UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2326

HERMAN GAINES,

Appellant

v.

BRAD BUSNARDO; MARY ELLEN GREEN; JOHN DOE

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1-13-cv-06566)
District Judge: Honorable Jerome B. Simandle

SUR PETITION FOR REHEARING

BEFORE: SMITH, Chief Judge, and MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, COWEN, and NYGAARD, Circuit Judges

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The petitions for rehearing filed by appellant, Herman Gaines, and appellee, Brad Busnardo, in the above captioned matter having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the Court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service who are not disqualified not having voted for rehearing by the Court en banc, the

petitions for rehearing by the panel and the Court en banc are denied. Judge Cowen's vote and Judge Nygaard's vote are limited to denying rehearing before the original panel.

BY THE COURT:

s/ Robert E. Cowen
Circuit Judge

DATED: 25 June 2018
AWI/CC: HG
TBR

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BRAD BUSNARDO; MARY ELLEN GREEN; JOHN DOE

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1-13-cv-06566)
District Judge: Honorable Jerome B. Simandle

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 25, 2018

Before: VANASKIE, COWEN and NYGAARD, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on May 25, 2018. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered June 6, 2017, be and the same is hereby affirmed in part, vacated in part, and remanded for further proceedings. Costs are not taxed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: 29 May 2018

Certified as a true copy and issued in lieu of a formal mandate on 3 July 2018

Teste: Patricia A Dodszuweit

Clerk, U.S. Court of Appeals for the Third Circuit

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Submitted Pursuant to Third Circuit LAR 34.1(a)
May 25, 2018

Before: VANASKIE, COWEN and NYGAARD, Circuit Judges

(Opinion filed: May 29, 2018)

OPINION*

PER CURIAM

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Pro se Appellant Herman Gaines appeals the District Court's order granting summary judgment to the Appellees. For the reasons detailed below, we will affirm in part, vacate in part, and remand for further proceedings.

I.

Gaines brought this action against Appellees Brad Busnardo and Mary Ellen Green about the medical care he received from them in September 2011, after he hurt his ankle. At the time, Gaines was an inmate at South Woods State Prison Facility, and both Appellees worked at the prison as nurses. After hurting his ankle playing basketball, Gaines went to the health unit and was examined by Busnardo. He told Gaines to ice his ankle, offered him Motrin (which Gaines declined to take because of religious beliefs), and gave him an ACE bandage. However, he did not offer Gaines crutches or an ankle brace, and did not put him on the list to see the doctor that week. A few days later and still experiencing pain, Gaines went back to the health unit and was treated by Green. She gave Gaines an ankle sleeve, Motrin (Gaines accepted the medication this time because the pain was "unbearable"), and put him on the doctor's list. Green also did not give or offer Gaines crutches or an ankle brace. Gaines eventually received crutches from a physical therapist after a guard noticed Gaines struggling to walk. Ultimately, a doctor at the prison determined that Gaines had ruptured his Achilles tendon.

Gaines filed a complaint in the Superior Court of New Jersey against the Appellees, alleging medical malpractice under New Jersey law and deliberate indifference to his medical needs in violation of the Eighth Amendment. In his

complaint, Gaines argued that the Appellees' failure to give him crutches caused him excruciating pain, which could have been avoided. Defendants removed the case to United States District Court for the District of New Jersey. After discovery, each side filed a motion for summary judgment. The District Court denied Gaines's motion, but granted in part and denied in part the Appellees' motion. Specifically, the District Court dismissed Gaines's medical malpractice claim under New Jersey law,[1] but determined that his Eighth Amendment claim could proceed. After a lengthy period of pretrial motions and proceedings, the Appellees filed a renewed motion for summary judgment based on our decision in Parkell v. Danberg, 833 F.3d 313 (3d Cir. 2016).[2] The District Court granted the Appellees' motion, and dismissed Gaines's remaining Eighth Amendment claim. Gaines timely appealed.

II.

We have jurisdiction pursuant to 28 U.S.C. § 1291. See Gen. Ceramics Inc. v. Firemen's Fund Ins. Cos., 66 F.3d 647, 651 (3d Cir. 1995). We review de novo the

[1] In his briefs, Gaines does not challenge the District Court's dismissal of the medical malpractice claim for failure to comply with New Jersey's affidavit of merit statute, so we do not consider that matter here. See United States v. Menendez, 831 F.3d 155, 175 (3d Cir. 2016).

[2] We do not read Parkell as materially changing this Court's precedent or Eighth Amendment analysis. However, we perceive no error by the District Court in allowing the renewed motion for summary judgment. See Krueger Assocs., Inc. v. Am. Dist. Tel. Co. of Pa., 247 F.3d 61, 65–66 (3d Cir. 2001) (explaining that we review whether the District Court erred by granting leave to file a renewed summary judgment motion for abuse of discretion); see also Fed. R. Civ. P. 56(b).

District Court's summary judgment order. See State Auto Prop. & Cas. Ins. Co. v. Pro Design, P.C., 566 F.3d 86, 89 (3d Cir. 2009). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions" of the summary judgment record which demonstrate the absence of a genuine dispute of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets its burden, the nonmoving party then must point to specific facts that show there is a genuine issue for trial. Fed. R. Civ. P. 56(c)(1), (e)(2); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Like the District Court, we view the facts in the light most favorable to the non-moving party and make all reasonable inferences in his favor. See Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994).

III.

The Eighth Amendment, through its prohibition of cruel and unusual punishment, forbids the imposition of "unnecessary and wanton infliction of pain contrary to contemporary standards of decency." Helling v. McKinney, 509 U.S. 25, 32 (1993). Accordingly, in Estelle v. Gamble, 429 U.S. 97 (1976), the Supreme Court held that prison officials violate the Eighth Amendment when they are deliberately indifferent to a prisoner's serious medical needs. Id. at 104-05. To succeed on an Eighth Amendment medical care claim, "a plaintiff must make (1) a subjective showing that 'the defendants

were deliberately indifferent to [his or her] medical needs' and (2) an objective showing that 'those needs were serious.'" Pearson v. Prison Health Serv., 850 F.3d 526, 534 (3d Cir. 2017) (quoting Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999)).

