NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 19-5201

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROSCOE CHAMBERS, Plaintiff-Appellant, v. WILLIAM HARDY, Medical Officer, FMC Devens; J. RAY ORMOND; MS. BARRONE; MS. JONES; UNKNOWN PA-C, individually and in their official capacities, Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

ORDER

Before: CLAY, McKEAGUE, and BUSH, Circuit Judges.

Roscoe Chambers, a federal prisoner proceeding *pro se*, appeals the district court's judgment in favor of the defendants in his civil rights action, filed pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This case has been referred to a panel of the Court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In September 2017, Chambers filed a complaint in the Western District of Kentucky alleging that certain officials at the United States Penitentiary-McCreary ("USP-McCreary") acted with deliberate indifference to his serious medical needs. Specifically, Chambers alleged that Dr.

William Hardy performed a surgical procedure on his right foot without permission, which resulted in an infection, and refused to send him for knee-replacement surgery. He further alleged that Warden J. Ray Ormond knew his medical condition was severe, but "refused to order the medical staff to put [him] in for surgery"; that "Ms. Barrone," an assistant warden, did nothing when she learned that Chambers had a "bone" growing out of his right foot; that health care administrator "Ms. Jones refuse[d] to see [him and] denied [him] medical attention, [a] knee brace, and a transfer[] to a medical facility"; and that the "unknown PA-C" was "very mean, threatened [him], denied [him] medicine [and a] knee brace, and refuse[d] to put [him] in for surgery to have [his] knee replaced." Chambers sought damages and injunctive relief.

Because all the defendants were identified by Chambers as employees of USP-McCreary and all the actions alleged in the complaint took place at USP-McCreary, the district court transferred the matter to the Eastern District of Kentucky, where USP-McCreary is located.

Pursuant to the screening provisions of the Prisoner Litigation Reform Act ("PLRA"), *see* 28 U.S.C. §§ 1915(e)(2), 1915A, the district court reviewed Chambers's complaint and dismissed the following claims: the claim against "unknown PA-C" because Chambers failed to provide any identifying description for this defendant; the official-capacity claims against all defendants as barred by sovereign immunity; and the individual-capacity claims against Ormond, Barrone, and Jones because Chambers failed to allege that they were aware of the seriousness of his medical condition or that they were personally involved in decisions regarding his medical care. This left pending only Chamber's individual-capacity claims against Dr. Hardy.

Dr. Hardy moved for dismissal of Chambers's complaint or, in the alternative, for summary judgment. Chambers responded to this motion and also filed his own motion for summary judgment, arguing that the Assistant United States Attorney lacked authority to represent Dr. Hardy in his individual capacity. The district court denied Chambers's summary judgment motion and granted summary judgment in favor of Dr. Hardy, concluding that Chambers failed to exhaust his administrative remedies with respect to his claim that Dr. Hardy improperly operated on his foot and that Chambers's claim that Dr. Hardy acted with deliberate indifference to his serious medical needs by failing to send him for knee-replacement surgery was untimely. In addition, the

district court found that Chambers's Eighth Amendment claims against Dr. Hardy failed on the merits and that Dr. Hardy was entitled to qualified immunity.

On appeal, Chambers argues that: (1) the district court improperly denied his motion for summary judgment; (2) the district court improperly dismissed his claims against Ormond, Barrone, and Jones; (3) the district court incorrectly found that his claim concerning Dr. Hardy's failure to refer him for knee-replacement surgery was untimely; (4) the district court incorrectly determined that he failed to exhaust his administrative remedies; and (5) the case was improperly transferred to the Eastern District of Kentucky. In addition to his appellate brief, Chambers has filed a "Motion to Request Discovery." Chambers has made no arguments with respect to the district court's dismissal of his claim against "unknown PA-C" or his official-capacity claims against all defendants and has therefore abandoned those claims on appeal. *E.g.*, *United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006).

I. *Transfer to the Eastern District of Kentucky*

As an initial matter, Chambers challenges the district court's decision to transfer his complaint from the Western District of Kentucky to the Eastern District of Kentucky. He states that he "believes" that USP-McCreary is in the Western District of Kentucky.

A district court's determination regarding venue is a question of law that we review *de novo*. *Lea v. Warren County*, No. 16-5329, 2017 WL 4216584, at *2 (6th Cir. May 4, 2017) (order) (citing *First of Mich. Corp. v. Bramlet*, 141 F.3d 260, 262 (6th Cir. 1998)).

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e)(1). Chambers does not dispute that the alleged actions took place at USP-McCreary or that the defendants were employees of that facility. Contrary to his stated belief, USP-McCreary is located in the Eastern District of Kentucky. *See* 28 U.S.C. § 97(a) (noting that

McCreary County is in the Eastern District). The district court therefore did not err in transferring the case to the Eastern District of Kentucky.

