

SEP 11 2018

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18-9141

IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

MATTHEW JAMES GRIFFIN,

Plaintiff -- Petitioner,

vs.

UNKNOWN GREGOLINE, licensed Doctor
of Dental Surgery, and; CORRECTIONS
CORPORATION OF AMERICA.

Defendants -- Respondents.

ORIGINAL

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

For the Plaintiff - Petitioner:

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QUESTIONS PRESENTED

QUESTION #1: Whether the District Court erred in granting Defendants summary judgment on the disputed material facts of this case?

QUESTION #2: Whether the District Court erred in denying Plaintiff's Motions (doc. 46 and 61) to take telephonic depositions of the Defendants and their expert medical witnesses by non-stenographic means?

QUESTION #3: Whether the District Court erred in entering, *sua sponte*, a protective order prohibiting Plaintiff from taking depositions, except upon extraordinary circumstances.

PARTIES

The Plaintiff – Petitioner is Matthew James Griffin a prisoner of the State of New Mexico who has a diagnosed serious vision impairment. Petitioner has been repeatedly transferred under the Interstate Corrections Compact (ICC) and is currently confined at the Alexander Correctional Institution, Taylorsville, North Carolina, as an out-of-state border.

Respondents are Defendant Gregoline a former Doctor of Dental Surgery licensed in Arizona and the Corrections Corporation of America, a Maryland corporation that has changed its name to CoreCivic.

TABLE OF AUTHORITIES

Decisional law (Cases):

<i>Anderson v. Liberty Lobby, Inc.</i> 477 U.S. 242, 248, 250 (1986)	Appx B-2, B-3
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<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 322-23 (1986)	Appx B-2
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<i>Fambro v. Fulton County Ga.</i> , 713 F. Supp 1426, 1429-31 (N.D. Ga. 1989)	6
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<i>First Nat'l Bank of Ariz. v. Cities Serv. Co.</i> 391 U.S. 253, 288-89 (1968)	Appx B-2

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<i>Francis v. Carroll</i> 773 F.Supp.2d 483, 487 (D.Del. Mar. 29, 2011)	Appx B-9
<i>Getz v. Boeing Co.</i> , 654 F.3d 852, 867-68 (9th Cir. 2011)	Appx A-3
<i>Gibson v. County of Washoe</i> 290 F.3d 1175, 1193-94 (9th Cir. 2002)	Appx B-12
<i>Gomez v. Westchester County</i> No. 12-CV-6869 (RA), 2015 WL 1054902 at *9 (S.D.N.Y. Mar. 10, 2015)	Appx B-9
<i>Gregg v. Nat'l Med. Health Care Servs., Inc.</i> 699 P.2d 925, 928 (Ariz. App. 1985)	Appx B-5
<i>Hunt v. Dental Dep't</i> , 865 F.2d 198, 200 (9th Cir. 1989)	6
<i>Jett v. Penner</i> 439 F. 3d 1091, 1096 (9th Cir. 2006)	Appx B-3
<i>Jorgensen v. Cassiday</i> , 320 F.3d 906, 913 (9th Cir. 2003)	Appx A-3
<i>Law v. Verde Valley Med. Ctr.</i> , 170 P.3d 701, 703-05 (Ariz Ct. App. 2007)	Appx A-3
<i>Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs.</i> 237 F.3d 1101, 1110-11 (9th Cir. 2001)	Appx B-12, B-13
<i>Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.</i> 475 U.S. 574, 587 (1986)	Appx B-3
<i>McGuckin</i> 974 F.2d at 1059-60	Appx B-5
<i>McGuire v. DeFrancesco</i> 811 P.2d 340, 342 (Ariz. App. 1990)	Appx B-4
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<i>Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.</i> 210 F. 3d 1099, 1102-03 (9th Cir. 2000)	Appx B-2

TABLE OF AUTHORITIES (Continued)

