UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON
CIVIL ACTION NO. 0:06 CV 368-DCR

LESTER NAPIER, Individually and on behalf of all others similarly situated — PLAINTIFF

v.

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

LAUREL COUNTY, KENTUCKY; JACK SIZEMORE, Individually and in his official capacity as the Laurel County Jailor, and JOHN and JANE DOES, Nos 1, 2, and 3 — DEFENDANTS

* * * * *

Come now the Defendants, Laurel County, Kentucky, and Jack Sizemore, Individually and in his official capacity, by and through counsel, and in support of their motion for summary judgment, states as follows:

FACTUAL SUMMARY

Lester Napier (hereinafter "Napier") is a resident of Whitley County. He resides with his daughter, Christine Clark. (Ex. A - Napier Dep., p.10). [1] Napier testified that he is disabled and receives Social Security/Disability. He was last employed in 1985. Napier underwent back surgery in 1974 and applied for and secured Social Security/Disability based upon continued numbness in his leg. In addition to Napier's back problems, he has medical conditions involving his heart and breathing. His medical conditions necessitate that he take multiple medications.

[1] All pages of Lester Napier's Deposition which are referenced herein are collectively attached as Exhibit A.

Napier was first incarcerated in Laurel County Detention Center (hereinafter "LCDC") in 1993 when he was convicted of aiding and abetting, (or at least knowing) that there was marijuana on federal property. Napier remained at LCDC for four to six months before being transferred to the Scott County Detention Center for two to three weeks. Napier was ultimately transferred to the federal prison in Manchester, Kentucky. Upon his release, Napier resided in Whitley County with his daughter from 1995 through 2005. Napier testified that he did not work but "piddled around". During that period, Napier attempted to secure black lung benefits and continued medical treatment for high cholesterol, back pain, breathing problems and high blood pressure. As a result of these problems Napier uses a Continuous Positive Airway Pressure (C-Pap) machine and takes breathing treatments three times daily.

In February 2005, Napier was convicted of being a felon in possession of a handgun and served approximately three to four months at LCDC. As to this period of incarceration, Napier testified that while incarcerated he filled out a medical questionnaire and the jail staff contacted his physician and got his necessary medication. At some point during this stay he was moved to the medical watch cell (hereinafter "med-watch") due to lung problems. Napier testified that he was placed in med-watch so that the jail staff could "keep an eye on him". He had his breathing machine with him in med-watch. He testified that he "did not like [med-watch] because there was no t.v. in med-watch. He remained in med-watch, under observation, until his breathing was under control. Napier was subsequently released from LCDC on April 12, 2005. Id., p. 33. Napier was arrested again in August 2005, in Whitley County based upon his indictment by the Clay County grand jury. Napier was initially taken to the Clay County Jail. Napier was

transferred to LCDC on August 22, 2005. Mr. Napier's medications were not turned over to LCDC at the time of his transfer from the Clay County Jail[2]. His daughter brought his C-Pap machine, the nebulizer, Albuterol and Ipratoprium Bromide to LCDC. (Ex. B-1, Bates 368-N-D26-0096)[3]. On 8/27/05 she brought his blood pressure and cholesterol medication. (Ex. B-2, Bates 368-N-D26-0103) He testified that his daughter could not bring his medication to LCDC because the Clay County Jail officials had the medications. (Ex. A - Napier Dep., pp.39-40). Napier testified that the LCDC staff called the Clay County Jail numerous times inquiring as to the location of the medicine. Id This is corroborated by the LCDC records. (Ex. B-3, Bates 368-N-D 26-0105). When the medication could not be located, the LCDC medical staff made Napier an appointment with LCDC physician, Dr. Rastogi, to get prescriptions for his medications. Id., p.38.

He acknowledged that his incarceration at LCDC lasted from August 22, 2005 through January 24, 2006. Napiertestified that he was housed inthe cell 145, next to Jailer Jack Sizemore, in what he referred to as the "t.v. room" during this incarceration. Napier testified that during this time he had his C-Pap machine, sleep apnea machine and, after the original confusion with the lost medication, he alwayshad all of his medications. Id, pp. 40-41. Napier testified that spoke to the med-staff every day, two to three times per day. He confirmed that he had no difficulties or additional medical problems during this time period. Id.

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[2]Mr. Napier seems to believe the Whitley County Sheriff kept his medicines. Napier Dep., Pg. 36-37

[3]All medical records will be filed collectively under seal as Ex. B-1-14 ; the Bates Numbers reflect previous production of documents to counsel in this case.

To corroborate Napier's testimony, his LCDC medical records indicate that he completed thirty-five (35) Medical Request Forms[4] during his August 2005-January 2006 incarceration. In August and September, 2005 he requested that his blood pressure be taken on four occasions. (Ex. B-4, Bates Nos. 368-N-D26-0104, 368-N-D26-0106, 368-N-D26-0107, 368-N-D26-0112). The records reflect medical requests on 9/11 and 9/14 regarding complaints of chest pain, back and leg pain, toothache, and earache. (Ex. B-5, Bates No. 368-N-D26-0110, 368-N-D26-0108, 368-N-D26-0111, 368-N-D26-0113). He was transported to and from the dentist, the oral surgeon and Dr. Rastogi, the LCDC physician, in September and October, 2005. On October 6, 2005 he had a urinalysis, and comprehensive laboratory blood work pursuant to orders from Dr. Rastogi. (Ex. B-6, Bates No. 368-N-D26-0114). In fact, he saw Dr. Rastogi twice (10/6 and 10/10) in October, and received a number of prescription medications at Dr. Rastogi's direction. (Ex. B-7, Bates 368-N-D26-0116, 368-N-D26-0115 thru0118). In November, 2005 he was taken to Dr. Rastogi twice, taken to the lab for lab work once, and to the oral surgeon twice. (Ex B-8, Bates Nos. 368-N-D26-0121 thru 368-N-D26-0132).

