IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11020-E

ROBERT L. CLARK,

Plaintiff-Appellant,

versus

CHIQUITA A. FYE,
in her official and individual capacity as
Medical Director of Macon State Prison,
GREGORY MCLAUGHLIN,
Macon State Prison,

Defendants-Appellees,

GEORGIA DEPARTMENT OF CORRECTIONS,
Prison Officials in their individual and official capacities, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Georgia

Before: WILLIAM PRYOR, Chief Judge, ROSENBAUM AND NEWSOM, Circuit Judges.

BY THE COURT:

Robert L. Clark, a Georgia inmate, has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's order dated May 11, 2020, denying his motions for leave to proceed based on imminent danger and for appointment of counsel in his appeal from the district court's grant of summary judgment to the defendants in his 42 U.S.C. § 1983 civil rights action.

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Because Clark has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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May 11, 2020

Clerk - Middle District of Georgia
U.S. District Court
475 MULBERRY ST
MACON, GA 31201

Appeal Number: 20-11020-E
Case Style: Robert Clark v. Chiquita Fye, et al
District Court Docket No: 5:18-cv-00071-MTT-MSH

The enclosed copy of this Court's Order of Dismissal is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gloria M. Powell, E
Phone #: (404) 335-6184

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

(CORRECTED)

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Hepatitis B in the mid-1990s and with bipolar disorder as a child, approximately 48 years before. Specifically, he alleged that, in May 2013, he told Dr. Fye about his conditions and requested a transfer, which she refused. He stated that he was presently dying of liver failure and suffered from daily anxiety attacks, insomnia, pain in his side, painful bowel movements, numbness in his legs, and severe stomach pain. He asked for damages and injunctive relief.

The district court dismissed the claims against GDOC and Georgia Correctional Healthcare without prejudice on preliminary review and dismissed all other claims except those against Dr. Fye and the claims for injunctive relief against Warden McLaughlin on the defendants' motion.

Dr. Fye and Warden Clinton Perry—Warden McLaughlin's successor, who was substituted as a defendant pursuant to Fed. R. Civ. P. 25(d)—moved for summary judgment. They argued, in relevant part, that the claims against Dr. Fye were time-barred because Clark only had one interaction with Dr. Fye, on the day he arrived at the prison in May 2013, which was more than two years before the complaint was filed. They presented evidence that Clark never claimed to have Hepatitis B or bipolar disorder until he so indicated on his February 2018 medical history form. They presented evidence that his previous medical history forms did not indicate a history of Hepatitis B or bipolar disorder. They also submitted evidence that Clark was tested for Hepatitis B in December 2018, and the results were negative. Additionally, Clark's medical records did not indicate that he had been diagnosed with bipolar disorder. A mental health evaluation completed at the prison did not indicate a history of bipolar disorder. The district court granted summary judgment and dismissed the complaint.

We have previously designated Clark as a three-striker, so we must determine whether he is under imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g). Taking his allegations as true, as we must in making an imminent-danger determination, he has sufficiently

demonstrated that he is in imminent danger of serious physical injury, as he alleged he is suffering liver failure, pain, and numbness related to a lack of treatment, and his hepatitis could lead to serious injury if it remains untreated. *Brown v. Johnson*, 387 F.3d 1344, 1349–50 (11th Cir. 2004).

Nonetheless, we conclude that his appeal is frivolous. The record shows that his last interaction with Dr. Fye was in 2013—five years before he filed his complaint. Thus, his claims against Dr. Fye were time-barred under Georgia's two-year statute of limitation for § 1983 claims, and he cannot raise a non-frivolous argument regarding the grant of summary judgment to Dr. Fye. *Caldwell v. Warden, FCI Talledega*, 748 F.3d 1090, 1098 (11th Cir. 2014). Additionally, the summary judgment record demonstrated that Clark was tested for Hepatitis B, but his results were negative. Thus, he cannot raise a non-frivolous argument regarding the grant of summary judgment to Warden Perry because he was not entitled to an injunction requiring the Warden to provide medical care for a disease he does not have. *Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Cir. 2000). Likewise, there is no record evidence supporting Clark's claim that he suffers from bipolar disorder. The record shows that Clark completed several medical history forms while imprisoned, and he did not indicate a history of bipolar disorder until he filled out the 2018 medical history form, even though he stated in his complaint that he was diagnosed with bipolar disorder as a child. Clark did not present any evidence beyond this statement in his pleadings to establish that a genuine issue of material fact existed regarding his bipolar disorder. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, his unsupported allegation that he suffers from bipolar disorder was not enough to survive summary judgment against the Warden. *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005); *see also Scott v. Harris*, 550 U.S. 372, 380 (2007). Accordingly, we now find that the appeal is frivolous, DENY leave to proceed, and DISMISS the appeal. We DENY AS MOOT Clark's motion for appointment of counsel.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ROBERT L CLARK,	:	
	:	
Plaintiff,	:	
	:	No. 5:18-cv-00071-MTT-MSH
v.	:	
	:	
CHIQUITA A FYE, *et al.*,	:	
	:	
Defendants.	:	