<i>Nunsuch ex rel. Nunsuch v. U.S.</i> 221 F. Supp. 2d 1027, 1032-33 (D. Ariz. 2001)	Appx B-10
<i>Rand v. Rowland</i> , 154 F.3d 952, 962 (9th Cir. 1998)	Appx B-1
<i>Ryan v. S.F. Peaks Trucking Co.</i> , 262 P.3d 863, 869-70 (Ariz. Ct. App. 2011)	Appx A-3
<i>Samaritan Found. v. Goodfarb</i> 862 P.2d 870, 875-76 (Ariz. 1993)	Appx B-11
<i>Sanchez v. Vild</i> 891 F.2d 240, 242 (9th Cir. 1989).....	Appx B-4, B-9
<i>Seisinger v. Siebel</i> 203 P.3d 483, 492 (Ariz. 2009)	Appx B-4
<i>Shapley v. Nevada Bd. of State Prison Comm'rs</i> , 766 F.2d 404, 407 (9th Cir. 1985)	Appx B-4
<i>State v. Superior Court</i> 524 P.2d 951, 953 (Ariz. 1974)	Appx B-11
<i>State v. Ulin</i> 548 P.2d 19, 21 (1976)	Appx B-4
<i>Toguchi v. Chung</i> , 391 F.3d 1051, 1056, 1060 (9th Cir. 2004)	Appx A-2, B-3
<i>Tsao v. Desert Palace, Inc.</i> , 698 F.3d 1128, 1138-39 (9th Cir. 2012)	Appx A-2, B-12
<i>Triton Energy Corp. v. Square D. Co.</i> 68 F.3d 1216, 1221 (9th Cir. 1995)	Appx B-2
<i>Wilhelm v. Rotman</i> 680 F.3d 1113, 1123 (9th Cir. 2012)	Appx B-9

TABLE OF AUTHORITIES (Continued)

Statutes:

28 U.S.C. § 1291	Appx A-2
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28 U.S.C. § 1915A(a)	Appx B-2
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REST 2d TORTS §§ 282, 284	Appx B-4

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Fed. R. App. . 34(a)(2)	Appx A-1
Fed. R. Civ. P. Rule 26(b)(2)(C)	Appx A-3
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Fed. R. Civ. P. Rule 56(d)	3-4, Appx A-3
Ninth Circuit Rule 36-3	Appx A-1

Other Authorities:

Prisoner's Self-Help Litigation Manual, 4th Edition (2010) by Daniel E. Manville and John Boston	9
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DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is not published and a copy of the Decision is attached as Appendix A to this petition (A.1 to A.4). The Order (doc. 100) of the United States District Court for the District of Arizona is attached as Appendix B to this Petition (B.1 to B.13).

JURISDICTION

The Decision of the United States Court of Appeals for The Ninth Circuit was entered on June 19, 2018 and is attached as Appendix B to this Petition. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VIII to the United States Constitution, which provides:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

The Amendment is enforced by Title 42, Section 1983, United States Code:

“Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”

STATEMENT OF THE CASE

1. On August 4, 2015, Plaintiff a prisoner of New Mexico brought suit against Defendant Gregoline a licensed¹ Doctor of Dental Surgery in Arizona and the Corrections Corporation of America (now known as CoreCivic) that owned and operated the Saguaro Correctional Center (SCC) where Defendant Gregoline was the facility dentist. Plaintiff sued Defendant Gregoline for medical negligence – malpractice by a dentist (Count One) and Eighth Amendment deliberate indifference (Count Three) arising out of Defendant Gregoline’s failure to Plaintiff’s moderately severe dental pain in the upper left quadrant of his mouth, permanent physical injury² and failure to treat Plaintiff’s gingivitis which ultimately progressed into periodontitis. Plaintiff also brought a respondent superior liability claim (Count Two) and Eighth Amendment claim (Count Four) against Defendant Corrections Corporation of America (CCA) for their custom, practice or policy that was the moving force behind the violation of Plaintiff’s constitutional rights. See, Complaint (doc.1). Defendant CCA waived service. See, doc. 11. Defendant CCA filed an Answer. See, doc. 13. On January 8, 2016, the District Court entered a Scheduling Order (doc. 16) opening discovery and the Court, *sua sponte*, limited Plaintiff’s use of written discovery and entered a protective order shielding the Defendants from having their depositions taken except upon extraordinary circumstances. *Id.* Defendant Gregoline waived service. See, doc. 20. On March 25, 2016, Defendant Gregoline filed an Answer. See, doc. 28. Plaintiff sought and received a 120-day extension of the discovery deadline. See, documents 32, 33 and 36 (Order Granting Extension of Discovery Deadline). Plaintiff brought a timely³ Motion

to Take Non-Stenographic Depositions. See, doc. 46. Plaintiff also sought to set the conditions under which depositions taken (doc. 55) and filed a Motion to Take Depositions by Telephone of the Prison

¹ Defendant Gregoline surrendered his license to practice dentistry in Arizona after his treatment of Plaintiff and before he executed his Declaration (doc. 76-1, pp. 10-14). *id.* at page 10, paragraph 3.