The parties agree that Gaines's ruptured Achilles tendon was a serious medical need. Accordingly, our inquiry focuses on whether it was error to determine that, as a matter of law, the record cannot support a finding that Busnardo or Green acted with deliberate indifference to Gaines's injury. Deliberate indifference can occur when prison officials "intentionally deny[] or delay[] access to medical care or interfer[e] with the treatment once prescribed." Id. (quoting Estelle, 429 U.S. at 104-05); see also Durmer v. O'Carroll, 991 F.2d 64, 67 (3d Cir. 1993) (explaining that deliberate indifference requires something "more than negligence"); Brown v. Borough of Chambersburg, 903 F.2d 274, 278 (3d Cir. 1990) ("[I]t is well established that as long as a physician exercises professional judgment his behavior will not violate a prisoner's constitutional rights"). For the reasons that follow, we conclude that Busnardo was not entitled to summary judgment, though Green was. We turn first to Busnardo.

A. Appellee Busnardo

Gaines's claim that Busnardo failed to provide adequate medical care presents a genuine dispute as to a material fact. Gaines argued that Busnardo's failure to give him crutches and schedule him an appointment with the doctor shows that he was deliberately indifferent to Gaines's serious medical need. In his answers to the Appellees' interrogatories and request for admissions, Gaines asserted that during his September 10,

2011 visit with Busnardo, he explained that he was in excruciating pain, heard a pop at the back of his ankle, could not feel his tendon, and that his ankle was swollen.[3] See Armbruster, 32 F.3d at 777; see also ECF No. 20-9 at 12. Busnardo offered an ankle sleeve, but it was too painful for Gaines to put it on at that time. Busnardo then gave Gaines an ACE bandage, offered him Motrin, and told him to put ice on his ankle (but did not provide the ice).

Accepting Gaines's story as true, which we must at this stage, and given the symptoms communicated by him at the time, Busnardo should have known that Gaines's injury was more serious than a twisted or sprained ankle (as Busnardo described the diagnosis in his medical notes). Of critical importance, of course, is Gaines's allegation that he told Busnardo that he heard a pop in the back of his ankle and could not feel the tendon. See ECF No. 20-9 at 12. That is surely enough information for Busnardo to draw an inference that Gaines was in earnest need of medical help – for example, an appointment with the doctor – and not simply an ACE bandage or a directive to ice his ankle (but failing to provide the ice). See Pearson, 850 F.3d at 540 (internal quotation marks omitted) (quoting Farmer v. Brennan, 511 U.S. 825, 843 n.8 (1994)) ("[A]n

[3] In its opinion granting summary judgment to the Appellees, the District Court gave a different version of the facts of this case – seemingly based on Busnardo's medical notes/records. The District Court stated that Gaines told Busnardo that he had left ankle pain when he "twisted it the wrong way." Additionally, according to the District Court, Gaines was able to perform range-of-motion activities with minor pain and Busnardo did not notice any "notable swelling." This version of the facts contradicts Gaines's assertions in his answers to the Appellees' interrogatories and request for admissions, which we must accept as true. See Armbruster, 32 F.3d at 777.

official may not escape liability by declin[ing] to confirm strong inferences of risk that he strongly suspect[s] to exist.").

We come to this conclusion not simply based on the fact that Busnardo did not provide Gaines with crutches or an ankle brace – which might well have alleviated Gaines's suffering – as that claim on its own might not be sufficient to survive summary judgment. However, Busnardo's failure to schedule Gaines for an appointment with a doctor and what Gaines describes as a dismissive attitude towards his injury and pain would have "so deviated from professional standards of care that it amounted to deliberate indifference." Pearson, 850 F.3d at 541 (internal quotation marks omitted) (quoting Allard v. Baldwin, 779 F.3d 768, 772 (8th Cir. 2015)). This conduct is what particularly "separates this complaint from ordinary allegations of medical malpractice," which is insufficient to support a finding of a constitutional violation. Pearson, 850 F.3d at 541 (internal quotation marks omitted) (quoting White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990)). Because these circumstances suggest that Busnardo may have engaged in deliberately indifferent conduct to Gaines's serious medical need, "we cannot conclude as a matter of law [his] conduct did not run afoul of the [Eighth Amendment]." Durmer, 991 F.2d at 68. Accordingly, Busnardo was not entitled to summary judgment.

B. Appellee Green

Finally, we conclude that summary judgment was properly granted as to Gaines's claim against Green. In his September 12, 2011 health services request form, prepared prior to seeing Green, Gaines explained that he felt a pop in his ankle while playing

basketball, that it was painful to walk, and could not feel his tendon. Although Green did not admit to reading the request form prior to the examination, Gaines specifically alleged that he told Green during his appointment that he "popped" his Achilles tendon and was experiencing pain.

Nevertheless, even if we assume, as we must, that Gaines's allegations are true, it is clear from the summary judgment record that Green exercised *professional* judgment in her treatment of Gaines. See Brown, 903 F.2d at 278. Given Gaines's description of his injury, the medical care Green provided to him showed that she understood that the injury was more severe than a possible twisted ankle or ankle sprain. Indeed, Green replaced Gaines's ACE bandage with an ankle sleeve, gave him Motrin, restricted his work and recreational activities, and put his name on the list for him to meet with the doctor.