On January 1, 2006 he filled out a medical request indicating the nature of the complaint was "tooth severe pain." (Ex. B-9, Bates No. 368-N-D26–0135). The first medical request indicating any concern with a knot or other swelling in his groin, testicle or other private area is January 10, 2006 (Ex. B-10, Bates No. 368-N-D26-0139). He was

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[4]Medical Request Forms document all medical complaints and medical requests made by the inmate while incarcerated, all medical treatment provided to the inmate while incarcerated. The Medical Request Form catalogs the inmate's name, cell number, date and time of the request and any necessary comments. The form is completed and acknowledged by the responding med-staff personnel.

taken to Dr. Rastogi that day regarding this issue. (Ex. B-11, Bates No. 368-N-D26-141). The doctor prescribed Cephalexin, which was administered. On the evening of January 12, 2006 Napier reported to medical staff that his scrotum was swollen; he allowed the nurse to check him. The next morning he was taken back to Dr. Rastogi. Dr. Rastogi referred Mr. Napier on to Mary Mount Hospital for admission (Ex. B-12, Bates No. 368-N-D26-0143 through 368-N-D26-0145.) The hospital called and asked the LCDC to bring Mr. Napier's C-Pap machine to him, and the machine was taken to the hospital for Napier's benefit. (Ex. B-13, Bates No. 368-N-D26-0146). Mary Mount Hospital referred Mr. Napier on to the University of Kentucky Medical Center, where he was hospitalized, surgery was performed, and he was discharged on January 20, 2006, with prescriptions for bactrim and pain medication. (Ex. B-14, Bates No. 368-N-D26-0149 through 368-N-D26-0152.)

Lester Napier's testimony regarding the sequence of events as to his medical care is somewhat less clear than the medical records. His deposition testimony, taken as a whole, suggests that he had some kind of a rash in October, 2005 for which he saw Dr. Rastogi and which cleared. (Ex. A, Napier Dep., pgs. 42, 47, 51). He thinks he told the nurses when it was getting "real bad" in January, 2005. (Ex. A, Napier Dep., pgs. 52-53) He can not recall whom he first told but concedes that the day he told the Jailer of his complaint is the day he was taken to Dr. Rastogi. (Ex. A, Napier Dep., pg. 61) Mr. Napier also testified that he spoke with someone on the medical staff daily. (Ex. A, Napier Dep., pg. 41).

The Discharge Summary from the University of Kentucky reflects that as of the date of admission on 1/14/2006 Napier gave a history that he had scrotal redness and itching over the past 3-4- weeks and that he had been on Keflex for one week. (As Keflex was

prescribed on January 10, 2005, he could not have been on Keflex for more than four days, not one week). However, taking that history prepared in 2006 as relatively accurate, Napier then had been experiencing redness and itching for a few weeks. Interestingly, he filled out a medical request on January 01, 2006 regarding severe tooth pain but did not make any reference to his scrotal redness or itching on that form. (See Ex. B-9, Bates No. 368-N-D26–0135).

After discharge from UK, he was returned to the LCDC, following there for a few days, then discharged on home health. He admits that Betty McKnight, the medical nurse at LCDC, coordinated the home health care with his daughter. (Ex A, Napier Dep., pg. 66, 67).

There is no contention in the record that Mr. Napier has required any follow-up medical care since 2005 for this condition, that he has incurred any economic detriment due to this condition, or that he has had any pain and suffering due to this condition since 2005. A formal grievance policy has been in place at the Laurel County Detention Center from at least 1997 forward. A copy of the August 17, 2005 Inmate Orientation Manual, provided to Mr. Napier upon his admission to the facility, contained information regarding obtaining medical attention and set forth the "Written Inmate Grievance Procedure That Is Available To All Inmates". (Ex. C, Bates No. 368-N-000638, 368-N-000645-000647). Mr. Napier did not file any grievance regarding his conditions or treatment at the Laurel County Detention Center. (Ex. A, Napier Dep. Pg 56). Confirming this testimony, Deputy Jailer Todd Prince has checked the grievance log at the LCDC and determined that it was started on 1/4/2004 to continuously log all grievances, including grievances regarding medical care, received from inmates. Lester Napier did not use this administrative process to seek

access to medical care, grieve about lack of access to medical care, or complain about the medical care afforded him. (Ex. D, Aff. of Todd Prince).

LEGAL ANALYSIS

A. Summary Judgment Standard

Per Fed. R. Civ. P. 56, summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that no genuine issue as to any material fact exists, and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56. The party who files a motion for summary judgment bears the initial burden to show that no genuine issues of material facts exist. Celotex v. Katterit, 477 U.S. 317, 322 (1986); Yeschick v. Mineta, 521 F.3d 498, 520 (6th Cir. 2008). This burden may be satisfied by "pointing out . . . an absence of evidence to support the non-moving party's case." Celotex, supra at 325: Cincinnati Newspaper Guild v. Cincinnati Enquirer, 863 F.2d 439, 443-44 (6th Cir. 1988). Once the moving party has met this burden, the non-movant, may not rest on its pleadings to defeat the motion, but instead must identify specific material facts upon which a reasonable juror could return a verdict for the non-movant on the challenged claim or claims. Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986).

In this manner, the inquiry upon a motion for summary judgment is similar to the directed verdict inquiry - whether the evidence presents a sufficient disagreement to require submission to a jury or whether or it is so one-sided that one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986); McKee v. Cutter Lab. Inc., 866 F.2d 219-226 (6th Cir. 1989). The proffer of a mere "scintilla of evidence" by the non-movant will not be sufficient to defeat an otherwise proper motion for summary

judgment. *Id.* The trilogy of Celotex, Matushita and Anderson have ushered in a new era in summary judgment jurisprudence under which the federal courts have enhanced discretion to grant summary judgment. The courts no longer need to independently search the record merely to deny a motion for summary judgment based upon some "metaphysical doubts as to the material facts." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476-81 (6th Cir. 1989). Summary Judgment is appropriate on a given claim when the facts, viewed most favorably to the non-movant, would not permit a reasonable juror to return a verdict in the non-movant's favor.

B. Napier's Claims must be dismissed as he failed to exhaust administrative remedies pursuant to the Prison Litigation Reform Act.