² Loss of tooth enamel and progression of gingivitis into the more serious condition of periodontitis.

³ Prison mail-box rule. See, doc. 48.

Dentists that Treated or Examined Plaintiff (doc. 61). Defendants filed responses in opposition to Plaintiff taking telephonic depositions. See, documents 53 and 63. By Order (doc. 64) the Magistrate Judge set a motions hearing for September 26, 2016. *Id.*

2. On September 26, 2016, Plaintiff and counsel for the Defendants participated in a telephonic hearing before the Honorable David K. Duncan, United States Magistrate Judge. Judge Duncan questioned Plaintiff on his ability to pay for telephonic depositions. Plaintiff responded that he could afford the cost of the recording device, phone calls, witness fees and mileage. Plaintiff intended to use a medical transcription service to transpose the digital voice recording. Judge Duncan held that Plaintiff must use a certified court reporter to transpose a non-stenographic deposition. Plaintiff indicated that he could not afford the cost of a certified court reporter and to require such defeats the very purpose behind the rules permitting non-stenographic depositions. The Court denied Plaintiff's Motion to Take Telephonic Non-Stenographic Depositions (doc. 46) due to Plaintiff's inability to pay for a *certified court reporter* to create a transcript. Thereafter, the Court denied as moot Plaintiff's motion to depose the dentists⁴ who treated or examined him (doc. 61) and his motion to set conditions under which depositions are taken (doc. 55). A transcript of this hearing was ordered for appeal. See, doe. 109 and 112. An Order (doe. 111) to prepare the transcript was entered. *Id.* The transcript of the September 26, 2016, hearing was prepared and filed in the record proper by a transcriptionist.⁵

3. After the close of discovery Defendants supplemented their discovery responses regarding documents relating to the standard of care. See, doc. 71. Then Defendants moved for summary judgment. See documents 75, 76 and 77. Plaintiff obtained extensions of time to respond. Plaintiff filed a response in opposition (doc. 88) to Defendants Motion for Summary Judgment. *Id.* Plaintiff's response included specific objections to Defendants evidence and sought a Rule 56(d) deferral on a summary judgment

⁴ Including Defendant Gregoline who treated or examined Plaintiff and Defendant CCA's witness Dr. Gill, DDS who is referenced in the Complaint (doc. 1).

⁵ While the Court was requiring Plaintiff to use a certified court reporters, the court itself used a transcriptionist who is not a certified court reporter to prepare the transcript on appeal.

motion to allow Plaintiff to depose Defendants Gregoline and CCA and their medical witness Dr. Gill, DDS. The District Court did not specifically address these objections and request for a Rule 56(d) deferral. Plaintiff's Response in Opposition was supported by his Second Declaration (doc. 89) and Plaintiff's Exhibits #1 through #17 (documents 6, 93, 94 and 95). The District Court withdrew its reference to a magistrate and granted Defendants summary judgment as to all claims. See, doc. 100, which is attached hereto as Appendix B.

4. Plaintiff reported his moderately severe dental pain in the upper left quadrant of his mouth upon arrival at SCC on November 13, 2014. See, doc. 89, Attachment #1 at block 13 (initial intake screening). Plaintiff suffered moderately severe dental pain in the upper left quadrant from that date forward, through his December 10, 2014 exam with Defendant Gregoline and onward until he was examined, x-rayed and treated by Doctor Gill, DDS on July 9, 2015. See, doc. 89, paragraphs 22-28, 30-34, 36-37, 40-42 and 58-59. Plaintiff seeks monetary damages for the 211 day period from December 10, 2014 through July 09, 2015.

5. On December 10, 2014 Plaintiff was diagnosed with gingivitis⁶ by Defendant Gregoline. See, doc. 76-1, at page 12, paragraph 20. Defendant CCA's own dental guide on the standard of care states, "If not treated early, gingivitis can lead to periodontitis a more serious condition..." See, doc. 93, Exhibit #4, at Attachment #1 at page 1, paragraph 3.⁷ Defendants later admit this is their written policy on the standard of care, but claim they don't know who authored it.⁸ See, doc. 95 at Exhibit #17, Answers to Interrogatories No. 1 and No. 2. Defendant Gregoline notes that Plaintiff was later diagnosed with the more serious condition of periodontitis on July 9, 2015, something that he [Gregoline] saw no evidence of on December 10, 2014. See, doc. 76-1, at page 14 of 44, paragraph 31.

