10-20-2015

Reply Brief for Plaintiff-Appellant Guy Zappulla

Betsy Ginsberg

15-903

United States Court of Appeals
FOR THE
Second Circuit

GUY ZAPPULLA,
Plaintiff - Appellant,
-v.-
SUPERINTENDENT WILLIAM LEE, individually and in his official capacity, ANTHONY J. ANNUCCI, ACTING COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, individually and in his official capacity, DOCTOR CARL KOENIGSMANN, CHIEF MEDICAL OFFICER OF THE NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, individually and in his official capacity,
Defendants - Appellees,

FRANCO, DEPUTY SUPERINTENDENT OF PROGRAMS, individually and in his official capacity, JOHN DOE, HEALTH CARE SUPERVISOR AT GREEN HAVEN, individually and in his official capacity, OFFICER JOHN DOE, 1-2, individually and in their official capacities, HEALTH CARE SUPERINTENDENT BERNSTEIN, OFFICER B. HOTALING, OFFICER BEACHY,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT GUY ZAPPULLA

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INTRODUCTION

Defendants have necessarily conceded that the Prison Litigation Reform Act ("PLRA") exhaustion argument they advanced in the district court, which served as the sole basis for that court's dismissal of this case, is foreclosed by Supreme Court and Second Circuit authority. Their failure to disclose this authority to the district court, where Plaintiff proceeded *pro se*, violated the New York Rules of Professional Conduct. They attempt to minimize this failure by arguing that it would nonetheless be appropriate for this Court to affirm the district court's dismissal, by deciding instead that Defendants are entitled to summary judgment on the merits, which the district court explicitly declined to decide.

This Court should not accept Defendants' invitation to depart from its preferred practice of allowing lower courts to decide fact-intensive issues in the first instance. Because this case involves a "necessarily contextual and fact-specific" deliberate indifference claim, *Smith v. Carpenter*, 316 F.3d 178, 185 (2d Cir. 2003), this Court should vacate the district court's dismissal and remand for further proceedings.

Even if this Court decides to address the merits, several disputes of material fact remain rendering this case inappropriate for summary judgment. Mr. Zappulla has presented facts to support his claim of deliberate indifference to a serious medical need; specifically the lack of post-surgical physical therapy for his right

elbow and the denial of surgical intervention on his left shoulder.

Defendants also ask this Court to dismiss one of Plaintiff's claims on the alternative exhaustion argument that the PLRA requires prisoners to request the relief they ultimately seek in litigation in their initial grievance. This argument is not surprisingly unsupported by any legal authority, because it is foreclosed by *Booth v. Churner*, 532 U.S. 731 (2001) (noting that "one 'exhausts' processes, not forms of relief.").

Plaintiff urges this Court to vacate the district court's erroneous judgment and remand to the district court. Plaintiff also asks this Court to impose sanctions upon the Office of the Attorney General ("OAG") for its bad-faith failure to disclose to the district court controlling authority, directly on point and well-known to trial counsel.

I. THIS COURT SHOULD ADHERE TO ITS PREFERRED PRACTICE OF ONLY REVIEWING QUESTIONS THAT THE DISTRICT COURT CONSIDERED.

Defendants have conceded that the district court erroneously granted summary judgment on grounds explicitly foreclosed by both this Court and the U.S. Supreme Court. *See* Appellees' Br. 27-28. However, Defendants urge the Court to affirm the decision on alternate grounds never considered by the district court. *Id*. at 12.

Generally, this Court will "decline considering arguments not addressed by

the district court." *Bacolitsas v. 86th & 3rd Owner*, 702 F.3d 673, 681 (2d Cir. 2012), citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). *See also Bouboulis v. Transp. Workers Union of Am.*, 442 F.3d 55, 66 (2d Cir. 2006) (noting the Court's "settled practice to allow … district court to address arguments in the first instance") (citing *Farricielli v. Holbrook*, 215 F.3d 241, 246 (2d Cir. 2000)). Even when the alternate issues were briefed by the parties below, it remains the "distinctly preferred practice" of this Court "to remand such issues for consideration by the district court in the first instance." *Schonfeld v. Hillard*, 218 F.3d 164, 184 (2d Cir. 2000).

In deciding whether to consider an issue unaddressed by the lower court, this Court takes into account such factors as the whether the issue presents "pure questions of law" and judicial economy. *See, e.g.*, *Rai v. WB Imico Lexington Fee*, ___ F.3d ___, 2015 WL 5515194, *13 (2d Cir. Sept. 21, 2015) (deciding unaddressed issue because it involved pure question of law already decided by district court as to other plaintiffs); *Bacolitsas*, 702 F.3d at 681. This Court has refused to address alternative issues where they involve factual questions not addressed by the district court. *See, e.g.*, *CILP Associates v. PriceWaterhouse Coopers*, 735 F.3d 114, 127 (2d Cir. 2013); *Brocklesby Transp. v. E. States Escort Servs.*, 904 F.2d 131, 133-34 (2d Cir. 1990).

Further, this Court may affirm summary judgment on an alternate ground

only when the "record [is] sufficient to permit conclusions of law." *Olsen v. Pratt & Whitney Aircraft*, 136 F.3d 273, 275 (2d Cir. 1998); *see also Shelden v. Barre Belt Granite Employer Union Pension Fund*, 25 F.3d 74, 80 (2d Cir. 1994) (refusing to affirm on alternate grounds where record not sufficiently clear).