The Prison Litigation Reform Act (PLRA) provides that no action under 42 U.S.C.A. §1983 can be brought, with respect to prison conditions, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available have been exhausted. *42 U.S.C.A. §1997; see also* Woodford v. Ngo 126 S.Ct. 2378 (2006). ("Under the Prison Litigation Reform Act, exhaustion of the available administrative remedies is required for any suit challenging prison conditions, not just for suits under §1983"). The PLRA was intended to reduce the quantity and improve the quality of prison's suits. Woodford supra. The PLRA attempts to eliminate unwarranted federal court interference with the administration of jails, prisons and other correctional facilities, and thus seeks to afford corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. Id. In addition, exhaustion of administrative remedies, pursuant to the PLRA, is required for all prisoner suits seeking redress for prison circumstances or occurrences, regardless of whether they involve

general circumstances of incarceration or particular episodes and whether they allege Eighth Amendment violations based on use of excessive force, or some other relative wrong. Porter v. Nussle, 122 S.Ct. 983 (2002). As is apparent from the Inmate Orientation Manual and the testimony of Todd Prince, LCDC has a grievance policy in place for use by its inmates and this system is in fact used by the inmates. Napier's testimony indicates that he did not file a grievance while incarcerated at LCDC. (Ex. A - Napier dep., pg. 56). Thus, Napier's failure to initiate and exhaust his administrative remedies precludes all his claims against these Defendants. Terrill v. Belcher, 22 Fed. Appx. 485 (6th Cir. 2001). ("State prisoners failure to exhaust available administrative remedies and his deliberate indifference claim against prison medical staff precluded a §1983 action regardless of whether or not the administrative process could provide the prisoner monetary relief.") Dean v. Odom, 19 Fed. Appx. 327 (6th Cir. 2001)(State inmate was required to exhaust his remedies regarding prison officials alleged denial of his prescription medication before filing a §1983 suit against officials). Therefore, Napier's claims against these Defendants must fail as a matter of law.

C. Defendant's are entitled to summary judgment as to Plaintiff's 42 U.S.C. §1983 claim

I. Eighth Amendment

To state a claim under §1983, Plaintiff must allege a violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law. West v. Adkins, 47 U.S. 42 (1988). The 8th Amendment to the U.S. Constitution provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments

inflicted." *U.S. Constitution, Am. 8.* Thus, the 8th Amendment requires detention facilities to provide the basic human needs of their prisoners. Id at 33. A plaintiff can only establish a violation of the 8th Amendment when he proves two elements. First, the alleged deprivation must be objectively, sufficiently serious. Specifically, "a prison official's act or omission must result in the denial of a 'the minimal civilized measure of life's necessities'". Farmer v. Brennen 511 U.S. 28 (1994) Secondly, only the unnecessary and wanton infliction of pain implicates the 8th Amendment. Id. at 834. Thus, to establish a violation, one must inquire into the state of mind of the responsible parties, the jail's officials. Helen v. McKinney 509 U.S. 25 (1993). Such inquiry must establish that the prison officials acted with "deliberate indifference to serious medical needs of prisoners". Farmers, supra at 835. Specifically, the plaintiff must establish that the defendant's conduct, with respect to the plaintiff, demonstrated "deliberateness tantamount to an intent to punish." Molten v. City of Cleveland, 839 F.2d 240, 243 (6th Cir. 1988).

The Supreme Court equates deliberate indifference with criminal recklessness. Farmers *supra* at 837. Therefore, a defendant must know of and disregard a substantial risk of serious harm. Id. This portion of the analysis is subjective. The proof of the violation requires that "the 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. A plaintiff's allegation that there existed a danger that an officer should have been aware of is not sufficient. Id. at 838. Deliberate indifference is something far more than negligence. Id. at 835. Thus, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." Id. at 844.

Lester Napier has sued Laurel County, Kentucky and Jack Sizemore, as an individual and as the Laurel County Jailer. Plaintiff' Complaint at Page 1. However, there is absolutely no evidence that any of these defendants violated the plaintiff's constitutional rights. The crux of Napier's claim is that the jail officials failed to properly treat him for or protect him from contracting MRSA, thus denying him appropriate medical care and violating the Constitution. However, neither of these claims are supported by the facts and relevant law regarding this matter.

Napier's testimony indicates that he was incarcerated at LCDC from August 2005 through January 2006. During that time he completed 35 medical request forms and was treated by jail staff and jail physicians relative to every such medial complaint. Specifically, in August and September 2005, he requested that his blood pressure be taken on four occasions. (Ex. B-1). His records indicate that he was taken to the dentist, oral surgeon and Dr. Rastogi in September and October 2005. On October 6, 2005 he had urinalysis and comprehensive blood work pursuant to Dr. Rastogi's orders. Specifically, he saw Dr. Rastogi twice in October and received a number of prescriptions from him. In November 2005 he was seen by Dr. Rastogi twice, taken to the lab for lab work once, and taken to the oral surgeon twice. In fact, Napier testified that he spoke to medical staff every day, two to three times per day. (Ex. A, Napier dep. pgs. 40-41.) As he testified,

Q: Okay. Did you ever go longer than three days without personally talking to somebody on the medical staff at Laurel County Detention Center?

A: Oh, no, I talked to somebody every day.

In the context of this litigation, Napier has testified that he first became aware that

he was having a problem in the scrotal area in October or November 2005. During this time he made numerous medical requests and had several trips to medical facilities. He testified that this "condition", for which he did see Dr. Rastogi, cleared. (Ex. A, Napier Dep., pgs. 42, 47, 51) His memory was relatively unclear and somewhat inconsistent as to the sequence of symptoms, complaints, and attention provided by the medical staff. What the records do establish, however, is that when Napier had a medical complaint, it was promptly addressed and he received treatment. (Ex. B, Bates No. 368-N-D-26-0135). Napier did complete a medical request form on January 1, 2006 which made no mention of the scrotal problem. The first jail medical request indicating any concern with a knot or other swelling in his scrotal area was made on January 10, 2006. (Ex. B, Bates No. 368-N-D-26-0136). As Napier was well-aware of the medical complaint and request process at LCDC and had utilized the procedure on many previous occasions, it seems most likely that he would have included the scrotal condition on the January 1st form if in fact that had been a matter which he desired to bring to the attention of the jail staff.