⁶ An inflammation of the gums

⁷ Same as Doc.1, Exhibit #1

⁸ An extraordinary claim given the document is computer generated and proportionally spaced. It must be on their computer.

6. On July 09, 2015 Dr. Gill, DDS diagnosed Plaintiff with a cavity in the upper left quadrant at tooth #12, the same spot Plaintiff had experienced pain in for the last 211 days. Upon drilling and filling the cavity at tooth #12 Plaintiff had no more pain. Dr. Gill, DDS also diagnosed Plaintiff with periodontitis. Dr. Gill stated the loss of tooth enamel was a permanent injury at tooth #12 and that periodontitis is a permanent injury. See, doc. 89, paragraphs 46, 48, 51, 53, 54 and 59. Thus, Plaintiff has established a permanent injury two (2) ways. First through the loss of tooth enamel at tooth #12 as his reported pain in this area was left untreated for 211 days. Secondly, for the development of the more serious dental condition of periodontitis. Plaintiff did not have periodontitis on December 10, 2014 when examined by Defendant Gregoline, but he did have periodontitis 211 days later when he was examined by Dr. Gill, DDS on July 9, 2015.

7. Finally a reasonable juror could draw the inference that Plaintiff's report of moderately severe dental pain in the upper left quadrant was left untreated for 211 days from the following facts: Plaintiff's report of moderately severe dental pain to Defendant Gregoline (doc.89 at paragraphs 30-32, 42 and 43) and the immediate end of pain 211 days later when Dr. Gill, DDS treated a cavity at tooth #12 in the upper left⁹ quadrant (doc. 89, paragraphs 45, 46, 56, 57, 58 and 59).

8. The District Court found that Plaintiff's dental condition presented a serious medical need which a "reasonable doctor" would consider to be "important and worthy of treatment." See, Appendix B of this Petition at page 7, line 22 through page 8, line 7. The District Court granted Defendants summary judgment for Plaintiff having failed to present evidence from an expert medical witness on the standard of care and causation of injury finding that the material facts were not in dispute. The Ninth Circuit Court of Appeals affirmed the grant of summary judgment for the reasons stated by the District Court. See, Appendix A (Decision) of this Petition.

⁹ Tooth #12 is located in the upper left quadrant. See, doc. 76-1, page 24 of 44, at paragraph 13 (Declaration of Dr. Sundeep Gill, DDS).

BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of the Cruel and Unusual Punishment Clause of the Eighth Amendment of the Constitution of the United States as applicable to state actors and their private prison contractors via the Fourteenth Amendment. The District Court had general Federal question jurisdiction conferred by 28 U.S.C. 1331 and diversity jurisdiction over Plaintiff's state law medical malpractice claims.

REASONS FOR GRANTING THE WRIT

A. Conflicts with Decisions of Other Courts

1. Deliberate indifference to serious dental needs is unconstitutional. *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989). The presence of a serious dental need may be based upon various factors including the pain suffered and deterioration of dental condition due to lack of treatment. See, *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998). Dental conditions are serious if they cause pain, discomfort or a threat to good health. See, *Dean v. Coughlin*, 623 F.Supp at 404. A three (3) week delay in providing dental care violates the Eighth Amendment. *Fambro v. Fulton County Ga.*, 713 F.Supp 1426, 1429-31 (N.D. Ga. 1989). Likewise, a three (3) month delay in treating a toothache supported a deliberate indifference claim and the inference of actual knowledge by the dentist. *Moore v. Jackson*, 123 F.3d 1082, 1087 Note 3 (8th Cir. 1997).

2. Defendants Gregoline and CCA had actual notice of Plaintiffs complaint of dental pain. See, doc. 89, Attachment #1 (cavities at block 13); doe. 76-1 at pp. 42 of 44 (19NOV2014 Medical Request of Plaintiff, problem: dental pain, cavity); doc. 94, Exhibit #14 at pp. 41-47 (complaints of dental pain by Plaintiff), and; doe. 89, paragraphs 11, 13, 15, 20, 22, 24, 28, 30, 32, 43, 58 and 59 (Defendant Gregoline and CCA knew of Plaintiff's dental pain and delayed his treatment for 211 days). Plaintiff needlessly suffered moderately severe dental pain in the interim (for 211 days). See, doc. 89 at para. 58. Conversely Doctor Gill examined, x-rayed, and performed a tooth restoration (filled cavity) all on the

very first appointment he had with Plaintiff, which resolved Plaintiff's dental pain. See, doc. 89, paragraphs 44 to 63. Defendant CCA had a custom or practice at SCC of delaying dental care for 3 to 8 months. See, doc. 76-1, page 12 of 44, at paragraph 15 and; doc. 76-1, page 23 of 44 at paragraph 8.¹⁰