Here, this Court should adhere to its "distinctly preferred practice," and remand to the district court. *Schonfeld*, 218 F.3d at 184. First, the question presented here is not a "pure question of law." *Bacolitsas*, 702 F.3d at 681. On the contrary, an Eighth Amendment claim is "'[necessarily] contextual' and fact-specific." *Smith*, 316 F.3d at 185 (quoting *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)). Proper disposition of the merits of this matter will require an examination of Mr. Zappulla's extensive medical records, grievance history, and deposition testimony. *See CILP Associates*, 735 F.3d at 127 (declining to affirm on alternate grounds where issue was "highly fact-intensive and … depend[ed] on an evaluation of expert … reports and deposition testimony."); *see also infra*, Point II.

Similarly, the question of whether an inmate has exhausted administrative remedies under the PLRA requires a court to examine facts. *See Howard v. Goord*, 98-CV-7471, 1999 WL 1288679, at *2 (E.D.N.Y. Dec. 28, 1999); *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2010) (finding whether prisoner has exhausted to be mixed question of law and fact.). The district court here only assessed whether Plaintiff named Defendants Annucci and Koenigsmann in his grievances,

not whether his grievances concerning his right elbow were otherwise properly exhausted.

Second, the district court is best situated to decide whether any material factual disputes remain. The district court here explicitly declined to consider the merits of Plaintiff's Eighth Amendment claims or Defendants' other exhaustion argument. *See* JA 256, n.4 ("the Court need not, and does not, reach Defendants' other arguments for summary judgment."). Thus, this Court does not have the benefit of that court's insight and familiarity with over three years of active litigation preceding summary judgment.[1] It is not this Court's "function to decide motions for summary judgment in the first instance," because it is "dependent on the district court to identify and sort out the issues on such motions" and the district court's judgment on the merits is "always helpful and usually persuasive." *Beckford v. Portuondo*, 234 F.3d 128, 130 (2d Cir. 2000); *see also Fisher v. JPMorgan Chase*, 303 Fed. Appx. 979, 982 (2d Cir. 2008) (refusing to affirm on alternate grounds where court would "benefit from the district court's further attention to it"); *Republic Technology Fund v. Lionel Corp.*, 483 F.2d 540, 553 (2d Cir. 1973) (refusing to affirm on grounds not reached by district court because "absent specific findings," the court is disinclined to decide in first instance).

[1] Over the course of this litigation, the district court decided motions to dismiss and for summary judgment and presided over, among other matters, a settlement agreement, its dissolution, and reinstatement of the case. *See* JA 1-22.

The federal rules recognize the importance of the district court's role in deciding summary judgment. Fed. R. Civ. P. 56(e)(1) empowers the district court to provide "an opportunity to properly support or address [an unsupported assertion of] fact." Allowing such an opportunity "[i]n many circumstances … will be the court's preferred first step." Fed. R. Civ. P. 56(e)(1), Advisory Committee Notes, 2010 amendment; *see also Noel v. Interpublic Group*, No. 12-CV-2996, 2013 WL 1955879 (S.D.N.Y. May 13, 2013) (exercising power under Rule 56(e)(1) to stay summary judgment). Here, the district court should be permitted to exercise this authority.

In their Eighth Amendment argument, Defendants rely heavily on inadmissible evidence, which cannot support summary judgment. *See, e.g.*, *LaSalle Bank v. Nomura Asset Capital Corp.*, 424 F.3d 195, 205-206 (2d Cir. 2005) (holding movant may not rely on inadmissible evidence). In particular, they rely on excerpts from Plaintiff's DOCCS medical records. Appellees' Br. 5-6, 19-20, 23. However, these records were never authenticated, and therefore are inadmissible hearsay. "Facts supporting admissibility must be supplied 'by the testimony of the custodian or other qualified witness or by certification' that complies with [Fed. R. Evid. 902]." *See, e.g.*, *Tutora v. Corr. Med. Care, Inc.*, No. 10-CV-0207, 2012 WL 1898871, at *2 (N.D.N.Y. Apr. 30, 2012), *report and recommendation adopted*, 2012 WL 1898915 (citing Fed. R. Evid. 803(6)).

Defendants made no attempt to authenticate any of Mr. Zappulla's medical records.[2] Were this case remanded to the district court, that court could, under Rule 56(e)(1), require Defendants to authenticate and render admissible all evidence on which they rely. Furthermore, the district court could allow Mr. Zappulla the opportunity to provide additional, admissible support for his factual allegations, given that he proceeded without counsel in the district court.

Third, this Court should not reach any of Defendants' alternative arguments because there is insufficient basis in the record to support an affirmance of the district court's judgment. *See, e.g.*, *Luitpold Pharm., Inc. v. Ed. Geistlich Söhn Für Chemische Industrie*, 784 F.3d 78, 91 (2d Cir. 2015). As Plaintiff argues, material issues of fact are in dispute concerning the merits. *See infra* Point II (noting factual disputes concerning the seriousness of Plaintiff's condition, the treatment prescribed and treatment provided). Thus, the record does not support affirming the district court's dismissal on Defendants' merits arguments never addressed by the district court. *Id.* Relatedly, contrary to Defendants' statement that the merits of Mr. Zappulla's claims were "fully briefed" below, Appellees' Br. at 13, this issue comprised fewer than five pages of Defendants' summary

[2] Defendants' proffered medical records were attached to a lawyer's declaration devoid of facts supporting authenticity. For example, as to one excerpt, the declaration simply stated "[a]ttached hereto as Exhibit E is a copy of a report of a medical history and physical taken of plaintiff, dated May 11, 2011." JA 164. *See Monroe v. Board of Ed. of Town of Wolcott*, 65 F.R.D. 641, 651 (D. Conn. 1975) (collecting cases).

judgment brief. *See* JA 142-44; 146-48. Because the merits of Plaintiff's claim comprised only a small section of an otherwise problematic brief and that Mr. Zappulla appeared *pro se* below, remand to the district court to address the merits in the first instance is warranted.