The date Napier informed LCDC officials and specifically Jack Sizemore, that he had a problem in his scrotal area, was when he complained to Jack Sizemore on January 10, 2006. That complaint was catalogued in a medical request form. (Ex. B, Bates No. 368-N-D-26-0136). Napier was taken to the doctor that day, January 10, 2006, regarding his complaint of scrotal pain. (Ex. B, Bates No. 368-N-D-26-0141). The doctor prescribed Cephalexin and administered it to Napier. When Napier complained of increased scrotal pain and swelling to the medical jail staff on the evening of January 12, 2006, he was taken the next morning to see Dr. Rastogi. Dr. Rastogi referred him to Mary mount Hospital for admission and Mary mount referred him to the University of Kentucky Medical Center. (Ex.

B, Bates No. 368-N-D-26-0143 through 0146, 368-N-D-0152). The University of Kentucky hospitalized Napier, performed surgery, and discharged him on January 26, 2006 with prescriptions for Bactrim and pain medication.(Ex. Bates No. 368-N-D-26-0149 through 0152). Thus, the proof indicates that the first notice that LCDC and Jack Sizemore had of Napier's scrotal issue was on January 10, 2006 and was addressed that day and consistently monitored thereafter.

The Supreme Court has opined that a difference of opinion regarding the Plaintiff's diagnosis and treatment does not establish a constitutional claim. Estelle v. Gamble, 29 U.S. 97, 107 (1976); *see also,* Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976). Further, the 6th Circuit has held that [t]he "requirement that the official had subjectively perceived a risk of harm and then disregarded it is meant to prevent the constitutionalization of medical malpractice claims; thus, a plaintiff alleging deliberate indifference must show more than negligence or the misdiagnosis of an ailment." Comstock v. McCrary, 273 F.3d 693, 703 (6th Cir. 2001). Thus, "[w]hen a prison doctor provides treatment, albeit carelessly or ineffectually, to a prisoner, he has not displayed a deliberate indifference to the prisoner's needs, but merely a degree of incompetence which does not rise to the level of a constitutional violation." Id.; *see also* Johnson v. Karnes, 398 F.3d 868, 870 (6th Cir. 2005). In contrast, to Comstock and Johnson, these defendants assert they acted immediately and appropriately to secure and provide Napier medical care after he reported the scrotal issue. Clearly, Napier believes that the jail officials should have provided and/or arranged for different or better treatment. However, this argument by Napier does not satisfy the legal standard and unquestionably fails to state a §1983 claim against Laurel County, Kentucky and Jack Sizemore. Thus, these defendants are

entitled to summary judgment as a matter of law.

In addition, even if Napier could prove that either Laurel County or Jack Sizemore was deliberately indifferent to his serious medical need, he still cannot prove that their actions or inactions *caused* his infections. Prisons and/or their officials are not the guarantors of a prisoner's health. Specifically, a prison and its officials are not constitutionally responsible for insuring that inmates do not get sick while incarcerated. Additionally, the prison and its officials are not responsible for insuring that MRSA is not contracted at their facility anymore than hospitals or schools are burdened with such a possibility. These Defendants are required not to act with deliberate indifference to the Plaintiff's serious medical needs. The record establishes that Napier has not proven with a reasonable degree of medical probability that these defendants knew and were deliberately indifferent to the fact any serious medical need of Lester Napier's. To the contrary, the record is replete that Lester Napier was afforded regular visits with a physician, dentist, and oral sugeon, medications for chronic and acute conditions, including necessary pain medications, and that he was closely monitored in the med-watch cell where his nebulizer and C-Pap machines were available to support his chronic medical conditions. After his discharge from the LCDC, Betty McKnight, the medical director worked with his daughter to arrange for his follow-up home health care. (Ex. A., Napier Dep., pp. 42) Assuming *arguendo* that Napier was exposed to MRSA at LCDC, there is no proof that the Defendants subjectively knew of Napier's medical needs, and that they, with this knowledge, ignored that need. Therefore, Napier has failed to satisfy the necessary requirement for establishing an 8th Amendment violation and deliberate indifference.

ii. Fourteenth Amendment

Under the Fourteenth Amendment due process clause, "... pretrial detainees have a right to adequate medical treatment that is analogous to the Eighth Amendment rights of prisoners." Watkins v. City of Battle Creek, 273 F.3d 686, 685 (6th Cir. 2001). As Plaintiff was not a pre-trial detainee at the time he was incarcerated at LCDC, the Fourteenth Amendment is not applicable and the claim must be dismissed.

D. In the alternative, Defendant's are entitled to qualified immunity of the Plaintiff's §1983 Claim.

"Government officials performing discretionary functions are entitled to qualified immunity from civil suits for damages arising out of the performance of their official duties 'as long as their actions could reasonably have been thought consistent with the rights they are alleged of violating.'" Watkins v. City of Southville, 221 F.3d 883, 887 (6th Cir. 2000). "The key inquiry in analyzing a claim of qualified immunity is whether the defendants alleged conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known." Id "Thus, a government employee will be shielded from liability so long as the employee acted under the objectively reasonable belief that his or her actions were lawful." Ahlers v. Schebil, 188 F.3d 365, 372-73 (6th Cir. 1999). Therefore, "[a] successful §1983 claimant must establish that the defendant acted knowingly or intentionally to violate constitutional right such that mere negligence or recklessness is insufficient." Id.

Assuming *arguendo*, this court finds that these defendants violated plaintiff's constitutional rights, which these defendants specifically deny, they are nevertheless entitled to qualified immunity. There is no evidence of record to indicate that Jack

Sizemore acted "knowingly" or "intentionally" to violate plaintiff's constitutional rights. In addition, there is no evidence that Sizemore intentionally or knowingly exposed Plaintiff to MRSA or failed to secure medical treatment for him.

E. Plaintiff's claims against the Defendants in their official capacity and the defendant in his official capacity, and against Laurel County, must be dismissed, as Plaintiff cannot prove municipal liability.