3. Contrary to their own written policy on dental care and flossing (doc. 1 at Exhibit #1), Defendants CCA and Gregoline did not provide prisoners at SCC with a method to floss. See, doc. 94 at Exhibit #16 (Memorandum of Defendant CCA's Health Services Administrator at SCC). Defendants did not say flossing presents a security issue, they said a method of flossing is not a requirement in our contract with Hawaii. *Id.*

4. The record in this case establishes that Defendant Gregoline knew of Plaintiff's complaint of moderately severe dental pain and that Plaintiff had gingivitis. Defendant CCA's custom and practice of delaying dental care and its unwritten policy of not allowing a method of flossing because it was the moving force behind the 211 day delay in Plaintiff's dental treatment for pain and the denial of a method of flossing which caused Plaintiff's gingivitis of December 2014 to evolve into periodontitis by July of 2015, a more serious dental condition marked by permanent loss of bone. Defendant Gregoline knew of Plaintiff's dental pain and made a conscious decision not to x-ray, treat Plaintiff's complaint of pain or provide dental pain medication. Plaintiff suffered for 211 days. Plaintiff had serious medical needs and the failure to treat Plaintiff's dental condition caused the unnecessary and wanton infliction of pain. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Defendant Gregoline and Defendant CCA knew of this and disregarded the excessive risk to the health and safety of Plaintiff for 211 days which caused Plaintiff to suffer permanent¹¹ physical injury. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, the District Court erred in granting Defendants summary judgment on Counts One, Two, Three, and Four of the Complaint (doc. 1).

¹⁰ Although Dr. Gill, DDS also describes Plaintiff's condition as 'not being urgent.' *Id.* at para. 12. Plaintiff's condition was serious, required treatment and was painful for 211 days. Nonetheless, Dr. Gill resolved Plaintiff's pain on his very first appointment with the Plaintiff (July 9, 2015).

¹¹ Loss of tooth enamel at tooth #12 and structural bone loss (periodontitis).

5. The District Court erred in denying (doc. 70) Plaintiff's Motions (doc. 46 and 61) to take telephonic depositions by non-stenographic means of Defendant Gregoline and Defendant CCA's dentist Dr. Gill, DDS, both of whom examined and were responsible for Plaintiff's care while he was confined at SCC. A motions hearing was held on this matter on September 26, 2016, before the Honorable David K. Duncan, Magistrate Judge. The transcript has been prepared and filed. See, doc. 113.

6. Judge Duncan questioned Plaintiff on the record at the hearing. Plaintiff indicated that he could afford to pay for a digital recording device, the phone call, witness fees and mileage. See, TR (26SEP2016) at page 8, line 17 through page 10, line 13. The Court requires a transcript. TR (26SEP2016) at page 10, line 14 through page 11, line 16. Plaintiff argues that the transcript of a non-stenographic deposition need not be prepared by a court reporter, that it can be prepared by a transcription service or a service that does medical transcription. See, TR (26SEP2016) at page 15, line 17 through line 21 and page 17, line 4 through line 12. Judge Duncan implies a court reporter is required for a non-stenographic deposition. See, TR (26SEP2016) page 14 at line 19. Judge Duncan mandates that a court reporter be used. TR (26SEP2016) page 15, line 8 through line 16. Finally, Judge Duncan denies Plaintiff's requests¹² to take the depositions of the dentists who treated him. See, TR (26SEP2016) page 18, line 8. Plaintiff contends it was reversible error to deny Plaintiff, in a medical malpractice case (doc. 1, Count One), leave to take telephonic non-stenographic depositions of the dentists who treated him, including Defendant Gregoline. This is especially true in this case where Defendant Gregoline changed his position on the standard of care regarding daily flossing for patients with gingivitis. Compare, doc. 93, Exhibit #3, Gregoline Answer to Interrogatory No. 2 (requiring regular flossing) with doc. 76-1 at page 12, para. 20 (omitting flossing from the standard of care). Plaintiff suffered moderately severe dental pain for 211 days and should have been allowed to depose Defendant Gregoline and CCA's dentist Defendant Gill, both of whom treated Plaintiff.