II. ***Dismissal of Claims Against Defendants Ormond, Barrone, and Jones***

We review *de novo* a district court's dismissal of a suit under 28 U.S.C. §§ 1915(e)(2) and 1915A. *Hill v. Lappin*, 630 F.3d 468, 470 (6th Cir. 2010). Under the PLRA, district courts must screen and dismiss any complaint filed by a prisoner against a governmental entity or an officer or employee of a governmental entity that is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(a)–(b); *Grinter v. Knight*, 532 F.3d 567, 572 (6th Cir. 2008). "[T]o survive scrutiny under §§ 1915A(b)(1) and 1915(e)(2)(B)(ii), 'a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Hill*, 630 F.3d at 471 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). To the extent Chambers argues in his appellate brief that the district court improperly dismissed his claims in the absence of a motion to dismiss by the defendants, the district court acted within its discretion under §§ 1915(e)(2) and 1915A by *sua sponte* dismissing the complaint insofar as it failed to state a claim for relief.

To state a claim under *Bivens*, "a plaintiff must allege that he was deprived of a right secured by the federal constitution or laws of the United States by a person acting under color of federal law." *Kesterson v. Fed. Bureau of Prisons*, 60 F. App'x 591, 592 (6th Cir. 2003) (order) (citing *Bivens*, 403 U.S. at 397). To establish liability under *Bivens*, "a complaint must allege that the defendants were personally involved in the alleged deprivation of federal rights." *Nwaebo v. Hawk-Sawyer*, 83 F. App'x 85, 86 (6th Cir. 2003) (order) (citing *Rizzo v. Goode*, 423 U.S. 362, 373–77 (1976)). "The Eighth Amendment forbids prison officials from 'unnecessarily and wantonly inflicting pain' on a prisoner by acting with 'deliberate indifference' to the prisoner's serious medical needs." *Talal v. White*, 403 F.3d 423, 426 (6th Cir. 2005) (quoting *Blackmore v. Kalamazoo County*, 390 F.3d 890, 895 (6th Cir. 2004)).

An Eighth Amendment claim for denial of adequate medical care has an objective and a subjective component. *Johnson v. Karnes*, 398 F.3d 868, 874 (6th Cir. 2005). To satisfy the objective component, the plaintiff must allege a sufficiently serious medical need. *Id.* The

subjective component is satisfied if the plaintiff alleges facts "which, if true, would show that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk." *Id.* (quoting *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001)).

Chambers alleged that Warden Ormond knew that his injuries were severe but "refused to order the medical staff to put [him] in for surgery." He further alleged that Assistant Warden Barrone "told Dr. Hardy she wanted to know what was growing out of the [b]ottom of [Chambers'] feet, [but] when she found out she did nothing." These claims do not allege the necessary level of personal involvement to render Ormond or Barrone liable for violating Chambers's Eighth Amendment rights. Instead, they seek to implicate Ormond and Barrone based on their supervisory roles at USP-McCreary and their alleged failure to take action with respect to Chambers's medical treatment. But "a supervisor cannot be held liable simply because he or she was charged with overseeing a subordinate who violated the constitutional rights of another." *Peatross v. City of Memphis*, 818 F.3d 233, 241 (6th Cir. 2016) (citing *Gregory v. City of Louisville*, 443 F.3d 725, 751 (6th Cir. 2006)). "'[A]t a minimum,' the plaintiff must show that the defendant 'at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'" *Id.* at 242 (quoting *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999)). Chambers failed to make this showing. Similarly, Chambers's complaint failed to allege adequately that health care administrator Jones was personally involved in any decision concerning the treatment of his knee or foot ailments. His only allegation against Jones was that she "refuse[d] to see [him and] denied [him] medical attention, [a] knee brace, and a transfer[] to a medical facility." Chambers did not allege that Jones was aware of any medical condition, let alone that she perceived him to be at a substantial risk of harm. Moreover, Chambers identified Jones as a "health care administrator," but made no allegation that she was authorized to make any decisions concerning his medical treatment. The district court properly concluded that Chambers's complaint failed to state a claim against these defendants in their individual capacities.

III. ***Denial of Chambers's Motion for Summary Judgment***

Chambers argued that he was entitled to summary judgment because the Assistant United States Attorney did not have the authority to represent Dr. Hardy in his official capacity. He contended that Hardy's summary-judgment motion was therefore "void." The district court properly rejected this argument as frivolous. We have recognized that the decision to represent a federal employee in such a proceeding "is solely within the discretion of the Department and is not subject to judicial review." *Walls v. Holland*, No. 98-6506, 1999 WL 993765, at *2 (6th Cir. Oct. 18, 1999) (order); *see also* 28 C.F.R. § 50.15(a). The district court did not err in denying Chambers's summary judgment motion.

IV. ***Summary Judgment in Favor of Dr. Barnes***

We review a district court's grant of summary judgment *de novo*, viewing the facts in the light most favorable to the non-moving party. *Flagg v. City of Detroit*, 715 F.3d 165, 178 (6th Cir. 2013). 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); *see also Estate of Smithers ex rel. Norris v. City of Flint*, 602 F.3d 758, 761 (6th Cir. 2010). A party opposing a motion for summary judgment may not rest upon their pleadings, but must set forth specific facts demonstrating that there are genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party must provide such evidence in the form of affidavits, depositions, and other admissible evidence. Fed. R. Civ. P. 56(c)(1). "[F]ailure to exhaust administrative remedies . . . is an affirmative defense that must be established by the defendants." *Napier v. Laurel County*, 636 F.3d 218, 225 (6th Cir. 2011).