Plaintiff has brought suit against the individual defendant, Jack Sizemore, in his individual and official capacities. An official capacity suit is a suit directly against the local government unit. Thus, it is another method of pleading an action against an entity of which an officer is an agent. Kentucky v. Graham, 43 U.S. 159 (1985). Assuming *arguendo*, that the plaintiff could prove that Sizemore and the defendants violated Napier's constitutional rights, which these defendants specifically deny, in order to recover against Sizemore in his individual and official capacity, as well as Laurel County, Plaintiff must also prove that the actions of these defendants were pursuant to a "policy or custom" attributable to Laurel County. Monell v. New York Depart. of Social Services, 436 U.S. 658 (1978).

Plaintiff has provided absolutely no evidence of a policy or custom that caused his constitutional rights to be violated, if in fact they were, it is well established that an municipality's liability in §1983 claims is limited to allegedly unconstitutional conduct which implements or executes a policy statement, ordinance, regulation or decision or officially adopted and promulgated by municipal officers or which results from a custom fairly attributable to the municipality. Id. "A governmental entity is liable under §1983 only when the entity itself is the 'moving force' behind the deprivation . . . Thus, in an official capacity suit, the entity's internal 'policy or custom' must have played a part in the violation of the

federal law." Kentucky, supra at 166. A single instant of misconduct can not form the basis for imposing liability on the county. Oklahoma City v. Tuttle, 471 U.S. 808 (1985).

A "custom" for the purposes of Monell liability must be "so permanent and well-settled as to constitute a custom or usage with the force of law." Id. Thus, the force of law must include "[d]eeply embedded traditional ways of carrying out state policy." Nashville, Chattanooga and St. Louis Ry. Co. v. Browning, 310 U.S. 362, 369 (1940). There must be a course of action deliberately chosen from among various alternatives. Oklahoma City, supra at 823. Thus, a "custom" is a "legal institution" not memorialized by written law. Feliciana v. City of Cleveland, 988 F.2d 649 (6th Cir. 1995).

Napier clearly cannot meet his burden in this regard. There is no evidence of record of a policy or custom of exposing inmates to MRSA, nor is there a policy or custom of denying or delaying medical treatment to inmates. To the contrary, it appears that Laurel County, Kentucky, Sizemore and LCDC's custom and policy is of providing reasonably immediate care to inmates. Regardless, Napier's testimony and records indicate that he was knowledgeable of the medical report system at LCDC, used that system regularly and received reasonably immediate care for his complaints. Despite this fact, even if there were such evidence, there is no evidence that Laurel County and/or its officials knew about any alleged incidents and tacitly approved them. In addition, there is no evidence of record that the Defendants' alleged actions or inactions were caused by custom or policy. Absent this proof, Plaintiff's §1983 claim against the county and the official capacity claims must be dismissed. Matthews v. Jones, 35 F.3d 1046, 1049 (6th Cir. 1994).

F. The Defendants are entitled to summary judgment as to the Plaintiff's State court claims.

Napier has alleged that the Defendants committed the state law torts of negligence, gross negligence and intentional infliction of emotional distress. Defendants are also entitled to judgment as a matter of law regarding these claims.

I. Negligence

To establish a negligence claim, a claimant must prove four elements. First, he must establish a duty of care owed by the Defendant. Second, he must establish conduct of the Defendants which would breach the standard of care by which the duty is measured. Third, he must have sustained an injury which results in actual loss or damage to his person or property. Fourth, the plaintiff must establish legal causation between the inadequate conduct of the defendant and injury to the plaintiff. David J. Liebson, Kentucky Practice. Vol. 13, Tort Law Sec. 10.2 (West 1995 and Supp.). If any of these are not established, the defendants prevails. Id. The evidence of record indicates that these Defendants provided timely medical care to the Plaintiff. In this matter, Plaintiff has brought forth no evidence to indicate that Jack Sizemore or Laurel County breached their duty to Plaintiff. As a result, Plaintiff's negligence claim must be dismissed.

ii. Gross Negligence

Gross negligence has been defined as "a wanton or reckless disregard for the safety of other persons, such that the offending conduct is so outrageous that malice could be implied from the facts of the situation." Estate of Presley v. CCS of Conway, 2004 U.S. Dist. (LEXIS 9583, at *11 (W.D. Ky. May 18,2004)(quoting Phelps v. Louisville Water Co. 103 S.W.3d 46, 52 (Ky. 2003)). As explained previously, there is no evidence that the

Defendants breached a duty owed to Plaintiff. Furthermore, it certainly has not been established that any of the defendants had a wanton or reckless disregard for his safety or health, such that their conduct would be so outrageous that malice could be implied. The only evidence of record establishes that once Defendants were informed of Napier's concerns, they immediately secured his medical treatment. As such, Plaintiff's gross negligence claim must be dismissed as a matter of law.

iii. Intentional Infliction of Emotional Distress

Kentucky courts have recognized a cause of action for Intentional Infliction of Emotional Distress, but this cause of action has been applied only sparingly. Kraft v. Rice, 671 F.2d 247, 250 (Ky. 1984). In fact, it is measured by a high standard which few meet. In Kraft, Kentucky made it tortious for "one who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another." However, in Kentucky IIED is a "gap-filler". Thus, where an actor's conduct amounts to commission of one of the traditional torts such as assault or negligence, for which recovery for emotional distress is allowed, and this conduct was not intended to cause extreme emotional distress in the victim, the tort of outrage will not lie. Recovery for emotional distress in those instances must be had with the appropriate traditional common law action. Rigazio v. Archdiocese of Louisville, 53 S.W.2d 295, 298-299 (Ky. App. 1993). Napier has alleged the tort of negligence for which recovery for emotional distress is allowed, as a result, IIED as a cause of action is not available to Napier as the traditional tort of negligence has been pled. Even if this were not the case, which these Defendants specifically deny, Plaintiff has produced no evidence supporting an allegation that Defendants' conduct was specifically intended to cause extreme emotional distress. Certainly a facility that provides timely

medical treatment upon awareness of a claim can not be deemed an attempt to cause extreme emotional distress. Therefore, Napier's cause of action for IIED must be dismissed as a matter of law.

iv. Or, in the alternative, the individual Defendant is entitled to the defense of qualified official immunity as to the Plaintiff's State law claims.