¹² Plaintiff's motion documents 46 and 61.

7. Plaintiff has no access to a law library. Still Plaintiff contends that a transcript of a non-stenographic deposition does not need to be made by a certified court reporter. The Prisoner's Self-Help Litigation Manual, 4th Edition (2010) by Daniel E. Manville and John Boston supplies the correct rule of law on this point:

"You can also make your own transcript of a tape recorded deposition, have a friend or family member do it or hire a stenographer to prepare a transcript from the tape." *Id.* at page 689.

Of course a transcript of a non-stenographic deposition is only required if a party offers the recording as evidence. *Id.* at pg. 689. Under the facts of this case the court erred in not permitting Plaintiff to take non-stenographic depositions by telephone of Defendant Gregoline and Dr. Gill, DDS, both of whom authored medical declarations during summary judgment proceedings.

8. Plaintiff stated two claims against Defendant Gregoline and two claims against Defendant CCA in his Complaint (doc. 1). See, Order, (doc. 7) (Finding cognizable claims and requiring an answer). The Court then erred by entering a Scheduling Order (doc. 16) which included a protective order shielding Defendants from having their deposition taken except upon extraordinary circumstances. Simultaneously the Court limited Plaintiff's use of written discovery. Written discovery requests are not a valid substitute for a deposition. Plaintiff needed to ask Defendant Gregoline and Dr. Gill about every instance of dental care in his records and whether they had any criticisms of the actions or inactions of any other dentist that treated Plaintiff. Plaintiff has already established that he needlessly suffered dental pain for 211 days and that Defendant Gregoline and Defendant CCA had a custom or practice of delaying dental care for 3 to 8 months while Defendant Gregoline never prescribed narcotic pain relief to any inmate, even for severe pain. Plaintiff should have been allowed to depose these Defendants and their medical witness, Dr. Gill on diagnosis, treatment, standard of care in the surrounding community, injury, causation and the defenses commonly presented in malpractice cases by health care providers, including Defendants affirmative defenses in their Answers. Under the facts of this case the Court erred in granting

Defendants a protective order *sua sponte* within the Scheduling Order (doc. 16). Protective orders are entered for "good cause." See, Rule 26(c) of the F.R.Civ.P. Here there was no good cause and the court failed to balance the need of a malpractice Plaintiff seeking a deposition against the burden of the Defendant Dentist.

B. Importance of the Questions Presented

1. This case presents a question regarding the application of this Court's decisions in *Estelle vs. Gamble*, 429 U.S. 97, 104 (1976) and *Farmer vs. Brennan*, 511 U.S 825, 837 (1994) during summary proceedings under Rule 56 of the Federal Rules of Civil Procedure. In this Eighth Amendment denial of medical (dental) care and medical malpractice case, the District Court refused to allow Plaintiff to depose Defendant Gregoline, D.D.S. who was the attending dentist and refused to allow Plaintiff to depose the Defendants expert witness Doctor Gill, D.D.S. who treated Plaintiff and provided a Declaration for Defendants during the summary judgment proceedings.

2. This Court confirmed the importance of expert testimony in upholding a grant of summary judgment against a prisoner stating that the prisoners "did not offer any fact-based or *expert-based* refutation [of prison officials' argument] in the manner the rules provide." *Beard vs. Banks*, 548 U.S. 521, 534 (2006) (emphasis supplied). The lower Courts refusal to allow Plaintiff in this case to depose the Doctors of Dentistry that treated him and the Defendants expert medical witness (Dr. Gill, DDS) means that a prisoner in custody will never be able to refute the expert evidence of prison officials.

3. This case is of great public importance because it affects the provision of dental care in the prison systems of all 50 states, the District of Columbia and hundreds of city and county jails. The guidance of this Court is also important to prisoners because it affects their ability to receive reasonable dental care in a timely manner. Here the Plaintiff needlessly suffered unnecessary pain for 211 days.

4. This Court should correct the lower court's refusal to allow the Plaintiff to depose the treating Doctors of Dentistry and the Defendants expert witness (Dr. Gill, D.D.S.) in this prison case

which was based upon both medical malpractice and the denial of care in violation of the Eighth Amendment of the Constitution of the United States.

CONCLUSION

WHEREFORE, the foregoing reasons the Petitioner respectfully requests that certiorari be granted in this case.

DATED this 5th day of September, 2018.

I ASK FOR THIS,


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