The district court concluded that Chambers did not properly and timely exhaust his administrative remedies with respect to his claim that Dr. Hardy acted with deliberate indifference to his serious medical needs when he operated on his foot without his permission. The PLRA requires a prisoner to first exhaust any available administrative remedies before resorting to the courts with a *Bivens* claim. 42 U.S.C. § 1997e(a). For the purposes of the PLRA, a remedy is exhausted upon completion of "'the administrative review process in accordance with the applicable procedural rules,' . . . [as] defined . . . by the prison grievance process itself." *Lee v.*

Wiley, 789 F.3d 673, 677 (6th Cir. 2015) (first two alterations in original) (quoting *Jones v. Bock*, 549 U.S. 199, 218 (2007)). Under the Federal Bureau of Prisons' Administrative Remedy Program, a prisoner must (1) "first present an issue of concern informally to staff," 28 C.F.R. § 542.13(a); (2) then, if the concern is not resolved informally, file "a formal written Administrative Remedy Request," *id.* § 542.14(a); (3) submit an appeal "on the appropriate form (BP-10) to the appropriate Regional Director" if unsatisfied with the response to the formal request, *id.* § 542.15(a); and (4) appeal the response to his BP-10 by "submit[ting] an Appeal on the appropriate form (BP-11) to the General Counsel," *id.*

Chambers did not complete this process with respect to the allegedly improper surgery on his foot. Chambers did not dispute that he filed five Administrative Remedy Requests related to his confinement at USP-McCreary. Evidence submitted by Dr. Hardy in support of his summary judgment motion established that the only one of these five requests that related to the alleged improper surgery on Chambers's foot was Administrative Remedy 857566. In it, Chambers alleged, "Dr. Hardy did a[n] inappropriate operation on my right f[oo]t without my consent: He cut a bone off the bottom of my feet and left the top part inside my feet." Hardy filed his formal request on March 31, 2016, and Warden Ormond responded. Unsatisfied with the warden's response, Chambers filed an appeal with the Mid-Atlantic Regional Office. The Regional Director denied Chambers's appeal and advised him how to appeal to the General Counsel's Office. Chambers did not pursue this Administrative Remedy Request any further.

In his response to Dr. Hardy's motion, Chambers asserted that he "attempted to exhaust" Administrative Remedy 857566 and that he "filed a BP-11 and never heard any response on it." Although statements made under the penalty of perjury may serve as an opposing affidavit sufficient to rebut a motion for summary judgment, *see* 28 U.S.C. § 1746; *Lavado v. Keohane*, 992 F.2d 601, 605 (6th Cir. 1993), Chambers's assertion is vague and unsupported by any specific facts. "[U]nsubstantiated, self-serving assertions will not preclude an adequately supported motion for summary judgment from being granted." *Mosquera v. MTI Retreading Co.*, 745 F. App'x 568, 573 (6th Cir. 2018). The district court properly concluded that Chambers failed to create a genuine

issue of material fact on the issue of whether he properly exhausted his claim concerning Dr. Hardy's treatment of his foot.

With respect to Chambers's claim that Dr. Hardy violated his Eighth Amendment rights by failing to refer him for knee-replacement surgery, the district court found that the claim was barred by the statute of limitations. Plaintiffs may sue federal employees for violating their civil rights under *Bivens*, but Kentucky litigants, such as Chambers, are subject to a one-year statute of limitations. *Zundel v. Holder*, 687 F.3d 271, 280–81 (6th Cir. 2012) (holding that *Bivens* claims are governed by the local statute of limitations for personal injury actions); *see also* Ky. Rev. Stat. § 413.140(1)(a) (stating that personal injury actions in Kentucky have a one-year statute of limitations). The statute of limitations begins to run when the plaintiff knows, or has reason to know, that he or she has suffered an injury. *Mason v. Dep't of Justice*, 39 F. App'x 205, 207 (6th Cir. 2002) (order).

Chambers does not dispute that Dr. Hardy denied his request for knee-replacement surgery on November 18, 2015. He therefore became aware of his claim on that date, and the statute of limitations began to run. Chambers then filed two Administrative Remedy Requests related to this claim—one on January 22, 2016, and one on March 3, 2016. Assuming that the statute of limitations was tolled during the entire pendency of both of these Administrative Remedy Requests, *see, e.g.*, *Cuco v. Fed. Med. Ctr., Lexington*, 257 F. App'x 897, 899 (6th Cir. 2007), it began to run again on June 8, 2016, the day after the Central Office denied his appeal in the second of these requests. That left Chambers with 300 days from that date to file his *Bivens* action, or until April 3, 2017. Chambers did not file his complaint until September 2017. His claim is therefore time-barred. Although Chambers argues that the application of a one-year statute of limitations period violates due process and that that the "continuing violation" doctrine should be applied to render his claim timely, those arguments are not properly before this Court because Chambers did not raise them in the district court. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006). We conclude that the district court properly granted summary judgment in favor of Dr. Hardy.

Accordingly, we **AFFIRM** the district court's judgment. Chambers's Motion to Request Discovery is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Re: Case No. 19-5201, *Roscoe Chambers v. William Hardy, et al*
Originating Case No. 6:17-cv-00256

Dear Mr. Chambers and Counsel:

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager

cc: Mr. Robert R. Carr

Enclosure

Mandate to issue

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION at LONDON

ROSCOE CHAMBERS,

Plaintiff,

V.