For the reasons stated above, judicial economy would not be served by this Court addressing the grounds that the district court explicitly declined to consider. This Court should, in accordance with its preferred practice, remand to the district court to consider the merits in the first instance.

II. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE MERITS OF MR. ZAPPULLA'S EIGHTH AMENDMENT CLAIMS.

Should this Court elect to address the merits of Plaintiff-Appellant's Eighth Amendment claims for injunctive relief, it should find summary judgment inappropriate here, where Mr. Zappulla has presented adequate facts supporting his claim that DOCCS is failing to provide him necessary medical treatment. To prove that inadequate medical treatment constitutes an Eighth Amendment violation, a plaintiff must show that a doctor's actions or omissions amount to a "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). To meet this standard, a prisoner must show that the deprivation is, objectively, sufficiently serious and that the defendants acted with the requisite state of mind. *Chance*, 143 F.3d at 702. Below, Plaintiff-Appellant identifies

evidence disputing Defendants' claim that the deprivations relating to his right elbow and left shoulder are sufficiently serious. He also satisfies the subjective element because the official-capacity defendants had the requisite authority and responsibility to correct the deprivation and because DOCCS officials were sufficiently aware of his serious medical needs.

A. Defendants Have Not Met Their Burden of Demonstrating that No Genuine Issues of Material Fact Exist as to Whether Plaintiff Suffered a Sufficiently Serious Deprivation of Medical Care.

The objective element of the deliberate indifference test is "'[necessarily] contextual' and fact-specific." *Smith*, 316 F.3d at 185. First, the Court must consider whether there was an actual deprivation of medical care. *Salahuddin v. Goord*, 467 F.3d 263, 279 (2d Cir. 2006). The Court then examines whether the inadequate care is sufficiently serious. *Id.* at 280.

This Court looks to the following non-exhaustive factors to "guide the analysis, including: (1) whether a reasonable doctor or patient would perceive the medical need in question as 'important and worthy of comment or treatment,' (2) whether the medical condition significantly affects daily activities, and (3) 'the existence of chronic and substantial pain.'" *Brock v. Wright*, 315 F.3d 158, 162 (2d Cir. 2003), citing *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998). Deprivations of care involving pain and limited mobility have been considered to be sufficiently serious. *See Hathaway v. Coughlin*, 37 F.3d 63, 67 (2d Cir. 1994)

(holding hip pain that made walking difficult sufficiently serious); *Brock*, 315 F.3d at 163-64 (holding keloid scar that caused pain and interfered with daily activities serious). This Court has not required "an inmate to demonstrate that he … experiences pain that is at the limit of human ability to bear," nor "a showing that his or her condition will degenerate into a life-threatening one." *Brock*, 315 F.3d at 163.

1. Mr. Zappulla Has Presented Facts Showing that the Condition of His Right Elbow is Sufficiently Serious.

Plaintiff has set forth facts supporting his claim that the deprivation of treatment for his right elbow condition is sufficiently serious. Mr. Zappulla underwent surgery on his right elbow on August 21, 2010[3] to address osteoarthritis and blocking osteophytes. Appellant's Mot. Corr. Rec. at 63.[4] A discharge summary dated August 27, 2010 states "Dr. Holder recommended passive range of motion exercises with the dressing removed … I did not submit a request for this physical therapy, as he will receive this at Clinton CF." *Id.* Mr. Zappulla did not receive the prescribed physical therapy during his month at Green Haven

[3] Mr. Zappulla initially went in for debridement surgery in March 2010, but after being placed under anesthesia, was awoken and told he needed a more extensive procedure that would involve reconstruction of his elbow. JA 103, 105, 203.

[4] Plaintiff's First Opposition to Summary Judgment and accompanying exhibits were erroneously never docketed in the district court. This Court granted Plaintiff's Motion to Correct the Record on June 12, 2015. These documents are not included in the Joint Appendix, but were docketed in this Court at No. 32 in this Court's docket.

Correction Facility, nor did he receive physical therapy upon returning to Clinton. *See* JA 227. Furthermore, the medical records, on which Defendants rely heavily throughout their brief are inadmissible and thus cannot support summary judgment.[5] *Supra* at 6.

The facts highlighted by Plaintiff support a finding of a serious deprivation of care. *See Mercer v. APS Healthcare, Inc.*, No. 13-CV-840, 2015 U.S. Dist. LEXIS 130070 (N.D.N.Y. June 25, 2015), (holding shoulder pain that required pain medication, x-rays, shoulder injections, physical therapy, and referral to orthopedic specialist to be objectively serious medical condition); *Stevens v. Goord*, 535 F. Supp. 2d 373, 387 (S.D.N.Y. 2008) (finding defendants' failure to provide physical therapy, including range of motion exercises as prescribed by a specialist, supported deliberate indifference claim). Similar to the plaintiffs in *Mercer* and *Stevens*, Mr. Zappulla's claim regarding his right elbow is sufficiently serious. *See* JA 39 ("plaintiff is still experiencing severe pain in the elbow joint, and has an obvious loss of movement, to the extent of not even being able to properly use his right arm, and can no longer fully extend his right arm, nor fully bend it from lack of the initial therapy.").