While Green's actions were not altogether dissimilar to those of Busnardo, it is key that she put Gaines on the list to see the doctor that week – which indicates that she, unlike Busnardo, necessarily viewed Gaines's injury as a serious medical need. Gaines did not point to any evidence suggesting that Green's treatment decision regarding the symptoms of which she had awareness was "a substantial departure from accepted professional judgment, practice, or standards" such that a reasonable jury could conclude that she "actually did not base [her] decision on such judgment." Youngberg v. Romeo, 457 U.S. 307, 323 (1982). Perhaps crutches or an ankle brace of some type would have better alleviated Gaines's pain. But that is not the relevant question under the Eighth

Amendment. The actions taken by Green undisputedly indicate that she employed professional judgment, see Brown, 903 F.2d at 278, and did not act with the "obduracy and wantonness" necessary to sustain an Eighth Amendment violation, see Whitley v. Albers, 475 U.S. 312, 319 (1986). Thus, Green was entitled to summary judgment.

Accordingly, for the reasons given, we will affirm the judgment of the District Court as to Green, vacate the judgment as to Busnardo, and remand for further proceedings consistent with this opinion.[4]

[4] We further deny Appellees' request for leave to file a supplemental brief. See Fed. R. App. P. 28(c). Consequently, we take no action on Gaines's reply to the supplemental brief.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2326

HERMAN GAINES,
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BRAD BUSNARDO; MARY ELLEN GREEN; JOHN DOE

On Appeal from the United States District Court
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District Judge: Honorable Jerome B. Simandle

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 25, 2018

Before: VANASKIE, COWEN and NYGAARD, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on May 25, 2018. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered June 6, 2017, be and the same is hereby affirmed in part, vacated in part, and remanded for further proceedings. Costs are not taxed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: 29 May 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

HERMAN GAINES, Plaintiff, v. BRAD BUSNARDO, et al., Defendants.	HONORABLE JEROME B. SIMANDLE Civil Action No. 13-6566 (JBS-JS) **ORDER**

This matter having come before the Court on Defendants Brad Busnardo and Mary Ellen Green's renewed motion for summary judgment [Docket Item 128]; and the Court having considered the submissions of the Parties; for the reasons explained in the Opinion of today's date; and for good cause shown;

IT IS this **5th** day of **June**, **2017**, hereby

ORDERED that Defendants' renewed motion for summary judgment [Docket Item 128] is **GRANTED**; and it is further

ORDERED that the Clerk of Court shall **CLOSE** this case upon the docket; and it is further

ORDERED that the Clerk of Court shall serve a copy of this Opinion and Order on Plaintiff by regular U.S. mail.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

HERMAN GAINES, Plaintiff, v. BRAD BUSNARDO, et al., Defendants.	HONORABLE JEROME B. SIMANDLE Civil Action No. 13-6566 (JBS-JS) **OPINION**

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Attorney for Defendants Brad Busnardo and Mary Ellen Green

SIMANDLE, District Judge:

I. INTRODUCTION

This matter comes before the Court on Defendants Brad Busnardo and Mary Ellen Green's renewed motion for summary judgment [Docket Item 128]. This Court previously denied Defendants' first motion for summary judgment [Docket Item 33], but Defendants contend that an intervening change in the law governing the standard applicable for an inmate's claim under

the Eighth Amendment based on inadequate medical care compels the opposite conclusion. Under this circumstance, Defendants may properly renew their motion. For the reasons that follow, the Court agrees and will grant Defendants' renewed motion for summary judgment.

II. BACKGROUND

Plaintiff argues that on September 10, 2011, he suffered a ruptured Achilles tendon while he was a prisoner at the South Woods State Prison ("SWSP"). He states that he informed Defendants Busnardo and Green that he "felt a pop" at the back of his left ankle while playing basketball (see Docket Item 18, Plaintiff's Pretrial Memorandum). Nurse Busnardo and Nurse Green are both Registered Nurses employed at SWSP. Nurse Busnardo first examined Plaintiff at the medical unit on Saturday, September 10 at approximately 11:00 a.m., moments after his basketball injury. Plaintiff claims he was in pain and his ankle was swollen. Nurse Busnardo gave Plaintiff Motrin and an ACE bandage. Plaintiff notes that while Defendants claim they gave him a "brace," the actual item given to him was an ankle "sleeve," that did not provide enough support for him while walking on a ruptured tendon. (Id.) Plaintiff argues that Defendants, "to avoid the workload" deliberately mischaracterized his injury as a sprained ankle; however, Plaintiff believes that Defendants knew that the injury was much

more serious than that. Plaintiff contends that he should be permitted to present his case to a jury to prove that Defendants "lied." (Id.) A few days after his injury, Mr. Gaines was given crutches. He states in his pretrial memorandum that he wanted to procure an expert to "deliver testimony regarding whether Motrin, and ACE bandage, and an ankle sleeve (brace) can address the serious medical need of walking on a ruptured Achilles tendon and also to testify as to the physical ramifications and what occurs when a person bears his weight on a ruptured tendon." (Id.)

The contemporaneous medical record (Exhibits A-I to Certification of Thomas B. Reynolds ("Reynolds Cert.") in Support of Defendants' Renewed Motion for Summary Judgment) reveals the timing and type of medical attention given to Mr. Gaines at the medical facility. Gaines told Busnardo he had left ankle pain from playing basketball when he "twisted it the wrong way." (Id.) On September 10, Nurse Busnardo examined Gaines's ankle and foot and found that Gaines was "able to perform ROM [range of motion] activities but with minor pain." (Id.) Nurse Busnardo stated: "No obvious deformities. No notable swelling seen." (Id.) The situation was assessed as a "Medical Emergency for sprained ankle." (Id.) The record on September 10 also reflects that Mr. Gaines "refused [M]otrin and ice," and that he "just wants ACE wrap," which Nurse Busnardo applied. (Id.) He

instructed Gaines to "return to medical if [symptoms] worsen or do not improve." (Id.)

