation in the complaint against this Defendant. The Plaintiff fails to identify how this Defendant is personally involved in conduct amounting to a constitutional violation. The complaint against this Defendant is subject to dismissal.

The Plaintiff also fails to allege any facts demonstrating that Defendants Connell and Chipriano were personally involved in conduct amounting to a constitutional violation. Rather, he attempts to impose liability upon these Defendants in their roles as nurse supervisors. This he cannot do. The complaint against these individuals is therefore subject to dismissal.

As concerns Defendants Cerullo, Dragovich, Bitner, Dotter and Brannigan, the allegations against them are for the role they played in addressing the Plaintiff's grievances. However, involvement in the grievance process is insufficient to amount to personal involvement. "The failure of a prison official to act favorably on an inmate's grievance is not itself a constitutional violation." *Hughes v. Chesney*, Civil No. 3:CV-00-0017, slip op. at 17 (M.D.Pa. Sept. 10, 2002)(Kosik, J.), citing *Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994), cert. denied, 514 U.S. 1022 (1995); *McGuire v. Forr*, Civ.A.No. 94-6884, 1996 WL131130, at *1 (E.D.Pa. March 21, 1996), aff'd 101 F3d 691 (3d Cir. 1996); *Flanagan v. Shively*, 783 F.Supp. 922,931 (M.D.Pa. 1992) aff'd, 980 F.2d 722 (3d Cir.), cert. denied, 510 U.S. 829 (1993).

Further, the Court of Appeals for the Third Circuit has clearly held that a prison official cannot be "considered deliberately indifferent simply because they failed to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor." *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3rd Cir. 1993). The *Durmer* Court also reiterated the longstanding principle that "*Respondeat superior* is, of course, not an acceptable basis for liability under § 1983." *Id.* at fn 14. Here, the Plaintiff clearly alleges that he was under the care of physicians in the medical department. Accordingly, under *Durmer v. O'Carroll*, the complaint against these individuals will be dismissed.¹

¹ Defendant Dotter, "Superintendent Assistant" at SCI-Mahanoy, who according to the entry of appearance filed on June 6, 2001, is also represented by the Office of General Counsel, was not included as a moving party in the Corrections' Defendants most recent motion. Regardless, this Defendant will benefit from the decision to grant the Corrections Defendants' motion as it is apparent that Dotter was mistakenly omitted from the motion. Alternatively, it is obvious from the face of the pleading that the Defendant also falls into

3. Inadequate medical care.

“A prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.” *Farmer v. Brennan*, 511 U.S. 825, 827, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) citing *Helling v. McKinney*, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993); *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). An inadequate medical care claim, as is presented here, requires allegations that the prison official acted with “deliberate indifference to serious medical needs” of the plaintiff, while a prisoner. *Estelle*, 429 U.S. at 104 (1976); *Unterberg v. Correctional Medical Systems, Inc.*, 799 F. Supp. 490, 494-95 (E.D. Pa. 1992). The official must know of and disregard an excessive risk to inmate health or safety. *Farmer*, 511 U.S. at 837. “[T]he official 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.* “The question...is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial ‘risk of serious damage to his future health.’” *Farmer*, 511 U.S. at 843. This test “affords considerable latitude to prison medical authorities in the diagnosis and treatment of the medical problems of inmate patients. Courts will ‘disavow any attempt to second guess the propriety or adequacy of a particular course of treatment...which remains a question of sound professional judgment.’” *Little v. Lycoming*

the category of supervisory official and thus, the complaint is subject to dismissal pursuant to 28 U.S.C. §1915(e)(2)(B)(ii).

County, 912 F.Supp. 809, 815 (M.D. Pa) *aff'd*, 103 F.3d 691 (1996) citing *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754,762 (3d Cir. 1979), quoting *Bowring v. Godwin*, 551 F.2d 44, 48 (4th Cir. 1977).

Furthermore, a complaint that a physician or a medical department "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. 97, 106 (1976). More than a decade ago, the Third Circuit ruled that "while the distinction between deliberate indifference and malpractice can be subtle, it is well established that as long as a physician exercises professional judgment his behavior will not violate a prisoner's constitutional rights." *Brown v. Borough of Chambersburg*, 903 F.2d 274, 278 (3d Cir. 1990). "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." *Estelle v. Gamble*, 429 U.S. at 107.

Where an inmate is provided with medical care and the dispute is over the adequacy of that care, an Eighth Amendment claim does not exist. *Nottingham v. Peoria*, 709 F.Supp. 542, 547 (M.D.Pa. 1988). Disagreement among individuals as to the proper medical treatment does not support an Eighth Amendment claim. *Monmouth County Correctional Inst. Inmates v. Lensario*, 834 F.2d 326, 346 (3d Cir. 1987). Only flagrantly egregious acts or omissions can violate the standard. Mere medical malpractice cannot result in an Eighth Amendment violation, nor can any disagreements over the professional judgment of a health care provider. *White v. Napoleon*, 897 F.2d 103, 108- 10.