[5] Mr. Zappulla, however, as the non-movant, is entitled to introduce evidence, defective in form, but "sufficient to apprise the court that there is important and relevant information that could be proffered to defeat the motion," and when this occurs, "summary judgment ought not to be entered." *Liberty Mutual v. Rotches Pork Packers*, 969 F.2d 1384, 1389 (2d Cir. 1992); *see also Celotex v. Catrett*, 477 U.S. 317, 324 (1986).

Defendants' argument that Mr. Zappulla received and refused the treatment both misstates the facts with regard to the treatment he received, and misapplies the law with regard to his refusal of treatment. First, Defendants falsely state that Mr. Zappulla actually received physical therapy at Clinton. Appellees' Br. at 22. They do not, and cannot, support this misstatement with any medical evidence. Instead, they rely on the Central Office Review Committee's ("CORC") response to Plaintiff's grievance that states "physical therapy appointments are *pending scheduling*." Appellees' Br. at 22 (citing JA 66) (emphasis added). However, CORC's response demonstrates that at that time, no appointments were actually scheduled and no treatment was provided. There is nothing in the record supporting Defendants' assertion that Mr. Zappulla has ever received the physical therapy prescribed for his right elbow; in fact, just the opposite is the case. *See, e.g.*, JA 56, 60, 62, 66, 227.

Furthermore, Defendants incorrectly allege that Mr. Zappulla cannot maintain an Eighth Amendment claim based on the lack of medical treatment for his right elbow, because he refused to attend two post-surgical follow up appointments at Green Haven. Appellees' Br. at 21. Mr. Zappulla's refusal of follow-up appointments, with a doctor who was not ensuring that he received prescribed post-surgical care, cannot moot his claim for the harm caused by not receiving that very same care. The discharge summary prepared after the surgery

on Mr. Zappulla's right elbow states "he will receive this [physical therapy] at Clinton CF." Appellant's Mot. Corr. Rec. at 59. This notation is consistent with Mr. Zappulla's stated reason for refusal of treatment and corroborates his statement that he wanted to be returned to Clinton so he could receive physical therapy there. The grievance and refusal forms completed by Mr. Zappulla demonstrate that he wanted to return to Clinton, where he was told he would receive physical therapy and other post-surgical care. JA 56, 62, 89, 91, 97, 99. On the refusal form, he wrote that he wanted to "go back to Clinton so I can get physical therapy as well as other medical care for my arm …" JA 211. Defendants do not cite any fact demonstrating that Mr. Zappulla refused physical therapy for his right elbow. *See* Appellees' Br. at 6-7.

Defendants' reliance on *Jones v. Smith*, 784 F.2d 149 (2d Cir. 1986) is inapt, because there, the prisoner was found to have "constant[ly]" declined treatment. Appellees' Br. at 21, citing *Jones*, 784 F.2d at 151. Nor does *Victor v. Milicevic*, 361 Fed. Appx. 212 (2d Cir. 2010) support Defendants' argument, because there, this Court found it reasonable to cancel physical therapy after the plaintiff three times refused the very treatment he sought. Appellees' Br. at 21, citing *Victor*, 361 Fed. Appx. at 215. Here, however, Mr. Zappulla was never scheduled for physical therapy and never refused the treatment he seeks through this litigation. JA 56, 60, 62, 66, 227.

Yet another significant disputed fact is whether Mr. Zappulla needed physical therapy at all. In support of their contention that Mr. Zappulla required only self-care after his right elbow surgery, Defendants cite another response to a grievance. Appellees' Br. at 22, citing JA 62. The orthopedic surgeon who operated on Mr. Zappulla's right elbow prescribed physical therapy, not self-care. *See* Appellant's Mot. Corr. Rec. at 61. Defendants have not pointed to any evidence in the record, such as medical records or physicians' affidavits, showing that any of the doctors who treated or examined Mr. Zappulla changed the prescribed course of post-surgical treatment, other than in the Superintendent's grievance response. *See* JA 62.

This Court has held that when a prisoner's treating physicians recommend a course of action, which officials ignore, the result is not a mere disagreement over proper medical treatment, but cause for a deliberate indifference claim. *Johnson v. Wright*, 412 F.3d 398, 406 (2d Cir. 2005); *see also Gill v. Mooney*, 824 F.2d 192, 196 (2d Cir. 1987) ("[p]rison officials are more than merely negligent if they deliberately defy the express instructions of a prisoner's doctors.") (citations omitted). The response to Mr. Zappulla's grievance, even if ostensibly supported by DOCCS medical staff, does not state any reason why the specialist's report is being rejected. Prison officials are not entitled to "substitute their judgments for a medical professional's prescription." *Johnson v. Wright*, 234 F. Supp. 2d 352, 361

(S.D.N.Y. 2002). Here, no explanation was provided as to why the post-surgical prescriptions of Mr. Zappulla's doctors were not carried out, and prison officials at Green Haven and Clinton are not entitled to deviate from their prescription. *Id.* Where prison officials fail to carry out a specialist's recommendation, defendants must provide an explanation for this course of action; they may not simply label it a difference of personal opinion.