DR. HARDY,

Defendant.

Civil Action No. 6: 17-256-KKC

MEMORANDUM OPINION AND ORDER

*** *** *** ***

Plaintiff Roscoe Chambers is an inmate confined at the United States Penitentiary ("USP")- Lewisburg in Lewisburg, Pennsylvania. Proceeding without an attorney, Chambers has filed a civil rights action pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). After Chambers' complaint was screened by the Court pursuant to 28 U.S.C. § 1915(e)(2), 1915A, the sole remaining claim pending in this case is a claim that Defendant Dr. William Hardy acted with deliberate indifference to Chambers' medical needs in violation of his constitutional rights while Chambers was confined at United States Penitentiary-McCreary ("USP-McCreary") in Pine Knot, Kentucky. [R. 1, 14]

Dr. Hardy, through counsel, has filed a motion to dismiss or, in the alternative, motion for summary judgment, [R. 22] to which Chambers has filed a response. [R. 28] Dr. Hardy has not filed a reply and the time for doing so has expired. Thus, this matter has been fully briefed and is ripe for review.

I.

While the factual details provided in Chambers' complaint are sparse, he alleges that, while he was incarcerated at USP-McCreary, Dr. Hardy, identified as USP-McCreary's physician, operated on Chambers' foot without his permission and neglected to send Chambers

for knee replacement. [R. 1 at p. 3]. Based on these allegations, Chambers asserts a claim that Dr. Hardy acted with deliberate indifference to his medical needs in violation of the Eighth Amendment of the United States Constitution.

In his motion, Dr. Hardy argues that Chambers' complaint should be dismissed because: (1) Chambers has failed to exhaust his administrative remedies; (2) his complaint is untimely; (3) Chambers' complaint fails to allege a claim of constitutional dimension; and (4) Dr. Hardy is shielded from liability by qualified immunity. [R. 22-1]

II.

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the plaintiff's complaint. *Gardner v. Quicken Loans, Inc.*, 567 F. App'x 362, 364 (6th Cir. 2014). When addressing a motion to dismiss, the Court views the complaint in the light most favorable to the plaintiff and accepts as true all 'well-pleaded facts' in the complaint. *D'Ambrosio v. Marino*, 747 F.3d 378, 383 (6th Cir. 2014). Because Chambers is proceeding without the benefit of an attorney, the Court reads his complaint to include all fairly and reasonably inferred claims. *Davis v. Prison Health Servs.*, 679 F.3d 433, 437-38 (6th Cir. 2012).

Here, Dr. Hardy moves both to dismiss and for summary judgment, attaching and relying upon declarations extrinsic to the pleadings in support of his motion. [R. 22] Thus, the Court will treat Dr. Hardy's motion to dismiss the complaint as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(d); *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F. 3d 1102, 1104 (6th Cir. 2010). *See also Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004) (where defendant moves both to dismiss and for summary judgment, plaintiff is on notice that summary judgment is being requested, and the court's consideration as such is appropriate where the nonmovant submits documents and affidavits in opposition to summary judgment).

A motion under Rule 56 challenges the viability of another party's claim by asserting that at least one essential element of that claim is not supported by legally-sufficient evidence. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). A party moving for summary judgment must establish that, even viewing the record in the light most favorable to the nonmovant, there is no genuine dispute as to any material fact and that the party is entitled to a judgment as a matter of law. *Loyd v. St. Joseph Mercy Oakland*, 766 F.3d 580, 588 (6th Cir. 2014). The burden then shifts to the nonmoving party to "come forward with some probative evidence to support its claim." *Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339, 1347 (6th Cir.1994). However, if the responding party's allegations are so clearly contradicted by the record that no reasonable jury could adopt them, the court need not accept them when determining whether summary judgment is warranted. *Scott v. Harris*, 550 U.S. 372, 380 (2007). The Court must grant summary judgment if the evidence would not support a jury verdict for the responding party with respect to at least one essential element of his claim. *Ford v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

A.

Chambers' complaint alleges that Dr. Hardy was deliberately indifferent to his serious medical needs in two respects: (1) he operated on Chambers' foot without his permission; and (2) he neglected to send Chambers for knee replacement. [R. 1 at p. 3]. However, with respect to his claim regarding the allegedly improper operation on his foot, Chambers did not properly and timely exhaust his administrative remedies as required by federal law. Under the Prison Litigation Reform Act of 1995 ("PLRA"), a prisoner wishing to challenge the circumstances or conditions of his confinement must first exhaust all available administrative remedies. 42 U.S.C. § 1997e(a); *Jones v. Bock,* 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.");

Fazzini v. Northeast Ohio Correctional Center, 473 F.3d 229, 231 (6th Cir. 2006); *Campbell v. Barron*, 87 F. App'x 577, 577 (6th Cir. 2004). Administrative remedies must be exhausted prior to filing suit and in full conformity with the agency's claims processing rules. *Woodford v. Ngo*, 548 U.S. 81, 92-94 (2006).