Throughout the time period in question, as noted by Defendants Janton, Diaz, Rush and Hall, the Plaintiff was seen on numerous occasions in the medical departments of each of the facilities at which he was incarcerated. In his complaint, he states that, at varying times, he was provided a cane, a walker and a wheelchair to assist him with mobility. He alleges that he was seen by nurses, and examined by physician's assistants, physicians and outside orthopedic and neurological specialists. He was prescribed pain medication and muscle relaxers. Tests such as an MRI, EMGs and nerve conduction studies were performed; some on more than one occasion. (Doc. 101, Exhibits A-1, B-1, and C-1). Despite all of this medical intervention, the Defendants have not been able to conclusively diagnose Plaintiff's condition. Nonetheless, this is clearly a case where the Plaintiff has been given significant medical attention and is simply dissatisfied with the results. At most, the allegations in the complaint rise to the level of mere negligence. As simple negligence cannot serve as a predicate to liability under § 1983, *Hudson v. Palmer*, 468 U.S. 517 (1984), Plaintiff's civil rights complaint fails to articulate an arguable claim under § 1983. *See White*, 897 F.2d at 108-110.

It is also noted that Defendant, Dr. Baddick, SCI-Graterford and Defendant Physician's Assistant Rutt, SCI-Mahanoy have not been served with the Amended Complaint. However, service of the complaint as to these individuals is unnecessary at this stage. The Court has the power to dismiss the case at any time if the court determines that the action fails to state a claim on which relief may be granted. 28 U.S.C. § 1915(e)(2)(B)(ii). For the same reasons cited above, the Plaintiff fails to state a claim of inadequate medical care against Defendants Baddick and Rutt. As such, the complaint against them will be dismissed pursuant to 28 U.S.C. §

1915(e)(2)(B)(ii).

4. State Law Claims

In the final paragraph of his Amended Complaint, the Plaintiff seeks relief for violations “underneath state laws surrounding fraud, perjury, and falsification of state documents which will also include a conspiracy and malpractice.” (Doc. 101, Section V. Relief ¶ E). The Court declines to exercise supplemental jurisdiction over these state law claims. 28 U.S.C. § 1367(c)(3). Those claims will be dismissed without prejudice to any right the Plaintiff may have to pursue them in state court. In so holding, we express no opinion as to the merits of any such claim.

III. Conclusion.

For the reasons set forth above, the following motions will be granted: Motion of Defendants Jeffrey Verzella, M.D. and William Keenan, M.D. to Dismiss the Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) (Doc. 117); Corrections Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) (Doc. 119); Motion of Defendant Renato Diaz, M.D., Joseph Rush, P.A. and Ignatius Hall, P.A. to Dismiss the Amended Complaint (Doc. 125); Defendant Solouff’s Motion to Dismiss the Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) (Doc. 129); Defendant Martin Lasky, D.O.’s Motion to Dismiss Plaintiff’s Amended Complaint (Doc. 132); and, Motion of Francis J. Janton, M.D. to Dismiss the Amended Complaint (Doc. 134). In addition, the claims against Defendants Rutt and Baddick will be dismissed for failure to state a claim upon which relief

may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Finally, the state law claims will be dismissed without prejudice to any right the Plaintiff may have to pursue them in state court

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

WENDELL K. BROWN,
Plaintiff

v.

BRANNIGAN, et al.,
Defendants

: CIVIL ACTION NO. 3:CV-01-0366
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: (Judge Munley)
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ORDER

AND NOW, to wit, this 30th day of September, 2003, in accordance with the foregoing memorandum, **IT IS HEREBY ORDERED** that:

1. The Motion of Defendants Jeffrey Verzella, M.D. and William Keenan, M.D. to Dismiss the Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) (Doc. 117) is **GRANTED**;
2. The Corrections Defendants' Motion to Dismiss Plaintiff's Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) (Doc. 119) is **GRANTED**;
3. The Motion of Defendant Renato Diaz, M.D., Joseph Rush, P.A. and Ignatius Hall, P.A. to Dismiss the Amended Complaint (Doc. 125) is **GRANTED**;
4. Defendant Solouff's Motion to Dismiss the Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) (Doc. 129) is **GRANTED**;
5. Defendant Martin Lasky, D.O.'s Motion to Dismiss Plaintiff's Amended Complaint (Doc. 132) is **GRANTED**;
6. The Motion of Francis J. Janton, M.D. to Dismiss the Amended Complaint (Doc. 134) is **GRANTED**;
7. The complaint against Defendants Baddick and Rutt is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii);
8. The state law claims are dismissed without prejudice to any right the Plaintiff may have to pursue them in state court;

9. The Clerk of Court is directed to CLOSE this case; and,

10. Any appeal from this Order will be deemed frivolous, lacking in probable cause and not taken in good faith.

BY THE COURT:

s/James M. Munley
JUDGE JAMES M. MUNLEY
United States District Court