2. Material Issues of Fact Remain Regarding Whether the Condition of Mr. Zappulla's Left Shoulder Is Sufficiently Serious.

Mr. Zappulla has similarly presented facts to support his contention that the degenerative joint disease in his left shoulder, for which he received no treatment, is sufficiently serious to support an Eighth Amendment claim. On January 6, 2010, a Clinton radiologist diagnosed degenerative joint disease at the acromioclavicular joint, noting that this condition was causing pain. JA 107. Over a year later, on May 11, 2011, Dr. Macelaru at Upstate Correctional Facility examined Mr. Zappulla based on his complaint of pain in his left shoulder. JA 212-15. In his report, Dr. Macelaru noted that Mr. Zappulla had "moderate acromio-clavicular degenerative joint disease/osteoarthritis, and distal clavicle osteolysis." JA 215. A DOCCS notation on August 29, 2011 reads "per Dr. Adams, [Plaintiff] has problems lifting anything, pain." Appellant's Mot. Corr. Rec. at 96. Most notably, during a consultation with an orthopedic surgeon on

October 14, 2013, the surgeon told Plaintiff that he needed surgery on his left shoulder. *See* JA 229.[6] Approximately two weeks later, Dr. Adams told him that DOCCS denied the surgery. *Id.*

Here, the lack of intervention to repair his left shoulder constitutes a failure by prison officials to treat a condition that resulted in further injury and the infliction of pain, and satisfies the *Chance* factors, as a reasonable doctor clearly perceived the medical need here as "important and worthy … of medical treatment." *Chance*, 143 F.3d at 702. Here, doctors examined Plaintiff's shoulder in 2011 and 2013, took x-rays, and discussed treatment options with him. JA 215. The condition of his left shoulder also affected his daily activities, as Dr. Macelaru recommended that he refrain from lifting. *Id*. Lastly, Mr. Zappulla was in chronic pain due to the condition of his left shoulder. JA 212.

Defendants erroneously characterize Mr. Zappulla's left shoulder claim as a personal disagreement with the treatment prescribed by his doctors. Appellees' Br. 20. This ignores the fact that an orthopedic specialist stated in October 2013 that surgery on his left shoulder was necessary. JA 229.

There is a dispute of fact as to the exact treatment prescribed by the doctors,

[6] An unsworn statement in a brief by a *pro se* litigant, as Plaintiff was below, is properly considered on summary judgment. *See Geldzahler v. N.Y. Medical College*, 746 F. Supp. 2d 618 n.1 (S.D.N.Y. 2010) ("… we take into account [plaintiff's] status as a *pro se* litigant and will consider the unsworn statements in his 56.1 response on the assumption that he would have testified to these statements in his Declaration.").

and Mr. Zappulla has not received any treatment for his left shoulder. *See* JA 229. Defendants also argue that Mr. Zappulla experienced only "mild pain" in his left shoulder. Appellees' Br. 19-20. However, a full examination of the record reveals several instances in which Mr. Zappulla complained about the pain he was experiencing in his left shoulder and the doctors' unsuccessful attempts to treat this pain. In the same report cited by Defendants to support their contention that Plaintiff was in only mild pain, there is a notation that states he reported "[t]he pattern of pain has been progressively worsening. The location of the pain is deep and anterior. It radiates to the arm." JA 212; Appellees' Br. at 5. Mr. Zappulla argues that the pain has worsened and become even more severe since that report was produced. JA 229. Nearly two years after that report, after several requests for consultation with an orthopedic specialist were denied, Mr. Zappulla met with an orthopedic specialist who told him that surgery was necessary. *Id.*

There is substantial support in the record indicating that the condition of Mr. Zappulla's right elbow and left shoulder is sufficiently serious to satisfy the objective prong of an Eighth Amendment claim. The dispute about this central issue of material fact makes summary judgment an improper means of resolving this case. *See, e.g.*, *Celotex*, 477 U.S. at 322.

B. Official-Capacity Defendants Had Subjective Awareness to Constitute Deliberate Indifference to Mr. Zappulla's Medical Needs.

To prove deliberate indifference, the plaintiff must also show that the prison official defendants "knew of and disregarded the plaintiff's serious medical needs." *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998). However, as against official-capacity defendants, personal involvement of those defendants need not be demonstrated. *Koehl v. Dalsheim*, 85 F.3d 86, 89 (2d Cir. 1996).

In *Koehl*, this Court dismissed a deliberate indifference claim against a prison superintendent in his *personal* capacity for lack of personal involvement, but upheld the claim for injunctive relief against him in his *official* capacity. *Koehl*, 85 F.3d at 89. In upholding the official-capacity claims, this Court noted that the Superintendent had the "overall responsibility to ensure that prisoners' basic needs were met" and that the medical personnel knew of and failed to act on his medical need. *Id.*; *see also Gowins v. Greiner*, 01-CV-6933, 2002 WL 1770772, *8 (S.D.N.Y. July 31, 2002); *Davidson v. Scully*, 148 F. Supp. 2d 249, 254 (S.D.N.Y. 2001); *White v. Mitchell*, 99-CV-8519, 2001 WL 64756, *3 (E.D.N.Y. Jan. 18, 2001). This holding is consistent with the long-standing conception that "[t]he real party in interest in an official-capacity suit is the governmental entity and not the named official." *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

Mr. Zappulla can establish the official-capacity Defendants' deliberate indifference by showing that Defendants have the responsibility and authority to ensure the treatment is provided, and that he placed prison officials on notice of his serious medical need. By virtue of their positions as Acting Commissioner and Chief Medical Officer, Annucci and Koenigsnmann have the duty and authority to "ensure that prisoners' basic needs were met." *Koehl*, 85 F.3d at 89*; see also Zappulla v. Fischer*, 2013 WL 1387033 at *10.