The federal Bureau of Prisons ("BOP") employs a multi-tiered administrative grievance process. The BOP's Inmate Grievance System requires a federal prisoner to first seek informal resolution of any issue with staff. 28 C.F.R. § 542.13. If a matter cannot be resolved informally, the prisoner must file an Administrative Remedy Request Form (BP-9 Form) with the Warden, who has 20 days to respond. *See* 28 C.F.R. §§ 542.14(a) and 542.18. If the prisoner is not satisfied with the Warden's response, he may use a BP-10 Form to appeal to the applicable Regional Director, who has 30 days to respond. *See* 28 C.F.R. §§ 542.15 and 542.18. If the prisoner is not satisfied with the Regional Director's response, he may use a BP-11 Form to appeal to the General Counsel, who has 40 days to respond. *See* 28 C.F.R. §§ 542.15 and 542.18. *See also* BOP Program Statement 1300.16. Because "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules...," *Woodford*, 548 U.S. at 90, the prisoner must file the initial grievance and any appeals within these time frames.

Here, even according to Chambers, the only administrative remedy requests relevant to this lawsuit that he completely exhausted are Administrative Remedy Nos. 849291 and 854754. [R. 28, Resp. at p. 3; R. 22-2, Exh. 1: Decl. of Carlos Martinez, Attachments D and E, at p. 84-97]. However, both of these administrative remedy requests relate to the allegedly inadequate medical treatment provided for Chambers' knees. Neither of these administrative remedy requests even mention treatment of Chambers' foot. [*Id.*]

Rather, Chambers' allegations that Dr. Hardy inappropriately operated on his foot (including his allegation that he "cut a bone off the bottom of my feet and left the top part inside

my feet") are raised only in Administrative Remedy No. 857566. [R. 22-2, Decl. of Carlos Martinez, Attachment F, at p. 98-102] Chambers filed an administrative remedy request complaining of the procedure on his foot on a BP-9 Form (which was later assigned as Administrative Remedy No. 857566) on March 31, 2016. [*Id.* at p. 98]. The Warden responded to the request, explaining that a review of Chambers' medical records showed that, after obtaining verbal informed consent for incision and drainage of Chambers' right foot, Dr. Hardy "excised a dead cornified piece of skin from your foot, not bone. This is secondary to a plantars wart." [*Id.* at p. 99] The Warden further informed Chambers that, if he was dissatisfied with his response, he may appeal to the Regional Director. [*Id.*]

Chambers filed a BP-10 appeal with the Mid-Atlantic Regional Office on April 26, 2016. [*Id.* at 100] The Regional Director issued a response denying the appeal dated April 29, 2016. [*Id.* at 101-102] Although this response also advised Chambers how to appeal at the Central Office level [*id.*], Chambers did not pursue Administrative Remedy No. 857566 any further. [R. 22-2, Decl. of Carlos Martinez, Attachment F, at p. 98-102] Thus, Chambers failed to fully exhaust his administrative remedies with respect to his Eighth Amendment claim related to Dr. Hardy's treatment of his foot.

In his response, with respect to the exhaustion of his available administrative remedies, Chambers offers only his statement that he "attempted to exhaust" Remedy No. 857566 [R. 28 at p. 3, ¶4], later claiming that "he filed a BP-11 and never heard any response to it." [*Id.* at p. 4, ¶7] However, Chambers provides no factual or evidentiary support for this claim, only his own unsupported and self-serving allegations made in his response. In order to defeat a properly supported motion for summary judgment, the party opposing the motion may not "rest upon mere allegation or denials of his pleading," but must present affirmative evidence supporting his claims. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). "[C]onclusory

allegations, speculation, and unsubstantiated assertions are not evidence, and are not sufficient to defeat a well-supported motion for summary judgment. *Jones v. City of Franklin*, 677 F. App'x 279, 282 (6th Cir. 2017) (citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). *See also Banks v. Rockwell Int'l N. Am. Aircraft Operations*, 855 F.2d 324, 325 n. 1 (6th Cir. 1988) ("[A] motion for summary judgment may not be defeated by factual assertions in the brief of the party opposing it, since documents of this nature are self-serving and are not probative evidence of the existence or nonexistence of any factual issues."); *Perry v. Agric. Dep't*, No. 6: 14-168-DCR, 2016 WL 817127, at *10 (E.D. Ky. Feb. 29, 2016) ("[C]onclusory allegations are not evidence and are not adequate to oppose a motion for summary judgment.").

Here, in response to Dr. Hardy's motion supported by evidence that Chambers did not fully exhaust Administrative Remedy No. 857566 [R. 22-2, Exh. 1: Decl. of Carlos Martinez, Attachments C and F], Chambers offers only his own, unsupported claim that he "attempted" to fully exhaust this claim by filing a BP-11, "but never heard any response on it." [R. 28 at p. 4, ¶7] This self-serving statement is insufficient to create a genuine issue of material fact with respect to Chambers' failure to exhaust Administrative Remedy No. 857566, the only administrative remedy request that Chambers filed with respect to Dr. Hardy's treatment of his foot.[1] Because Chambers failed to fully exhaust his administrative remedies with respect to this claim, he did not satisfy the exhaustion requirement of 42 U.S.C. § 1997e(a) prior to filing his complaint, thus this claim must be dismissed. *Liggett v. Mansfield*, 2009 WL 1392604, at *2-3 (E.D. Tenn. May 15, 2009) ("A prisoner who files a grievance but does not appeal to the highest