"Official immunity is immunity for tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions." Yanero v. Davis, 65 S.W.3d 510, 521 (2001). "[W]hen sued in their individual capacities, public officers and employees enjoy qualified official immunity which affords protection from damages and liability for good faith judgment calls made in a legally uncertain environment." Id. at 522.

> Qualified official immunity applies to negligent performance by a public officer employee of (1) discretionary acts or functions, i.e. those involving the exercise of discretion and judgment, or deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority. Id.

This Defendant is clearly entitled to qualified official immunity if there is no evidence that his actions with respect to Napier, which were unquestionably discretionary, were not in good faith. Consequently, he is entitled to the defense of qualified official immunity as to Napier's state law claims.

v. The State law claims against Laurel County, and the official capacity claim must be dismissed pursuant to the doctrine of sovereign immunity.

The suit against the Defendant in his official capacity and against Laurel County is barred by the doctrine of sovereign immunity. The issue of sovereign immunity has long been settled in Kentucky. A county is a political subdivision of the Commonwealth and is,

as such, an arm of the state government. The county is clothed with the sovereign immunity of the Commonwealth. Franklin County v. Malone, 957 S.W.2d 195, 203 (Ky. 1997); Cullinan v. Jefferson County, 418 S.W.2d 407, 408 (Ky. 1967).

In addition, an official capacity suit is the suit directly against the local government unit. Thus, it is another way of pleading an action against the entity of which the officer is an agent. Kentucky supra at 165-166. Because a claim against an individual in his official capacity is merely a claim against the county, the official capacity claims against the Defendants must be dismissed pursuant to the defense of sovereign immunity. *See* Salyer v. Patrick, 874 F.2d 374 (6th Cir. 1989). For these reasons, the state law claims against Laurel County and individual defendant in his official capacity must be dismissed as a matter of law.

CONCLUSION

Defendants are clearly entitled to judgment as a matter of law as there is no evidence of a constitutional violation and, at a very minimum, the individual Defendant, Sizemore, is entitled to the defense of qualified immunity. Laurel County must be dismissed as Plaintiff has failed to establish municipal liability. Finally, it is clear that the Defendants are entitled to judgment as a matter of law with respect to Napier's tort claims.

WHEREFORE, Defendants hereby respectfully request that their Motion for Summary Judgment be GRANTED.

Respectfully Submitted,

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By: /s/ Leslie P. Vose
ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

LONDON DIVISION

CIVIL ACTION NO. 6:06 CV 368-DCR

LESTER NAPIER, individually and on behalf of all others similarly situated,

PLAINTIFFS

VS.

LAUREL COUNTY, KENTUCKY, et al.,

DEFENDANTS

DEPONENT:

LESTER NAPIER

DATE:

AUGUST 23, 2007

REPORTER:

JANINE LEROUX

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EXHIBIT
tabbies
A

they are, how young they are, how smart they are, how rich they are, gets confused and will start nodding their head because that's how we talk.

So I'm going to remind you from time to time to answer out loud. And that's not to be picking on you, that's just how we have to do it in this process. Okay?

A I understand.

Q All right. Would you state your name, please.

A Lester Napier.

Q Where do you live now?

A Whitley County, 4125 Big Creek Road.

Q Who do you live with?

A I live with my daughter or she lives with me, ever which.

Q All right. What's your daughter's name?

A Christine.

Q Christine Napier?

A Clark.

Q Clark. Okay. Are you employed outside your home?

A No.

Q When is the last time you were employed outside the home?

rest of the time that you were at the Detention Center, that time in 2005 between February and April, that you hadn't had when you came in?

A No.

Q Okay. Okay. According to the records I've got, they released you on April 12th of 2005. Does that sound right to you?

A That sounds about right.

Q Okay. When is the next time that you were in a detention center?

A In August - I believe it was August the 22nd or 23rd, somewhere in there. I believe now. I ain't for sure.

Q Okay. Of the same year 2005?

A Yeah.

Q Okay. And what gave you that opportunity, and I'm teasing you a little bit.

A Well, they indicted us in front of the grand jury, and I didn't know I had been indicted; but they come picked me up so -- They picked me up and took me to Manchester, and then they transferred me from Manchester back to here.

Q Okay. So during the summer of 2005 you came back in to Laurel County, and then you got transported to Manchester; is that right?

A No.

Q All right. Do you know when you finally got the medicine here in Laurel County and who you got it from?

A I got it from the nurses' staff. It was probably two or three weeks later or a month.

Q Okay. And did Christine bring it, or did the Whitley County Sheriff bring it, or did the Clay County Sheriff bring it?

A No, they took me to a doctor and then they wrote a new prescription.

Q Okay. So Laurel County --

A It was two or three weeks or more later.

Q Okay. Did Laurel County take you out to the doctor because nobody would bring your medicine to the Jail? Is that why they took you to the doctor?

A Do what now?

Q Did the people in Laurel County take you out to the doctor because nobody would bring the medicine that they knew you needed?

A Because Clay County didn't send it to them or they sent it to them and they didn't give it to me, one of the two. I don't know which.

Q Okay. So Laurel County took you out to see the doctor so you could get your medicine; is that

right?

A Yeah, yeah.

Q Okay. And who did they take you out to see? d.

A Dr. Rastogi.

Q Okay. Did you get your medicine then?

A Yeah, I got the medicine.

Q During that time, did you ever talk to Betty about trying to find your medicine and get your medicine?

A I talked to every one of them down there.

Q Okay.

A They come through there three times a day so, you know, I'm talking to them every day.

Q Okay.

A And especially blood pressure is sky high and your heart is a racing away and stuff, you know, you are going to be talking to somebody.

Q All right.

A I have had chest pains.

Q Do you know why Christine couldn't get your medicine to you?

A Because they had it over there or someone had it.

Q At Clay County?

A Yeah.

Q Okay. Now, how long were you at Laurel County that time?

A I was -- I can't exactly recall. It was either the 23rd or the 24th of January or something or other.