Defendants' only argument in support of their contention that Mr. Zappulla is unable to meet the subjective requirement is that the Defendants' predecessors[7] were not themselves aware of his medical needs. Appellees' Br. at 25-26. This argument ignores that Annucci and Koeningsmann are sued only in their official capacities, which, as shown by *Koehl*, is sufficient to meet the deliberate indifference standard. Furthermore, it fails to acknowledge that the district court in this case already ruled that Defendants' predecessors' personal involvement need not be shown. *Zappulla v. Fischer*, 11-CV-6733, 2013 WL 1387033, at *10 (S.D.N.Y. Apr. 5, 2013) ("by virtue of their supervisory positions alone [Defendants] presumably have a 'direct connection to, or responsibility for, the alleged illegal action[s],' and 'the authority to perform the required act,' namely

[7] Mr. Zappulla originally named Commissioner Fischer and Deputy Commissioner Wright in his Complaint, but presumably pursuant to Fed. R. Civ. P. 25(d), Defendants Annucci and Koeningsmann were substituted when they assumed those positions. *See* Docket No. 11-CV-6733, Entry No. 73.

obtaining adequate medical care for Plaintiff."), citing *N.Y. Youth Club v. Town of Smithtown*, 867 F. Supp. 2d 328, 339 (E.D.N.Y. 2012) and *Briscoe v. Rice*, 11-CV-578, 2012 WL 253874, *4 (E.D.N.Y. Jan. 27, 2012).

Furthermore, DOCCS security and medical officials were aware of and failed to address Plaintiff's serious medical needs. The grievance and appeal procedure, with which Mr. Zappulla fully complied, made his complaints about the lack of treatment for his right elbow and left shoulder known to the Superintendents of both Green Haven and Clinton Correctional Facilities, DOCCS medical providers, as well as CORC. *See* JA 109, 201-204. Mr. Zappulla's communications with his doctors as reflected in his medical records also provided prison medical providers with the knowledge that Mr. Zappulla had a serious medical need that was not being addressed. *See* JA 34-35, 38, 77,176-178, 215, 227, 229.

III. MR. ZAPPULLA ADEQUATELY EXHAUSTED HIS ADMINISTRATIVE REMEDIES WITH RESPECT TO HIS CLAIM CONCERNING HIS RIGHT ELBOW.

Defendants contend alternatively that Mr. Zappulla's claims are barred by the PLRA's requirement that inmates may not bring suit until "administrative remedies as available are exhausted." 42 U.S.C. § 1997e(a). Defendants argue that by requesting a slightly different remedy in his complaint than in his grievance, the PLRA bars his claim. Appellees' Br. at 14-17. However, this

assertion, with no supporting authority, directly contradicts Supreme Court precedent in *Booth v. Churner*, 532 U.S. 731 (2001), which expressly holds that no incarcerated person is required to exhaust a *remedy* before seeking relief in court.

The PLRA's exhaustion provision requires that "[n]o action shall be brought … by a prisoner … until such administrative remedies as available are exhausted." 42 U.S.C. § 1997e(a). The purpose of this requirement is to ensure that prison authorities have notice of and opportunity to respond to prisoner complaints. *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004) (citing *Freedom Holdings v. Spitzer*, 357 F.3d 205, 234 (2d Cir. 2004)). Therefore, "a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought … the grievant *need not … demand particular relief*. All the grievance need do is object intelligibly to some asserted shortcoming." *Johnson*, 380 F.3d at 697 (emphasis added) (quoting *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002)).

A prison grievance system may not "demand that the prisoner specify each remedy later sought in litigation—for *Booth v. Churner* holds that § 1997e(a) requires each prisoner to exhaust *a process* and not a *remedy*." *Strong*, 297 F.3d at 649-50 (internal citations omitted) (emphasis in original), citing *Booth v. Churner*, 532 U.S. 731, 739 (2001) ("one 'exhausts' processes, not forms of relief"). In

Johnson, this Court noted that "[u]ncounselled inmates navigating prison administrative procedures without assistance cannot be expected to satisfy a standard more stringent than that of notice pleading." *Johnson*, 380 F.3d at 697.

DOCCS' internal rule, which requires grievances to contain "a concise, specific description of the problem and the action requested," is not to the contrary. 7 N.Y.C.R.R. § 701.5(a)(2). This policy requires only that the grievance state a request; it does not preclude an inmate from seeking different relief in litigation. *See, e.g.*, *Peoples v. Fischer*, No. 11-CV-2694, 2012 WL 1575302, at *5 (S.D.N.Y. May 3, 2012) (citing *Booth*, 532 U.S. at 739) (holding plaintiff's claim against DOCCS not barred as "[t]he requirement to exhaust available remedies refers to the procedural means, not the particular relief ordered") (internal quotations omitted). Here, by requesting to "receive [his] pre-prescribed physical therapy" and to be "returned to Clinton A.S.A.P. where [he] can receive his prescribed and much needed after surgery physical therapy," Mr. Zappulla, by requesting specific relief, met the § 705.1(a)(2) requirement. *See* JA 89.