[1] Although Chambers filed another administrative remedy request on January 22, 2016 (later assigned Administrative Remedy No. 849290), this remedy request complained of "Ms. J. West improper conduct" and requested "to see the health-care physician concerning my knee problems and my feet problem." [R. 28-1 at p. 3] However, not only did this remedy request fail to make any reference to Dr. Hardy's treatment of Chambers, but Chambers also failed to pursue this Administrative Remedy beyond the Regional level. [R. 22-2, Exh. 1: Decl. of Carlos Martinez at p. 2-3; *Id.* at Attachment C]

possible administrative level, does not exhaust available administrative remedies.") (citing *Hartsfield v. Vidor*, 199 F.3d 305, 309 (6th Cir. 1999)).

B.

With respect to the basis for Chambers' remaining Eighth Amendment claim against Dr. Hardy – that Dr. Hardy acted with deliberate indifference to Chambers' serious medical needs by neglecting to send Chambers for knee replacement – this claim must be dismissed as untimely. Because the remedy afforded in a *Bivens* action is entirely judge-made, there is no statutory limitations period. Instead, federal courts apply the most analogous statute of limitations from the state where the events occurred. *Wilson v. Garcia*, 471 U.S. 261, 268-71 (1985). The medical care about which Chambers now complains occurred in Kentucky; therefore, Kentucky's one-year statute of limitations for asserting personal injuries applies. Ky. Rev. Stat. § 413.140(1)(a); *Hornback v. Lexington-Fayette Urban Co. Gov't.*, 543 F. App'x 499, 501 (6th Cir. 2013); *Mitchell v. Chapman*, 343 F.3d 811, 825 (6th Cir. 2003).

A claim accrues when the plaintiff becomes aware of the injury which forms the basis for his claims. *Estate of Abdullah ex rel. Carswell v. Arena*, 601 F. App'x 389, 393-94 (6th Cir. 2015) ("Once the plaintiff knows he has been hurt and who has inflicted the injury, the claim accrues.") (internal quotation marks omitted) (citing *United States v. Kubrick*, 444 U.S. 111, 122 (1979)). Here, Chambers alleges that Dr. Hardy acted with deliberate indifference when he neglected to refer Chambers for a total knee replacement after a medical examination on November 18, 2015. [R. 1 at p. 3; R. 22-2, Exh. 1: Decl. of Carlos Martinez at p. 2-3; *Id.* at Attachments D and E] Where, as here, the operative facts are not in dispute, the Court determines as a matter of law whether the statute of limitations has expired. *Highland Park Ass'n of Businesses & Enterprises v. Abramson*, 91 F.3d 143 (Table) (6th Cir. 1996) (citing *Hall v. Musgrave,* 517 F.2d 1163, 1164 (6th Cir.1975)). *See also Fox v. DeSoto*, 489 F.3d 227, 232 (6th Cir. 2007).

Because Chambers undoubtedly became aware of the denial of his request for knee replacement on November 18, 2015 when he was informed that he did not meet the criteria for knee replacement, his claim accrued (and the statute of limitations with respect to this claim began running) on this date. Thus, Chambers had one year from that date – or until November 18, 2016 – to file his complaint. However, as noted above, before he could file suit, Chambers was required to exhaust his administrative remedies available under the BOP's Inmate Grievance Program. 42 U.S.C. § 1997e(a). When a claimant is required to exhaust such remedies before bringing suit, the limitations period is tolled while he or she does so, as long as such remedies are pursued diligently and in good faith. *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000).

Assuming (without deciding) that Chambers pursued his remedies diligently and in good faith, according to Chambers, the fully exhausted administrative remedy requests that relate to his claim regarding his knee replacement request are Administrative Remedy No. 849291 (which was filed at USP-McCreary on January 22, 2016) and Administrative Remedy No. 854754 (which was filed at USP-McCreary on March 3, 2016). [R. 28 at p. 3, ¶3; R. 22-2, Exh. 1: Decl. of Carlos Martinez at Attachments D and E][2] The Central Office denied Chambers' appeal of Administrative Remedy No. 849291 on April 26, 2016 and denied his appeal of Administrative Remedy No. 854754 on June 7, 2016. [*Id.*]

Thus, even if the statute of limitations was tolled for the entire time period that Chambers pursued these administrative remedies from January 22, 2016 through June 7, 2016

[2] It should be noted that, to the extent that Chambers alleges in his response to Dr. Hardy's motion that Dr. Hardy also failed to treat a "broken bone" in his knee resulting from separate staff assaults on Chambers on May 16, 2016 and June 29, 2016, there are no allegations of this nature in his complaint and he may not simply add new substantive claims in his response to a dispositive motion. Nor are these claims raised in any of the administrative remedy requests relevant to the claims in his complaint. Indeed, both of these incidents occurred well after the date that Chambers began pursuing his administrative remedies with respect to the one claim related to his knee that he did allege in his complaint, which was Dr. Hardy's failure to refer Chambers for a knee replacement after the examination in November 2015.