The condition did not improve and Gaines submitted a written health services request form two days later on September 12. (Reynolds Cert., Ex. B.) Gaines continued to experience ankle pain, was "triaged" September 13, 2011, and was seen in the medical facility on September 14, 2011 by Defendant Nurse Green. (Id.) Nurse Green stepped up the medical care, prescribing a five-day supply to Motrin and replacing the ACE bandage with an ankle brace. (Reynolds Cert., Ex. C.) Nurse Green scheduled Gaines for a doctor's care visit and she excused Gaines from performing work or recreational activities. (Id.)

Also, on September 15, a physical therapist provided crutches to Mr. Gaines, which Nurse Green documented on a medical note on September 16. (Reynolds Cert., Ex. D.) Mr. Gaines said he was walking well with the crutches and was aware that he would shortly be seeing the doctor. (Id.)

Next, on Tuesday, September 20, Physician Assistant Avynne Hester evaluated Mr. Gaines and noted he was unable to bear weight on his left ankle, and ordered an ankle x-ray and MRI, to rule out an Achilles tendon injury which she suspected. (Reynolds Cert., Ex. E.) She examined his left lower extremity and noted "no calf pain or gross deformity, pain with plantar flexion, unable to stand on tiptoes, tenderness to palpitation

of Achilles tendon." (Id.) Restrictions on his work and recreation were continued including a restriction to ground floor housing only. (Id.)

The radiological studies were completed and were consistent with an Achilles tendon rupture, and Mr. Gaines was therefore evaluated by an orthopedic specialist, Dr. Gerald Packman. (Reynolds Cert., Ex. F.) Dr. Packman saw Mr. Gaines at his office on October 3, 2011. (Id.) Dr. Packman conducted tests and found "a palpable defect at the Achilles tendon [a] little bit above the insertion into the calcanei," and also administered a "Thompson test" that was "positive for an Achilles rupture on the left." (Id.) He recommended surgery to be done "in no more than about 3 weeks from now." (Id.) Mr. Gaines consented to the surgery (id.), and Dr. Packman would "get him scheduled as soon as possible. (Id.) He prescribed Tylenol No. 3 or tramadol as pain medication. (Id.)

The prison's arrangements for the surgical repair are documented on October 5, and the surgery occurred on October 19, 2011. (Reynolds Cert., Ex. G.) Dr. Packman performed successful surgery to repair the left Achilles tendon, and Mr. Gaines received follow-up care by Dr. Packman and orthopedic specialist Dr. W. Scott Williams (Reynolds Cert., Ex. H) on November 1, 2011 and November 15, 2011. (Id.) Dr. Packman was satisfied with Gaines's post-surgical status as he inspected the incision wound

and changed his temporary cast on November 1, and Dr. Williams removed the cast, repositioned the foot, and applied a new short leg cast on November 15. (Id.) The short leg cast was removed on February 14, 2012, and Dr. Williams cleared Gaines to begin physical therapy, including weight bearing as tolerated with crutches. (Id.) Although he missed several physical therapy sessions at the prison, his physical therapy with Robert Capri, PT, continued until April 3, 2012, when Gaines was discharged from therapy. (Reynolds Cert., Ex. H.) There is no evidence that the delay in diagnosing an Achilles tendon rupture complicated the surgical repair or Gaines's recovery and prognosis. This delay is the period from September 10, when Mr. Gaines presented with what was seen as a twisted ankle, and September 20, when Physician Assistant Hester evaluated Mr. Gaines, suspected that he may have a torn Achilles tendon and ordered the radiological diagnostic tests that suggested the Achilles injury.

Defendants' Statement of Material Facts (Docket Item 31-5) reiterates Plaintiff's statements in the Complaint and in answer to interrogatories.[1]

[1] In connection with this motion, the Court has reviewed the moving papers and exhibits [Docket Item 128], Plaintiff's Opposition [Docket Item 131], Defendants' Reply of December 9, 2016 [Docket Item 133], Plaintiff's Sur-reply letter of December 15, 2016 [Docket Item 135], and Defendants' further reply letter of December 22, 2016 [Docket Item 136], and finally Plaintiff's letters of December 27, 2016 [Docket Item 139] and January 2, 2017 [Docket Item 138].

With this factual background, the Court next evaluates whether Defendants' motion should be granted.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) generally provides that the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" such that the movant is "entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A "genuine" dispute of "material" fact exists where a reasonable jury's review of the evidence could result in "a verdict for the non-moving party" or where such fact might otherwise affect the disposition of the litigation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Disputes over irrelevant or unnecessary facts, however, fail to preclude the entry of summary judgment. Id. Conclusory, self-serving submissions cannot alone withstand a motion for summary judgment. Gonzalez v. Sec'y of Dept. of Homeland Sec., 678 F.3d 254, 263 (3d Cir. 2012) (internal citations omitted).

In evaluating a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party, and must provide that party the benefit of all reasonable inferences. Scott v. Harris, 550 U.S. 372, 378 (2007); Halsey v. Pfeiffer, 750 F.3d 273, 287 (3d Cir. 2014). However, any such inferences "must flow directly from admissible evidence [,]" because "'an inference based upon [] speculation or

conjecture does not create a material factual dispute sufficient to defeat summary judgment.'" Halsey, 750 F.3d at 287 (quoting Robertson v. Allied Signal, Inc., 914 F.2d 360, 382 n. 12 (3d Cir. 1990); citing Anderson, 477 U.S. at 255).