ORDER AND RECOMMENDATION

Plaintiff, an inmate currently confined at Macon State Prison in Oglethorpe, Georgia, filed a complaint seeking relief under 42 U.S.C. § 1983. Pending before the Court are Plaintiff's motion for independent medical tests (ECF No. 63), motions to stay (ECF Nos. 75, 79, 84), and motions to compel (ECF Nos. 80, 81). For the reasons stated below, Plaintiff's motions are denied. Also pending is Defendants Fye and Perry's motion for summary judgment (ECF No. 65). The Court recommends that Defendants' motion be granted.

BACKGROUND

Plaintiff's claims arise from his medical care at facilities operated by the Georgia Department of Corrections ("GDOC"). He alleges he was diagnosed with Hepatitis B in 1995. Compl. 5. He contends he also suffers from bipolar disease. *Id.* According to Plaintiff, he informed Defendant Fye of his conditions upon his arrival at Macon State Prison ("MSP") on or about May 14, 2013. *Id.* He asserts prison officials have refused to

treat his conditions. *Id.* As a result, he states he suffers liver cirrhosis, numbness, pain, heart problems, anxiety attacks, and sleeplessness.

At this stage, Plaintiff's deliberate indifference to medical needs claim against Defendant Fye and his claim for injunctive relief against Defendants Fye and Perry[1] remain. Order 4-5, May 29, 2018, ECF No. 15; Order 6-13, Mar. 26, 2019, ECF No. 56. Defendants moved for summary judgment (ECF No. 65) on July 24, 2019. Plaintiff has failed to respond. This motion is ripe for review.

DISCUSSION

I. Plaintiff's Motions

A. Motion for Independent Medical Tests

On July 5, 2019, the Court received Plaintiff's motion for independent medical tests (ECF No. 63). Plaintiff requests "outside doctors" to perform "independent blood tests and a mental health test[ ]" on him. Mot. for Ind. Med. Tests 1, ECF No. 63. In support, he cites Rule 35 of the Federal Rules of Civil Procedure. *Id.* Plaintiff argues these tests are necessary because similar prior tests were performed by Quest—a company Plaintiff claims is "used by the defendant" and, therefore, is biased. *Id.* In other words, Plaintiff seeks to have the Court order a physical examination and have an expert witness appointed for him.

[1] The Court allowed Plaintiff's claim for equitable relief to proceed against MSP Warden McLauglin. Order 11-13, Mar. 26, 2019. According to Defendants, Defendant Perry is now the Warden of MSP. Mot. for Summ. J. 1 n.1, ECF No. 65; Perry Decl. ¶¶ 2-3, ECF No. 65-5. Therefore, under Rule 25(d) of the Federal Rules of Civil Procedure, Defendant Perry is substituted as a party. The Clerk is **DIRECTED** to amend the case caption accordingly.

Rule 35(a)(1) provides that a court may "order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner." Such an order "may be made only on motion for good cause." Fed. R. Civ. P. 35(a)(2)(A). "[G]ood cause for an examination exists when a person's physical or mental state cannot be evidenced without the assistance of expert medical testimony based on an examination." *Romano v. Interstate Express, Inc.*, No. 4:08–cv–121, 2009 WL 211142, at *1 (S.D. Ga. Jan. 28, 2009) (alteration in original). The good cause requirement is "not met by mere conclusory allegations of the pleadings—nor by mere relevance to the cause—but require[s] an affirmative showing by the movant . . . that good cause exists for order [the] examination." *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964). This is because "[t]he specific requirement of good cause would be meaningless if [it] could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed by Rule 26(b)." *Id.*

Here, Plaintiff has not established good cause for an examination under Rule 35. His motion rests on mere conclusory statements that his prior examinations were biased because the companies which performed the examinations were "used by defendants." Mot. for Ind. Med. Tests 1. Defendants respond that neither of the companies which previously examined Plaintiff are "affiliated with the Georgia Department of Corrections." Resp. to Pl.'s Mot. for Ind. Med. Tests 2, ECF No. 67. Further, although Plaintiff is proceeding IFP, he is required to fund the expenses of litigation—such as a medical evaluation—like any other litigant. *See Easley v. Dep't of Corr.*, 590 F. App'x 860, 868

(11th Cir. 2014). "Rule 35 . . . does not vest the court with authority to appoint an expert to examine a party wishing an examination of himself." *Brown v. United States*, 74 F. App'x. 611, 614 (7th Cir. 2003). "Rather, under appropriate circumstances, it [allows] the court to order a party to submit to a physical examination at the request of an opposing party." *Id.* Plaintiff "seeks to compel the government to bear the cost of and responsibility for hiring an expert witness to testify on his behalf [.]" *Id.* "[N]o civil litigant, even an indigent one, has a legal right to such aid." *Id.* Plaintiff's motion is thus denied.