(or approximately 138 days), the limitations on his claim expired on or around April 3, 2017.[3] However, he did not file this lawsuit in this Court until September 18, 2017.[4] Thus, because Chambers filed his lawsuit well over five months after the statute of limitations with respect to his claim had expired, his claim is barred by the applicable statute of limitations and must be dismissed. *Dellis v. Corr. Corp. of Am.*, 257 F.3d 508, 511 (6th Cir. 2001).

C.

Even putting aside the procedural deficiencies of Chambers' claims, Chambers fails to state a viable claim for violation of the Eighth Amendment. The Eighth Amendment "forbids prison officials from 'unnecessarily and wantonly inflicting pain' on an inmate by acting with 'deliberate indifference' toward [his] serious medical needs." *Blackmore v. Kalamazoo County*, 390 F. 3d 890, 895 (6th Cir. 2004) (*quoting Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). A plaintiff asserting deliberate indifference to his serious medical needs must establish both the objective and subjective components of such a claim. *Jones v. Muskegon Co.*, 625 F. 3d 935, 941 (6th Cir. 2010). The objective component requires the plaintiff to show that the medical condition is "sufficiently serious," *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), such as one "that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Harrison v. Ash*, 539 F. 3d 510, 518 (6th Cir. 2008) (citations omitted). The subjective component requires the plaintiff to show that prison officials actually knew of a substantial risk of harm to the plaintiff's health

[3] Approximately 65 days passed between the date Chambers claim accrued on November 18, 2015, and the date he filed his first administrative remedy on January 22, 2016. If the "clock is stopped" until the administrative remedy process was completed on June 7, 2016, Chambers had 300 days remaining (or until April 3, 2017) within which to file his claim.

[4] While he originally attempted to bring this claim against Dr. Hardy in a civil lawsuit filed in the United States District Court for the Central District of California, Chambers filed that lawsuit on August 21, 2017, which was also after the expiration of the statute of limitations. *Roscoe Chambers v. Dr. Allen, et al.*, No. 5:17-cv-01353-MWF (KES) (C.D. Cal.). After finding that it did not have personal jurisdiction over the defendants in Kentucky for actions occurring in Kentucky, the District Court in California dismissed Chambers' claim against Dr. Hardy without prejudice to his ability to refile those claims here. *Id.*

but consciously disregarded it. *Cooper v. County of Washtenaw*, 222 F. App'x 459, 466 (6th Cir. 2007); *Brooks v. Celeste*, 39 F. 3d 125, 128 (6th Cir. 1994).

Even assuming that Chambers could satisfy the objective component, the subjective component requires a showing that Dr. Hardy was aware of Chambers' medical conditions yet, through his actions, chose to consciously and deliberately disregard a serious risk to his health, a much more demanding standard. *Farmer*, 511 U.S. at 834; *Arnett v. Webster*, 658 F. 3d 742, 751 (7th Cir. 2011) ("Deliberate indifference 'is more than negligence and approaches intentional wrongdoing.'") (quoting *Collignon v. Milwaukee Cnty.*, 163 F.3d 982, 988 (7th Cir. 1998)). Dr. Hardy has provided extensive medical records documenting that, while Chambers was housed at USP-McCreary, he received comprehensive examinations and extensive treatment for his knees and an infected plantar wart on his foot (which Chambers repeatedly mischaracterizes as a "bone growing out of his foot," citing no evidence supporting this characterization other than his own opinion). [R. 22-6 (Corrected R. 22-3), Exh. 2 Declaration of Dr. William Hardy and supporting medical records] Moreover, Dr. Hardy has submitted evidence that, despite Chambers' claim to the contrary, Chambers verbally consented to the procedure on his foot, then refused to sign the consent form after the procedure had concluded. [*Id.* at Exh. 2, Declaration of Dr. William Hardy, p. 5] Chambers then refused to attend an off-site evaluation by a podiatrist, a medical doctor devoted to the study and medical treatment of disorders of the foot, ankle and lower extremity. [*Id.* at p. 7]

In response, Chambers offers no affirmative evidence to the contrary, but rather only his own self-serving statements that he did not grant permission for the procedure on his foot and continues to question why he would have needed to see a podiatrist. However, despite Chambers' repeated statements that Dr. Hardy operated on his foot without his permission, it is clear that the gist of his complaint is actually based on his disagreement with Dr. Hardy's

alleged failure to send what Chambers characterizes as a foreign object to a lab to have a biopsy or to send Chambers to a hospital to have the rest of the allegedly foreign object removed. [R. 28 at p. 7, ¶20] Chambers also does not dispute that he received medical treatment from Dr. Hardy, nor could he, as the extensive documentation submitted by Dr. Hardy clearly demonstrates that Chambers received treatment for both his foot and knee conditions from Dr. Hardy. Rather, Chambers makes it quite clear that his disagreement is with the medical decisions made by Dr. Hardy during the course of Chambers' treatment. [R. 28 at p. 15, ¶7 ("Let say next an ulcer in part of the foot, that would be the bone growth growing out of the bottom of Chambers feet, in which the different cut part off and just discarded without at least sending it to the lab for a biopsy."); *Id.* at p. 15, ¶8 ("Misleading Chambers saying your too young for a total knee replacement, how old do you have to be? Chambers was 43 or 44 years old."). However, "[w]here a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims that sound in state tort law." *Graham ex rel. Estate of Graham v. County of Washtenaw*, 358 F.3d 377, 385 (6th Cir. 2004)