IV. DISCUSSION

The Eighth Amendment proscription against cruel and unusual punishment requires that prison officials provide inmates with adequate medical care. See Estelle v. Gamble, 429 U.S. 97, 103-04 (1976); Rouse v. Plantier, 183 F.3d 192 (3d Cir. 1999). In order to prevail on an Eighth Amendment medical-needs claim, "evidence must show (i) a serious medical need, and (ii) acts or omissions by prison officials that indicate deliberate indifference to that need." Parkell v. Danberg, 833 F.3d 313, 337 (3d Cir. 2016). As the Third Circuit Court of Appeals recently explained,

> [i]n the Eighth Amendment context, "deliberate indifference" is a subjective standard of liability consistent with recklessness as that term is defined in criminal law. A prison official is deliberately indifferent if the official knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. A plaintiff may demonstrate deliberate indifference by showing that the risk of harm was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past such that the defendants must have known about the risk. But the plaintiff must show that the officials were aware of facts from which the inference could be drawn that a substantial risk of harm exists, and that they also drew the inference. It is not enough merely to find

> that a reasonable person would have known, or that the defendant should have known.

Id. at 335 (internal citations omitted). A plaintiff cannot succeed on a medical-needs claim where he merely disagrees with the medical treatment provided or where his allegedly inadequate treatment was "a result of an error in medical judgment." Id. at 337 (discussing Spruill v. Gillis, 372 F.3d 218, 235 (3d Cir. 2004) and Durmer v. O'Carroll, 991 F.2d 64, 69 (3d Cir. 1993)). Rather, a medical-needs claim is actionable only where the plaintiff can show that "the prison official (1) knows of a prisoner's need for medical treatment but intentionally refuses to provide it; (2) delays necessary medical treatment based on a non-medical reason; or (3) prevents a prisoner from receiving needed or recommended medical treatment." Id. (citing Rouse, 182 F.3d at 197.)

In this case, the undisputed record before the Court shows that Defendants' failure to provide Plaintiff with crutches and instead to treat his ankle injury at first with Motrin, bandages, and a brace does not rise to the level of actionable deliberate indifference. Plaintiff presented to the medical clinic on September 10 with symptoms of an ankle sprain, and he described his injury as a twisted ankle for which he received treatment and follow-up care. There is no indication until September 20 that his injury was possibly a ruptured Achilles

tendon, which is the date Physician Assistant Avynne Hester ordered the ankle x-ray and MRI to rule out Achilles rupture, as noted above. While Nurse Busnardo and Nurse Green did not realize what they thought was an ankle sprain was actually a ruptured Achilles tendon, there is no evidence that their medical perceptions and treatment were the result of indifference or refusal to do what was medically necessary for the condition they saw in the first few days of treatment.

First, Plaintiff has adduced no admissible evidence that Defendants ignored his medical needs and intentionally refused to provide treatment. Parkell, 833 F. 3d at 337 (citing Rouse, 182 F.3d at 197.) Plaintiff's speculation that the Defendants knew immediately that his injury was to his Achilles and not an ankle sprain is not supported by any admissible testimony or document in the record and does not alone create a triable dispute of fact over whether Defendants recognized and ignored the extent of his injury. In this case, Plaintiff's claims, and Defendants' responses, are quite similar to those found not actionable against a nurse in Parkell. There, the plaintiff claimed that the nurse "never properly examined his injury in person even though he had a 'massive infection' and that she should have given him medication for pain," but the Third Circuit determined that, because the nurse ordered an x-ray that showed normal results and offered over-the-counter pain

medication, "a factfinder could not reasonably conclude that [the nurse] deliberately ignored risks to [the plaintiff's] health." Parkell, 833 F.3d at 337-38. Likewise, here, Plaintiff claims that he was in "severe pain" and his ankle was swollen, but it is undisputed that Defendants Busnardo and Green perceived his injury as a twisted ankle and offered Plaintiff over-the-counter pain medications, bandages, and a brace; ordered that Plaintiff refrain from work and recreation; confirmed a medical order for crutches; and arranged for Plaintiff to see a doctor. (See Chart Notes [Ex. A to Reynolds Cert. (September 10, 2011), Ex. C (September 14, 2011), and Ex. D. (September 16, 2011)].)

Like the nurse in Parkell, who noted that the plaintiff's x-ray results came back normal, Nurse Busnardo examined Plaintiff's ankle on the day of the accident, conducted a range of motion test on the joint, and noted "no obvious deformities" and "no notable swelling" in his medical record. (Ex. A.) Also, like the other medical professionals in Parkell who subsequently examined the plaintiff, Nurse Green offered additional treatment and scheduled Plaintiff for an appointment with a doctor when it became apparent that Plaintiff's condition had not improved. (Ex. C & D.) It would be unreasonable for a jury to conclude, from these actions, that the Defendants intentionally ignored Plaintiff's medical needs. Despite Plaintiff's disagreement that

he immediately should have been provided additional treatment in the form of crutches, there is nothing in the record to suggest that either of these Defendants ignored Plaintiff's medical needs and intentionally refused to provide adequate treatment. After all, "prison authorities are accorded considerable latitude in the diagnosis and treatment of prisoners" and a plaintiff cannot succeed on a medical-needs claim where he merely disagrees with the medical treatment provided. Parkell, 833 F.3d at 337.

Second, Plaintiff has pointed to nothing in the record, beyond his own speculation, that Defendants delayed or denied Plaintiff treatment for non-medical reasons. Parkell, 833 F. 3d at 337 (citing Rouse, 182 F.3d at 197.) Plaintiff posits that Defendants decided not to provide him with crutches as a cost-saving measure, in order to avoid "acknowledgment and admission that the injury was serious," but points to no evidence in the record supporting his theory. (Plaintiff's Opposition to Summary Judgment [Docket Item 131] at 12.) Indeed, Plaintiff's speculation that Defendants "covered up" the extent of his injury in order to save money is contradicted by the actual medical record, which indicates that Defendants Busnardo and Green instructed Plaintiff to return for a follow-up if his symptoms worsened, and scheduled Plaintiff for a doctor's call when his physical exam a few days later showed deterioration of

his ankle's condition. Indeed, the record is uncontradicted that as Mr. Gaines's medical condition persisted, Nurse Busnardo and Nurse Green intensified their efforts, which was the opposite of exhibiting deliberate indifference to his needs. "Unsupported assertions, conclusory allegations, or mere suspicions are insufficient to overcome a motion for summary judgment." Betts v. New Castle Youth Dev. Ctr., 621 F.3d 249, 252 (3d Cir. 2010); Sterling Nat'l Mortg. Co. v. Mortg. Corner, Inc., 97 F.3d 39, 44 (3d Cir. 1996) (stating that "[m]ere speculation about the possibility of the existence of such facts" does not raise triable issue to defeat motion for summary judgment).