Q Okay. So you were there from August until January, August of 2005 until January of 2006. Does that sound about right?

A No.

Q Okay. What's not right?

A From 2005 to 2006?

Q Uh-huh.

A From August 2005 to January 2006 and that sounds right to me.

Q Okay. During that time, did you get your CPAP machine and the medicine for it?

A Yeah.

Q Did you get your sleep apnea machine?

A I got that.

Q Did you get your medications once they took you out to Dr. Rastogi to get new prescriptions?

A Yeah.

Q Okay. Did you see the medical staff two or three times a day every day that you were in Laurel

County Detention Center to get your medicine for the CPAP machine?

A Sometimes they give me enough medicine for two or three days at a time.

Q Okay.

A And then when I run out when I used up what I had, and then they would give me some more.

Q Okay. Did you ever go longer than three days without personally talking to somebody on the medical staff at Laurel County Detention Center?

A Oh, no, I talked to somebody every day.

Q Okay. Did you have any different medical problems that time during the time you were there than you had when you came in?

A No.

Q Okay. Where were you housed during that time?

A I was in the TV room.

Q Okay.

A Which is right next to Mr. Sizemore and them where they come over there where they report them in out there.

Q Okay. When were you next in the Detention Center?

A When was I next in?

Q Yes, sir. You got out in January of 2006?

A When I went in the hospital and I had some surgery and I got - I had the surgery and stuff, they brought me back. And then they took me upstairs, and that's when Betty right there she started seeing me up there changing the bandages and stuff.

They let me back out on incarceration to the --

Q Okay.

A And then that's when the family health took over and then they doctored on me --

Q Okay.

A -- until I got well.

Q Okay. What was that problem? Tell me about that problem.

A I had a staph infection.

Q Okay.

A I had a staph infection. I swelled up and it turned into gangrene, and they did some surgery and --

Q When did you first become aware you were having a problem in that area that ultimately got infected?

A It was October or November one. I ain't for sure of the direct date that but -- And then I told some of the nurses about it down there. And they -- I

Q But before you tell Mr. Sizemore anything about it?

A Yeah, it kept getting a little bit worser so I didn't -- It didn't start swelling up all that bad until maybe the first part of January or the last part of the December. I don't know.

Q Okay. But you are telling us today that you had it in October; is that right?

A I had that rash. They give me some antibiotics, I believe, or sent me to the doctor to get some antibiotics. I don't remember how it was now for sure.

Q So you think you went out to the doctor to get some antibiotics for it?

A I think I did. I can't say for sure, but I believe I did. I believe they took me to the doctor. Now, I ain't too sure.

Q During that time how many different doctors did you go see? Did you go see anybody for your teeth? Did you go see a dentist?

A Yeah, I went and seen a dentist.

Q And what was that for?

A To get a tooth pulled.

Q Okay. And then you went to Dr. Rastogi to get your medicines back in I guess September; is that

January when it got really bad.

Q Right.

A But maybe I had a little rash or something there maybe during October or something or other and it just went away and then it all came back.

Q Okay.

A But they did give me some sav to put on it because I remember - I remember that. I asked them if they could give me some hydrocortisone cream or something or another to put on it.

Q Okay.

A I can't recollect right now right down to word to word because if I did, I would be telling you a damn lie.

Q Okay. Well, I appreciate that, and I don't want you to testify to anything that you aren't pretty darn sure is true. Okay? And the records sure don't show that you went to four different nurses in October and November and got antibiotic ointment and ice packs. Okay? I'll just be very clear with you. It does not show that at all. That's new to me.

A Well, the ice packs was I'd say was in January.

Q I would agree with you. All right.

A All right.

Q Okay.

A But we would get ice - we would get ice, and they'd give us some ice in a cooler, but we'd get ice out of the cooler, yeah.

Q Okay. Well, you can do that. Did you do that?

A Maybe several times maybe.

Q Okay.

A I don't remember for sure. I ain't -- I'm not going to recall for sure because I can't remember.

Q Okay. So you're not real sure when you had the rash on your testicles, and you are not real sure when you told the nurses about it. Is that a fair thing to say or do you - are you pretty sure when you told them?

A No, I told the nurses now because --

Q When did you tell the nurses?

A I can't recall the dates on that now because I don't remember.

Q Okay. It's okay. I don't need you to say a particular day but how about a month?

A Yeah, yeah.

Q What month did you first tell the nurses that you had a rash on your testicles?

A Well, when it started getting real bad I

would say it was in January, but they give me the cream and stuff before.

Q Okay. Do you know - have any idea what month it was that you told them you wanted a cream?

A I can't recall that. I can't recall for sure.

Q Okay.

A But I have -- One of the inmates now, he had a problem. He had a problem, and they quarantined him. They put him in a place. He had the same problem down on his testicles, but which I think he's the one carried it in our cell.

Q And who was that?

A James Barnett.

Q Okay.

A But they put him in there and put that paper suit on him and walked back in there.

Q When was that?

A Betty and them put him back in there.

Q Okay. When was that?

A I don't recall exactly when it was, but it was sometime during December or January, maybe December.

Q Okay.

A I can't recall for sure now.

A We'd tell them -- We'd tell them guards that was down there, Steve and them guys down there, we'd tell Steve and them we need to shower. We need a bath. And Steve and them would say when we get time or Mr. Hill or ever which one was on duty there, we need a bath.

And they wouldn't -- if they got time they would let us get a bath? Maybe sometimes we would get one twice a week, and most of the time it was one a week one day on Sunday.

Q Did you ever complain to Jack, did you ever tell Jack --

A No, I never told Jack. I didn't think he should -- Jack shouldn't have been bothered, and the guard is right there and us telling the guards.

Q Okay. Did you ever file a grievance?

A No, un-huh.

Q Did you ever complain to Betty?

A No, I never complained to Betty. I didn't want to bother -- I didn't want to bother the staff.

Q Okay. Now, this - this place that you were back the first time you were back in Laurel County in February after you've been out for ten years, you had been out of the criminal justice system for ten years, and then you came in on the handgun thing, you said

Q Okay. So you told Jack, and he said, well, just four or five days ago you went to the doctor, but then what did he do? Did he -- What happened next to you? Did you get taken to the hospital or what?