B. Motions to Stay

On August 19, 2019, the Court received Plaintiff's first motion to stay further proceedings (ECF No. 75) in light of his notice of interlocutory appeal (ECF No. 69). In support, Plaintiff states he "has filed an appeal with the [Eleventh] Circuit Court concerning issues that could greatly change the course of this case and humbly ask[s] this Honorable Court to wait on the rulings by the higher court." Pl.'s First Mot. to Stay 1, ECF No. 75. On August 26, 2019, the Eleventh Circuit issued its mandate dismissing Plaintiff's appeal. Mandate 1, ECF No. 76. Because Plaintiff's motion to stay relied entirely on this appeal, his motion is denied.

On October 28, 2019, the Court received Plaintiff's second motion to stay proceedings (ECF No. 79). Plaintiff's motion to stay is predicated on his motions to compel (ECF Nos. 80, 81). He requests a stay for additional time to subpoena records, obtain declarations, and serve discovery requests. Pl.'s Second Mot. to Stay 1, ECF No. 79. Because the Court denies Plaintiff's motions to compel for the reasons stated below, his motion to stay is also denied.

On December 9, 2019, the Court received Plaintiff's motion to clarify request for stay (ECF No. 84). The Court construes this as a renewed motion to stay proceedings. Plaintiff's motion is predicated on his motion for independent medical tests (ECF No. 67), as he again requests a stay to permit medical tests to be conducted by an "outside agency." Mot. to Clarify Request for Stay 2, ECF No. 84. Because the Court denies his motion for independent medical tests for the reasons stated above, his motion to clarify request for stay, which the Court construes as a renewed motion to stay, is also denied.

C. Motions to Compel

On October 28, 2019, the Court received Plaintiff's first motion to compel (ECF No. 80). Plaintiff includes twenty-five interrogatories and asks the Court to compel Defendants to answer the interrogatories. *See generally* Pl.'s First Mot. to Compel 1-5, ECF No. 80. Under Local Rule 37 of the Middle District of Georgia Local Rules, "[m]otions to compel disclosure or discovery will not be considered unless they contain a statement certifying that movant has in good faith conferred or attempted to confer with the opposing party in an effort to secure the information without court action." Plaintiff failed to attach a statement indicating he attempted to confer with Defendant concerning these discovery requests. In his motion to stay, which the Court received the same day, Plaintiff states he "is also in the process of serving the defendant with a request for interrogatory questions." Pl.'s Second Mot. to Stay 1. Thus, it does not appear Plaintiff served these interrogatories upon Defendants or conferred in good faith before filing his motion to compel. His motion to compel is thus improper under the Court's Local Rules. Plaintiff's motion is denied.

On October 28, 2019, the Court also received Plaintiff's second motion to compel (ECF No. 81). Plaintiff states he sent subpoenas to several "agencies" seeking medical records. Pl.'s Second Mot. to Compel 1, ECF No. 81. Upon Plaintiff's request and in accordance with Rule 45(a)(3) of the Federal Rules of Civil Procedure, the Clerk signed and issued Plaintiff five blank subpoenas on August 2, 2019. *See* Mot. for Subpoenas 1, ECF No. 68; Text-only Order, Aug. 2, 2019, ECF No. 71. He alleges the "agencies have refused to honor a federal subpoena served by Plaintiff" because they have not responded to his requests. *Id.*

Plaintiff's motion to compel is denied for three reasons. First, Plaintiff fails to show he gave appropriate notice to Defendants before serving his subpoenas. Under Rule 45(a)(4), "[i]f the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party." Here, the Court received Plaintiff's proofs of service for his subpoenas (ECF Nos. 73, 74) on August 12 and August 19, 2019—eight days and fifteen days, respectively, after the Clerk issued the subpoenas. The record does not indicate, and Plaintiff does not allege, that he notified Defendants of his intent to serve the subpoenas before these dates. Therefore, Plaintiff has failed to comply with Rule 45(a)(4), and his motion to compel should be denied for his failure to give proper notice.

Second, Plaintiff failed to file proper proofs of service. Under Rule 45(b)(4), proof of service "requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the

server." Here, Plaintiff filed four proofs of service in two separate filings. *See* Proof of Service 1-3, Aug. 12, 2019, ECF No. 73; Proof of Service 1, Aug. 19, 2019, ECF No. 74. Two of Plaintiff's proofs of service are unsigned. Proof of Service 2-3, Aug. 12, 2019. Three omit the date that service was perfected. *Id.*; Proof of Service 1, Aug. 19, 2019. None indicate the manner of service. Pl.'s Second Mot. to Compel 1-2. By failing to sign the proofs of service and omitting the date and manner of service, Plaintiff did not comply with Rule 45(b)(4), and his motion to compel should be denied accordingly.