Defendants cite no authority whatsoever for the proposition that inmates must request the same *relief* in their complaint as requested in the grievance. Appellees' Br. at 14-17. In fact, no such authority exists, for this argument was foreclosed by the Supreme Court in *Booth*. 532 U.S. at 739 (internal quotations omitted). So long as the grievance "afford[s] time and opportunity to address

complaints internally," the grievance will suffice as grounds for a complaint. *Johnson*, 380 F.3d at 697 (citing *Porter v. Nussle*, 534 U.S. 516, 525 (2002)).

Here, Mr. Zappulla's grievance certainly afforded the institution such opportunity. His grievance requested his prescribed physical therapy after the surgery on his right elbow. JA 89. His Amended Complaint states that he is "still experiencing severe pain in the elbow joint, and has an obvious loss of movement, to the extent of not even being able to properly utilize his right arm, and can no longer fully extend his right arm, nor fully bend it *from lack of the initial therapy*." JA 39 (emphasis added). Any additional relief that Mr. Zappulla seeks in his Amended Complaint resulted from Defendants' failure to provide prescribed after-care before, during, and after the grievance process. Furthermore, to argue that the Amended Complaint and the grievances seek different relief is to split hairs. In both, he seeks medical care for pain and limited range of motion in his right elbow, and therefore has fully exhausted this claim under the PLRA.

IV. SANCTIONS ARE APPROPRIATE BECAUSE DEFENDANTS' CONDUCT BELOW LACKED MERIT AND WAS THUS IN BAD FAITH.

Plaintiff seeks sanctions against the OAG under 28 U.S.C. § 1927 for Defendants' failure to alert the district court to adverse controlling authority in violation of N.Y.R. Prof. Conduct 3.3(a)(2), thereby "multipl[ying] the proceedings … unreasonably and vexatiously." 28 U.S.C. § 1927. Appellees

concede their position that Plaintiff's claims should have been dismissed under the PLRA for failing to name Defendants in his grievances was directly contrary to U.S. Supreme Court and Second Circuit precedent, but argue that sanctions are inappropriate because Plaintiff cannot show bad faith. Appellees' Br. at 27-30.

To impose sanctions under § 1927, the Court must find "conduct constituting or akin to bad faith." *Star Mark Management v. Koon Chun Hing Kee Soy & Sauce Factory*, 682 F.3d 170, 178 (2d Cir. 2012). Bad faith may be inferred from the circumstances when counsel's "actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 143 (2d Cir. 2012), citing *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323 (2d Cir. 1999); *see also In re 60 East 80th Street Equities, Inc.*, 218 F.3d 109, 117 (2d Cir. 2000) ("bad faith may be inferred from the clear lack of merit of the claims."). In fact, "[c]ourts will *generally* infer bad faith" in such situations. *See, e.g.*, *Neshewat v. Salem*, 365 F. Supp. 2d 508, 528 (S.D.N.Y. 2005) (emphasis added). Here, Defendants' actions are so completely without merit as to require such a conclusion.

Jones v. Bock, 549 U.S. 199 (2007), the leading case on point, held that the PLRA does not require prisoners to name potential defendants in their grievances in order to comply with the exhaustion requirement. Since 2007, it was cited for

this proposition at least 5,781 times by the federal courts, and at least 340 times by courts in this Circuit.[8] Defendants offer no explanation for their failure to cite to this Supreme Court case, which stands in direct opposition to their exhaustion argument. *See* Appellees' Br. at 27-30.

Furthermore, Christina Okereke, the Assistant Attorney General who represented Defendants below, was no doubt well aware of the Supreme Court's decision in *Jones* before filing her summary judgment brief in this case on June 6, 2014. In fact, she cited it in memoranda of law supporting virtually every motion seeking dismissal on PLRA exhaustion grounds that she filed prior to June 6, 2014.[9] She did not, however, cite *Jones* at all in her summary judgment briefs below, let alone for the proposition that the PLRA does not impose a "name-all-defendants" rule. *See generally* JA 119-52.

Espinal v. Goord, 558 F.3d 119 (2d Cir. 2009), the leading case on point, clarified that DOCCS' grievance procedures did not require prisoners to name all defendants.[10] Since *Espinal*, a case litigated by Ms. Okereke's office, was

[8] These figures were obtained on Westlaw by filtering case citations of *Jones v. Bock* by the headnote: "PLRA did not impose a 'name all defendants' requirement as part of exhaustion" and then further filtering by jurisdiction. This search was performed on October 5, 2015.

[9] A docket search conducted on Bloomberg Law and PACER on October 12, 2015 of all cases in which Christina Okereke was counsel, found eight memoranda of law seeking dismissal on exhaustion grounds filed by her. *Jones* was cited in all but the motion for summary judgment in this case and in *Inside Connect, Inc. v. Fischer*, No. 13-CV-1138 (S.D.N.Y.) (Doc. No. 54).