A No. When I got talked to Jack, Jack got me back over there at that doctor; and then that doctor told him they are going to have to put me in the hospital.

Q Okay. How did you get to Dr. Rastogi four or five days earlier? Who did you tell that got you to Dr. Rastogi the first time in January?

A I filled out papers. I don't recall, but I talked to Mr. Sizemore. I know that.

Q My understanding is that Mr. Sizemore is the first person you told that you were having trouble with your privates, and you told him in January; is that right or wrong?

A That's wrong. That ain't right.

Q Okay. But you can't recall who the first person you told is?

A I can't recall right off, but I know it wasn't Mr. Sizemore.

Q Okay.

A If it would have been Mr. Sizemore, I presume he would have gotten me some help.

Q Okay.

A I don't remember how long it was. I was up there about a week or so. I don't know.

Q Okay.

A A week and a half or something like that. It was over a weekend.

Q Okay. And when you came back, you had a bandage on a - on your surgery that needed some pretty good care, didn't it?

A Right.

Q What did Betty or any of the people at the Detention Center do to try to help take care of you?

A Well, she changed it and put solution on it. She changed the bandage a bit and her sister changed it, too.

Q Okay. And did they keep you at the Detention Center, or did they try to arrange for you to be taken care of by home health?

A Well, they kept me here for a few days, but they made arrangements for home health to take care of me at home.

Q Okay. Did Betty make those arrangements to your knowledge?

A To my knowledge, yeah, she did.

Q Okay. And did she have to coordinate with

your daughter because somebody had to be there with you?

A I think she cooperated with home health to the best of my knowledge.

Q Okay. And how long were you taken care of through home health?

A About four or five months from January to August.

Q Okay.

A Yeah.

Q Have you been back in the Laurel County Detention Center since then?

A No, un-huh.

Q Okay. Was there ever a night that you were at the Laurel County Detention Center that you did not have a mattress or a blanket?

A No, I had -- Even though I did sleep on the floor a lot of times, I had a mat.

Q Okay. Because of your medical problems except for that very first time you went in, were you always kept down in the medical area?

A I was always downstairs. When they first brought me in, I was snoring upstairs and the inmates complained, and they brought me downstairs. I always was downstairs, yeah.

EXHIBIT B DOCUMENTS FILED UNDER SEAL

SEARCHES: While you are in inmate at L.C.D.C., your person and your property are subject to search at any time. All searches will be conducted by a staff member of the same sex as yourself. Cell searches will be done on a random basis.

GRIEVANCE PROCEDURES.

STANDARD: 501 KAR 3:140 E 6.
WRITTEN INMATE GRIEVANCE PROCEDURE THAT IS AVAILABLE TO ALL INMATES.

POLICY:
Any inmate shall be allowed to file a grievance at such time as the inmate believes he or she has been subject to abuse, harassment, abridgement of civil rights, or denied privileges specified in the posted rules. (Grievances must be restricted to incidents which occur while the prisoner is in custody of the facility.) No prisoner shall fear against reprisal for initiating grievance procedure in an attempt to resolve legitimate complaints.

PROCEDURE:

1. Transmittal: A grievance shall be made in the form of a written statement by the inmate promptly following the incident, sealed in an un-stamped envelope and addressed to the Jailer or his designee such statement shall be transmitted promptly and without interference to the Jailer by a detention officer or staff member to whom the grievance is given.

2. Contents: The grievance shall state fully the time, date and names of those detention officers and/or staff members involved, and pertinent details of the incident including the names of any witnesses.

EXHIBIT C

COPY

368-N-000645

3. Review: Upon receipt of a grievance by the Jailer or his designee, they shall review the grievance and determine if it constitutes:

A. a prohibited act by a detention officer or staff member.

B. a violation of the inmates's civil rights

C. a criminal act, or

D. an abridgement of inmate privileges as cited in the posted rules.

4. Investigation: If the grievance constitutes a prohibited act by a detention officer or staff member, a criminal act, or a violation of the inmates's civil rights, the Jailer shall order a prompt investigation. If the grievance constitutes an abridgement of the inmates's privileges, the Jailer or his designee may appoint an impartial member of the staff to investigate the grievance and make a report of findings and recommendations.

NOTE: Any officer or staff member who subjects an inmate to harassment, curtailment of privileges or any type of punishment because of a grievance, or attempts to prevent or interfere with the reporting of a grievance, shall be subject to disciplinary action.

5. Response: Any inmate who submits a grievance to the Jailer will receive a response in 7 days following the investigation of the grievance, to include findings and actions taken by the Jailer.

6. Appeal: If not satisfied with the disposition of the grievance by the Jailer, an

inmate will have 30 days to file an appeal, from the date of action. The inmate shall be furnished paper, pencil, and an envelope in order to set forth his grievance in writing and his objection to the disposition of the grievance. The inmate's appeal will then be forwarded to the County Judge/Executive, for a decision which shall be final.

inmate will have 30 days to file an appeal, from the date of action. The inmate shall be furnished paper, pencil, and an envelope in order to set forth his grievance in writing and his objection to the disposition of the grievance. The inmate's appeal will then be forwarded to the County Judge/Executive, for a decision which shall be final.

Affidavit of Todd Prince

Comes Todd Prince, being first duly sworn, and states as follows:

1. I am Deputy Jailer at the Laurel County Detention Center and have been employed by the Laurel County Detention Center since 1/31/2003.

2. I have checked the grievance log at the Laurel County Detention Center and determined that it was started on 1/4/2004 to log all grievances received from inmates.

3. I have reviewed the grievance log from its inception to today's date and it does not show receipt of any grievance from Lester Napier regarding any matter.

4. Grievances regarding medical care are included in this grievance log.

Further the affiant sayeth not.

Todd Prince

STATE OF KENTUCKY

COUNTY OF Fayette

Subscribed and sworn to by Todd Prince this 3rd day of April, 2009.

Leslie P. Vose

NOTARY PUBLIC

My Commission Expires 8-25-2010

EXHIBIT

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