Finally, Plaintiff has not shown that Defendants prevented Plaintiff from receiving necessary medical care, despite his conclusory assertion to the contrary. Parkell, 833 F. 3d at 337 (citing Rouse, 182 F.3d at 197.) The record shows that Defendant Busnardo attended to Plaintiff on the day of his injury and instructed him to come back to the clinic if his condition did not improve, that Defendant Green scheduled Plaintiff for a doctor's call after her first examination of Plaintiff's ankle, just days after his injury, and that shortly thereafter Plaintiff was examined by Physician Assistant Avynne Hester and Dr. William Briglia, DO, and was referred to Dr. Gerald Packman, an orthopedic specialist. (See Chart Notes from 9/14/2011 [Ex. C]; from 9/16/2011 [Ex. D]; from 9/20/2011 [Ex. E]; and

10/3/2011 [Ex. E].) No rational factfinder could determine that this series of events constitutes preventing Plaintiff from receiving medical care.[2]

Accordingly, where the undisputed record shows that Plaintiff received medical care from Defendants for an ankle injury, and in the absence of any indication that Defendants intentionally ignored Plaintiff's injury, acted for non-medical reasons, or prevented Plaintiff from receiving necessary medical care, no rational jury could conclude as a matter of law that Defendants acted with deliberate indifference with respect to Plaintiff's medical needs. Defendants' renewed motion for summary judgment will be granted.

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[2] In addressing this Eighth Amendment claim, Defendants Busnardo and Green need not demonstrate that they rendered perfect medical care or even optimal care. An Eighth Amendment claim for deliberate indifference to serious medical needs requires proof of more than medical malpractice, which may be defined as a negligent deviation from the prevailing standard of medical care; "mere disagreements over medical judgment do not state Eighth Amendment claims." White v. Napoleon, 897 F.2d 103, 110 (3d Cir. 1990). Even if a medical provider's judgment concerning the proper course of treatment ultimately is shown to be mistaken, at most what would be proved is medical malpractice, not an Eighth Amendment violation. See Estelle, 429 U.S. at 105-106; White, 897 F.2d at 110. Thus, in the present case, disputes about whether Nurse Busnardo and Nurse Green should have more quickly diagnosed and treated Mr. Gaines's Achilles tendon rupture are not material in the absence of evidence showing they were deliberately indifferent to his medical needs. Indeed, such questions are not material to any claim in the present case, given that the Court previously granted Defendants' motion for summary judgment on Plaintiff's state law medical malpractice claim. (See Docket Item 33 at 5-8.)

V. CONCLUSION

For the reasons stated above, Defendants' renewed motion for summary judgment is granted. An accompanying Order will be entered.

June 5, 2017
Date

s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HERMAN GAINES, Plaintiff,	:	Civil Action No. 13-6566(JBS)
v.	:	
BRAD BUSNARDO, *et al.*, Defendants.	:	**ORDER**

For the reasons set forth in the Opinion filed herewith;

It is on this 23rd day of December, 2014;

ORDERED that Plaintiff's Motion for Summary Judgment and the Appointment of Counsel (Docket Item 26) is hereby denied, (said denial being without prejudice as to the counsel claim); and it is further

ORDERED that Defendants' Motion for Summary Judgment (Docket Item 31) is granted in part, denied in part; Plaintiff's state medical malpractice claim is hereby dismissed, without prejudice; and it is further

ORDERED that Plaintiff's application to proceed *in forma pauperis* (Docket Item 30) is hereby granted; and it is further

ORDERED that the Clerk of the Court shall send Plaintiff a blank form to be used by a prisoner filing an application for

pro bono counsel in a civil rights case (DNJ-ProSe-001-04-(9/00)), and Plaintiff will be permitted to file a Motion to Appoint Counsel within 45 days of the date of this Order; and it is further

ORDERED that Plaintiff's Eighth Amendment denial of medical care claim will proceed.

s/ Jerome B. Simandle
JEROME B. SIMANDLE, Chief Judge
United States District Court

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HERMAN GAINES, Plaintiff,	:	Civil Action No. 13-6566(JBS)
v.	:	
BRAD BUSNARDO, *et al.*, Defendants.	:	**OPINION**

APPEARANCES:

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SIMANDLE, Chief Judge

This matter comes before the Court upon Plaintiff's Motion for Summary Judgment, to appoint counsel, and for a Writ of Habeas Corpus ad testificandum (Docket Item 26), filed on March 4, 2014, and Defendants' Motion for Summary Judgment (Docket Item 31). The Court has carefully considered the Parties' motions, oppositions, and arguments. For good cause shown,

Plaintiff's motion will be denied. Defendants' motion will be granted in part, denied in part. Plaintiff's Eighth Amendment claims will be permitted to proceed; however, Plaintiff's medical malpractice claims will be dismissed.