Simply put, the facts here are insufficient to support a claim of deliberate indifference to Chambers' serious medical needs. Where a prisoner has been examined and treatment provided but the prisoner merely disagrees with the course of care determined by his treating physician in the exercise of his medical judgment, his claim sounds in state tort law – it does not state a viable claim of deliberate indifference under the Eighth Amendment. *Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014). *See also Durham v. Nu'Man*, 97 F. 3d 862, 868-69 (6th Cir. 1996). Even "[w]hen a prison doctor provides treatment, albeit carelessly or inefficaciously, to a prisoner, he has not displayed a deliberate indifference to the prisoner's needs, but merely a degree of incompetence which does not rise to the level of a constitutional violation." *Comstock*

v. McCrary, 273 F. 3d 693, 703 (6th Cir. 2001). A prisoner's "disagreement with the exhaustive testing and treatment he received while incarcerated does not constitute an Eighth Amendment violation." *Lyons v. Brandy*, 430 F. App'x 377, 381 (6th Cir. 2011) (citing *Estelle*, 429 U.S. at 107; *Westlake v. Lucas*, 537 F.2d 857, 860 n.5 (6th Cir. 1976)); *see also Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008) ("Deliberate indifference is not medical malpractice; the Eighth Amendment does not codify common law torts.").

In sum, Chambers' disagreement with Dr. Hardy regarding the best course of medical treatment for his feet and knees is insufficient to state a claim of deliberate indifference under the Eighth Amendment. Thus, Chambers' complaint fails to state a claim for violation of the Eighth Amendment.

D.

Finally, Dr. Hardy argues that, as no constitutional violation has occurred, he is entitled to qualified immunity from suit. "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). When evaluating official immunity claims, the Sixth Circuit applies the following three-part test: "First, we determine whether a constitutional violation occurred; second, we determine whether the right that was violated was a clearly established right of which a reasonable person would have known; finally, we determine whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999)(citation omitted).

The Court has concluded above that no Eighth Amendment violations occurred. Thus, Dr. Hardy is entitled to and shielded by qualified immunity.

For all of these reasons, the Defendant's motion to dismiss, or in the alternative, motion for summary judgment will be granted and Chambers' complaint will be dismissed.

Accordingly, **IT IS ORDERED** that:

1. Defendant Dr. Hardy's motion to dismiss, or in the alternative, motion for summary judgment [R. 22] is **GRANTED**.
2. Chambers' complaint [R. 1] is **DISMISSED WITH PREJUDICE**.
3. All pending motions or requests for relief in this case are **DENIED AS MOOT**.
4. This action is **STRICKEN** from the Court's active docket.
5. Judgment shall be entered contemporaneously with this Memorandum Opinion and Order.

Dated February 20, 2019.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Karen K. Caldwell

KAREN K. CALDWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION at LONDON

ROSCOE CHAMBERS,

Plaintiff,

V.

DR. HARDY,

Defendant.

Civil Action No. 6: 17-256-KKC

JUDGMENT

*** *** *** ***

Consistent with the Memorandum Opinion and Order entered today, pursuant to Federal Rules of Civil Procedure 58 it is **ORDERED** and **ADJUDGED** that:

1. Plaintiff's Complaint [R. 1] is **DISMISSED WITH PREJUDICE** with respect to all issues raised in this proceeding.
2. Judgment is **ENTERED** in favor of Defendant.
3. This is a **FINAL** and **APPEALABLE** Judgment and there is no just cause for delay.

Dated February 20, 2019.

Karen K. Caldwell

KAREN K. CALDWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

No. 19-5201

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 15, 2020
DEBORAH S. HUNT, Clerk

ROSCOE CHAMBERS,

Plaintiff-Appellant,

v.

WILLIAM HARDY, Medical Officer, FMC Devens; J. RAY ORMOND; MS. BARRONE; MS. JONES; UNKNOWN PA-C, individually and in their official capacities,

Defendants-Appellees.

ORDER

Before: CLAY, McKEAGUE, and BUSH, Circuit Judges.

Roscoe Chambers, a federal prisoner, has filed a petition for rehearing of this court's order of October 30, 2019, affirming the district court's judgment in favor of the defendants in his civil rights action, filed pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Upon consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a)(2).

We therefore **DENY** the petition for rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

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Filed: February 03, 2020

Roscoe Chambers
A.U.S.P. Thomson
P.O. Box 1002
Thomson, IL 61285

Re: Case No. 19-5201, *Roscoe Chambers v. William Hardy, et al*
Originating Case No.: 6:17-cv-00256

Dear Mr. Chambers,

The enclosed petition for rehearing en banc and motion to recall the mandate are being returned to you unfiled.

Neither the Federal Rules of Appellate Procedure nor the Rules of the Sixth Circuit make any provision for filing successive petitions for rehearing. Your petition for panel rehearing was denied by order of January 15, 2020. Therefore, the petition for rehearing en banc and the motion to recall the mandate are not accepted for filing.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Thomas Lee Gentry
Kyle M. Melloan
Mr. Charles P. Wisdom Jr.