[10] In *Ocampo v. Fischer*, litigated by trial counsel herself, the Magistrate Judge's Report and

decided in 2009, it was cited for this proposition at least 52 times by courts in this Circuit.[11]

Defendants attempt to minimize the importance of their violation of N.Y.R. Prof. Conduct 3.3(a)(2). First, they claim that their argument rested primarily on a recent case, *Skyers v. United States*, 12-CV-3432, 2013 WL 3340292 (S.D.N.Y. July 2, 2013), which they claim suggested that "a *federal* inmate was required to name future defendants in a grievance in order to satisfy the PLRA's exhaustion requirement." Appellees' Br. at 27 (emphasis in original). *Skyers* did not hold that the Federal Bureau of Prisons' ("BOP") grievance system requires prisoners to name defendants in their grievances, but rather relied on pre-*Jones* authority for the proposition that all prisoners must name potential defendants in their grievances. *Skyers*, 2013 WL 3340292, at *8.[12]

Skyers was also a case in which a government attorney, litigating against a

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Recommendation cited *Jones* and *Espinal*. *See* JA 279. Defendants argue that the Magistrate Judge's report is insufficient to establish an inference of bad faith, *see* Appellees' Br. at 30. However, this is just one instance among many supporting this inference. It is also notable that the district court in *Ocampo* also relied on *Jones* and *Espinal* in rendering its decision, rejecting Defendants' objections on exhaustion and adopting the Report and Recommendation. *Ocampo v. Fischer*, No. 11-CV-4583, 2014 WL 7422763, at *3 (E.D.N.Y. Dec. 31, 2014).

[11] These figures were obtained on Westlaw by filtering case citations of *Espinal v. Goord* by the headnote: "New York state grievance procedures did not require an inmate to specifically name responsible parties…" and then further filtering by jurisdiction. This search was performed on October 5, 2015.

[12] The courts that have addressed whether the BOP requires prisoners to name defendants in their grievances have all held it does not. *See, e.g.*, *Lombardi v. Pugh*, 4:CV-05-0300, 2009 WL 1649908, at *7 (M.D. Pa. June 9, 2009).

pro se prisoner, failed to cite controlling authority to the Court, and its consequences are apparent here. In *Skyers*, the government failed to cite *Jones* in either their principal or reply memoranda in support of their motion to dismiss, filed over five years after the decision in *Jones*. *See Skyers v. United States*, No. 12-CV-3432 (S.D.N.Y.), Defs' Mem. Mot. Dismiss (Nov. 16, 2012); Defs' Reply (Jan. 4, 2013). Their principal authority was *Collins v. Goord*, 438 F. Supp. 2d 399 (S.D.N.Y. 2006), a district court case decided before *Jones*, holding that a plaintiff must name all defendants to exhaust under the PLRA. Presented with only pre-*Jones* authority by the government, the district court found fatal the prisoner's failure to name defendants in his grievance. *Skyers*, 2013 WL 3340292 at *8-9. The Assistant Attorney General's reliance here on *Skyers*, an unpublished district court case, is inexcusable given her obvious familiarity with *Jones*.

Mr. Zappulla's claims aside, the outcome in *Skyers* and Defendants' reliance on it show clearly that the consequences of Defendants' failure to cite *Jones* resonate well beyond the boundaries of this litigation: their actions create incorrect decisions, which other litigants and courts inappropriately rely upon. The duty to disclose adverse authority ensures that, "at a minimum, an unjust decision is not handed down by a misinformed court." Christopher W. Deering, *Candor Toward the Tribunal: Should an Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 31 Suffolk U. L. Rev. 59 (1997).

Defendants also argue that a "[s]hephardization of the other district court cases cited in the summary judgment motion did not identify *Espinal* and the change in law it effected,"[13] which demonstrates that the "error was inadvertent." Appellees' Br. at 28. However, this in no way demonstrates inadvertence; it merely demonstrates that the cases Defendants *chose* to cite, years old at the time, do not show *Espinal* as a contrary authority. Appellants do not, and cannot, suggest that trial counsel was unaware of the Supreme Court's decision in *Jones*, a decision that foreclosed Defendants' argument.

Appellees offer no cogent reason for trial counsel's failure to alert the district court to *Jones*, a Supreme Court case directly on point and often cited by counsel, or to *Espinal*, a reported Second Circuit case also directly on point, known to counsel and litigated by her office. Given these circumstances, an inference of bad faith is warranted, as counsel's "actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose." *Enmon*, 675 F.3d at 143; *see also Warren v. Westchester County Jail*, 106 F. Supp. 2d 559, 565 (S.D.N.Y. 2000) (noting Defendants' legal misrepresentations, "inaccurate to the point of being unethical, [are] especially problematic where, as here, the Defendants' adversary is *pro se*," and that "continuation of such conduct would be sanctionable."). For these

[13] *Espinal* did not effect a change in law, but rather applied *Jones* to New York's grievance procedures. *See Espinal*, 558 F.3d at 125.

reasons, the Court should impose sanctions under 28 U.S.C. § 1927, and hold Defendants liable for the costs of this appeal.

CONCLUSION

For the foregoing reasons, and for the reasons outlined in Plaintiff's principal brief, this Court should vacate the district court's judgment, remand, and impose sanctions for the costs of this appeal.

Dated: New York, NY
October 20, 2015

By: _____/s/_____
Betsy Ginsberg

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,933 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the typestyle requirements of Fed. R. App. P. 32(a)(6), and the form requirements of Fed. R. App. P. 32(c)(2), because the brief has been prepared using Microsoft Word in 14-point Times New Roman font.

Dated: New York, NY
October 20, 2015

By: _____/s/_____
Betsy Ginsberg