I. Background

Plaintiff argues that on or about September 10-16, 2011, he suffered a ruptured Achilles' tendon while he was a prisoner at the South Woods State Prison ("SWSP"). He states that he informed Defendants Busnardo and Green that he "felt a pop" at the back of his left ankle while playing basketball (*see* Docket Item 18, Plaintiff's Pretrial Memorandum). Plaintiff was in intense pain and his ankle was swollen. Neither Defendant performed a Range of Motion test, according to Plaintiff. They gave Plaintiff Motrin and an ACE bandage. Plaintiff notes that while Defendants claim they gave him a "brace," the actual item given to him was an ankle "sleeve," that did not provide enough support for him while walking on a ruptured tendon. (*Id.*). Plaintiff argues that Defendants, "to avoid the workload" deliberately mischaracterized his injury as a sprained ankle; however, Plaintiff believes Defendants knew that the injury was much more serious than that. Plaintiff contends that he should be permitted to present his case to a jury to prove that Defendants "lied." (*Id.*). Plaintiff continued to have pain until he was finally given crutches. He states in his pretrial

memorandum that he wanted to procure an expert to "deliver testimony concerning whether Motrin, and ACE bandage, and an ankle sleeve (brace) can address the serious medical need of walking on a ruptured Achilles' tendon and to also testify as to the physical ramifications and what occurs when a person bears his weight on a ruptured tendon." (*Id.*).

Defendants' Statement of Material Facts (Docket Item 31-5) reiterates Plaintiff's statements in the Complaint and in answer to interrogatories.

II. Plaintiff's Summary Judgment Motion

This Court has reviewed Plaintiff's Motion (Docket Item 26), filed *pro se*. It does not appear to be a motion at all, but instead, opposition to a previously-filed Motion for Summary Judgment by Defendants which was withdrawn on September 10, 2014 (*see* Docket Item 32). In the opposition/motion, Plaintiff argues that the previously-filed Motion for Summary Judgment should have been denied, and summary judgment granted to him, instead. Plaintiff argues that Defendants "admitted themselves in the medical reports which they prepared that they were aware of plaintiff's pain and they've made no argument, in their motion, showing that an expert is required to prove the existence of pain (which defendants were deliberately indifferent to)." (Plaintiff's Brief, Docket Item 26-1).

Plaintiff also reasserts his Eighth Amendment claim, states that "it's abundantly clear that plaintiff is way out of his league and has no idea what he's doing." (Brief, p. 12).

In response to the opposition/motion filed by Plaintiff, Defendants submitted a Reply Brief (Docket Item 27), which points out that Plaintiff admittedly knew that he needed an Affidavit of Merit and attempted to secure one, and that Plaintiff's argument that he does not need a medical expert to prove the existence of his pain is meritless under Third Circuit law. (Docket Item 27 at p. 3).

III. Defendants' Motion for Summary Judgment

Defendants filed a Motion for Summary Judgment on June 2, 2014 (Docket Item 31). They argue that Plaintiff's state law claims must be dismissed for failure to serve an appropriate Affidavit of Merit, and that Plaintiff's Eighth Amendment claims must be dismissed for failure to serve an expert report. Plaintiff did not respond to Defendants' motion.

IV. Legal Standard & Analysis

1. Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving

party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" only if it might affect the outcome of the suit under the applicable rule of law. *See id.* Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. *See id.* The Court will view any evidence in favor of the nonmoving party and extend any reasonable favorable inferences to be drawn from that evidence to that party. *See Scott v. Harris*, 550 U.S. 372, 378 (2007).[1]

2. Affidavit of Merit Issue

Plaintiff's claim for medical malpractice in the diagnosis and treatment of his injury arises under New Jersey law. This Court has supplemental jurisdiction under 28 U.S.C. § 1367(a).

Defendants assert that this action must be dismissed because Plaintiff failed to serve an Affidavit of Merit as required by N.J.S.A. 2A:53A-29 ("If the plaintiff fails to provide an affidavit or a statement in lieu thereof, pursuant to section 2 or 3 of this act, it shall be deemed a failure to state a cause of action."). Specifically, this statute provides:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide

[1] This Court will deny Plaintiff's Motion for Summary Judgment as Plaintiff has not shown in the motion that there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law.

> each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.
>
> In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in section 7 of P.L.2004, c. 17 (C.2A:53A-41). In all other cases, the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.

N.J.S.A. 2A:53A-27. However, under certain circumstances, a sworn statement by the plaintiff may be provided in lieu of an affidavit of merit. *See* N.J.S.A. 2A:53A-28.

The New Jersey affidavit of merit statute therefore requires "plaintiffs to make a threshold showing" of merit, *Vitale v. Carrier Clinic, Inc.*, 409 F. App'x 532, 533 (3d Cir. 2010) (citation omitted), in order "'to dispose of meritless malpractice claims early in the litigation'" and "'to allow meritorious claims to move forward unhindered.'" *Snyder v. Pascack Valley Hosp.*, 303 F.3d 271, 274 (3d Cir. 2002) (quoting

Burns v. Belafsky, 166 N.J. 466, 766 A.2d 1095, 1099 (2001)). *See also Fontanez v. United States*, --- F. Supp.2d ----, 2014 WL 2608386, *2 (D.N.J. May 30, 2014). The affidavit of merit statute also requires that the affidavit be filed within sixty days of the answer, but permits an extension of time "not to exceed [sixty] days" for "good cause[.]" N.J.S.A. 2A:53A-27.

Failure to file a timely affidavit of merit generally "requires dismissal of the action with prejudice." *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. Withum-Smith Brown, P.C.*, 692 F.3d 283, 305 (3d Cir. 2012); *see also* N.J.S.A. 2A:53A-29 (setting forth the consequence for a plaintiff's failure to provide an affidavit of merit). However, "four limited exceptions[,]" where applicable, excuse a plaintiff's failure to comply with the affidavit of merit statute. *Nuveen*, 692 F.3d at 305. The limited exceptions are: "(i) a statutory exception regarding lack of information; (ii) a 'common knowledge' exception;" (iii) an exception predicated upon "substantial compliance with the affidavit-of-merit requirement;" or (iv) "'extraordinary circumstances' that warrant equitable relief." *Id.* (citations omitted).

In this case, Plaintiff has failed to allege or support any of the four limited exceptions to preclude dismissal with prejudice of his medical negligence claim. Further, the mere fact of Plaintiff's *pro se* status does not constitute

extraordinary circumstances to overcome the affidavit of merit requirement. *See Kant v. Seton Hall University*, Civil No. 00-5204, 2009 WL 2905610 (D.N.J. Sep. 9, 2009). *See also Lee v. Thompson*, 163 F. App'x 142, 144 (3d Cir. 2006) (holding that plaintiff's status as a *pro se* litigant does not excuse his failure to file an affidavit of merit); *Allah v. MHSM, Inc.*, Civil No. 07-2916, 2008 WL 5115889, *3 (D.N.J. Dec. 2, 2008) (same as applied to a *pro se* prisoner litigant).

Therefore, because Plaintiff has not filed an Affidavit of Merit, or a substantial equivalent, and because the time to file an Affidavit of Merit has now expired, the Court will grant Defendants' Motion for Summary Judgment on the medical malpractice claim. This Court will order the dismissal of the state medical malpractice claim to be without prejudice. The Court notes, however, that Plaintiff's Complaint alleges facts that, if true, may support his Eighth Amendment denial of medical care claim under 42 U.S.C. § 1983. Accordingly, Plaintiff's Eighth Amendment claims will proceed at this time.

3. Eighth Amendment Claim

The Eighth Amendment proscription against cruel and unusual punishment requires that prison officials provide inmates with adequate medical care. *See Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976); *Rouse v. Plantier*, 182 F.3d 192 (3d Cir. 1999). In order to set forth a cognizable claim for a violation of his

right to adequate medical care, an inmate must allege: (1) a serious medical need; and (2) behavior on the part of prison officials that constitutes deliberate indifference to that need. *See Estelle*, 429 U.S. at 106; *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 582 (3d Cir. 2003).

To satisfy the first prong of the *Estelle* inquiry, the inmate must demonstrate that his medical needs are serious. "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.'" *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).

The second element of the *Estelle* test requires an inmate to show that prison officials acted with deliberate indifference to his serious medical need. *See Natale*, 318 F.3d at 582 (finding deliberate indifference requires proof that the official knew of and disregarded an excessive risk to inmate health or safety). "Deliberate indifference" is more than mere malpractice or negligence; it is a state of mind equivalent to reckless disregard of a known risk of harm. *See Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994). Furthermore, a prisoner's subjective dissatisfaction with his medical care does not in itself indicate deliberate indifference. *See Andrews v. Camden County*, 95 F. Supp.2d 217, 228 (D.N.J. 2000); *Peterson v. Davis*,

551 F. Supp. 137, 145 (D. Md.1982), *aff'd*, 729 F.2d 1453 (4th Cir. 1984). Similarly, "mere disagreements over medical judgment do not state Eighth Amendment claims." *White v. Napoleon*, 897 F.2d 103, 110 (3d Cir. 1990). "Courts will disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment ... [which] remains a question of sound professional judgment." *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979) (internal quotation and citation omitted). Even if a doctor's judgment concerning the proper course of a prisoner's treatment ultimately is shown to be mistaken, at most what would be proved is medical malpractice and not an Eighth Amendment violation. *See Estelle*, 429 U.S. at 105-06; *White*, 897 F.3d at 110.

The Court of Appeals for the Third Circuit has found deliberate indifference in addressing a serious medical condition where a prison official: (1) knows of a prisoner's need for medical treatment but intentionally refuses to provide it; (2) delays necessary medical treatment for non-medical reasons; or (3) prevents a prisoner from receiving needed or recommended treatment. *See Rouse*, 182 F.3d at 197. The Court of Appeals also has held that needless suffering resulting from the denial of simple medical care, which does not serve any penological purpose, violates the Eighth Amendment. *See Atkinson*, 316 F.3d at 266; *see also Monmouth County Correctional*

Institutional Inmates, 834 F.2d at 346 ("deliberate indifference is demonstrated '[w]hen ... prison authorities prevent an inmate from receiving recommended treatment for serious medical needs or deny access to a physician capable of evaluating the need for such treatment"); *Durmer v. O'Carroll*, 991 F.2d 64 (3d Cir. 1993); *White v. Napoleon*, 897 F.2d 103 (3d Cir. 1990).

Here, the Court finds that there are material facts in dispute as to Plaintiff's treatment, and whether or not the delay caused by Defendants in providing him crutches was deliberately indifferent to his serious medical needs. As such, this Court will allow the Eighth Amendment claims to proceed through litigation.

4. Appointment of Counsel

In addition, this Court has reviewed Plaintiff's application to proceed *in forma pauperis*, filed April 14, 2014, and finds that Plaintiff qualifies for pauper status. Because Plaintiff's request for an attorney in his Motion for Summary Judgment is incomplete, the Clerk will be requested to provide Plaintiff with a blank form to be used by a prisoner filing an application for pro bono counsel in a civil rights case (DNJ-ProSe-001-04-(9/00)), and Plaintiff will be permitted to file a renewed Motion to Appoint Counsel.

IV. Conclusion

For the reasons set forth above, and for other good cause shown, it is hereby ordered that Plaintiff's Motion for Summary Judgment will be denied, without prejudice. Defendants' Motion for Summary Judgment will be granted as to Plaintiff's medical malpractice claim, which will be dismissed without prejudice. The remaining constitutional claims under the Eighth Amendment will proceed. Plaintiff's application to proceed *in forma pauperis* will be granted.

An Order consistent with this Opinion will be entered.

s/ Jerome B. Simandle
JEROME B. SIMANDLE, Chief Judge
United States District Court

Dated: December 23, 2014