Third, even assuming Plaintiff properly noticed and served his subpoenas, he fails to show he conferred in good faith before filing his motion to compel. Rule 37(a)(1) of the Federal Rules of Civil Procedure provides that a motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Plaintiff failed to attach a statement indicating he attempted to confer with the subpoenaed non-parties concerning the issues raised in his motion to compel. His motion to compel is thus improper under Rule 37(a)(1). For these three reasons, Plaintiff's second motion to compel is denied.

II. Defendants' Motion for Summary Judgment

Defendants move for summary judgment arguing (1) Plaintiff's claims against Defendant Fye are time-barred by the statute of limitations, (2) Defendant Fye was not deliberately indifferent to Plaintiff's serious medical needs, (3) Defendant Fye is entitled to qualified immunity as to Plaintiff's claims against her in her individual capacity, and (4) Plaintiff is not entitled to equitable relief from Defendants Perry and Fye. Defs.' Br. in

Supp. of Mot. for Summ. J. 4-11, ECF No. 65-1. The Court recommends that Defendants' motion be granted as to the second, third, and fourth grounds.

A. Summary Judgment Standard

Summary judgment may be granted only "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). In determining whether a *genuine* dispute of *material* fact exists to defeat a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing summary judgment, drawing all justifiable inferences in the opposing party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A fact is *material* if it is relevant or necessary to the outcome of the suit. *Id.* at 248. A factual dispute is *genuine* if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. *Id.*

B. Undisputed Material Facts[2]

Plaintiff avers Oakland Children's Hospital in Oakland, California first diagnosed him with bipolar disease approximately forty-eight years ago. Pl.'s Dep. 20:21-21:18, ECF No. 65-3. He states the Cobb County, Georgia Health Department rediagnosed him with

[2] Plaintiff failed to comply with Local Rule 56 by not filing a specific response to each numbered paragraph of Defendants' statement of material facts. *See* M.D. Ga. L. R. 56 ("Response shall be made to each of the movant's numbered material facts."). The purpose of this rule is to "protect[] judicial resources by making the parties organize the evidence rather than leaving the burden upon the district judge." *Reese v. Herbert*, 527 F.3d 1253, 1268 (11th Cir. 2008) (quotation marks and citation omitted). The Court could simply deem admitted those "material facts contained in the [Defendants'] statement which are not specifically controverted by specific citation to particular parts of materials in the record." M.D. Ga. L. R. 56. Nevertheless, the Court has reviewed the entire record of the case, and if evidence in the record shows that a fact is disputed, the Court has drawn all justifiable inferences in his favor for purposes of summary judgment. *Maxwell v. Brennan*, No. 5:16-cv-572-MTT, 2018 WL 2072850, at *2 n.2 (M.D. Ga. May 3, 2018).

bipolar disease in 2000 and prescribed him Prozac to treat his condition. *Id.* at 21:19-22:02. He contends he took Prozac from 2000 until he was incarcerated in 2004. *Id.* at 22:01-22:06. Plaintiff alleges a plasma donation center in Las Vegas, Nevada first diagnosed him with Hepatitis B in 1994. *Id.* at 9:18-10:09. He contends a blood bank in Oakland, California rediagnosed him with Hepatitis B in 1996. *Id.* at 12:12-12:25. He never sought treatment for Hepatitis B before incarceration. *Id.* at 10:10-10:22.

Plaintiff first entered GDOC custody in 2004, when he was incarcerated at Georgia Diagnostic Classification Prison ("GDCP") in Jackson, Georgia. Pl.'s Dep. 10:13-10:16. On September 15, 2004, Plaintiff and a GDCP nurse completed a medical history form. Mot. for Summ. J. Attach. 11, at 1, ECF No. 65-11. The form instructs the inmate or nurse to "circle any of the following medical problems [the inmate] currently ha[s]," and lists bipolar disease and Hepatitis B as options. *Id.* Plaintiff indicated he suffered from "joint pain/stiffness," "muscle pain," and "numbness/tingling," but neither bipolar disease nor Hepatitis B. *Id.* On September 15, 2004, Plaintiff also underwent a mental health evaluation at GDCP. Mot. for Summ. J. Attach. 9, at 121-24, ECF No. 65-9. Plaintiff indicated he had no history of mental health conditions or treatment, and he stated he did not desire mental health treatment. *Id.* at 122-24. The psychiatrist recommended no further mental health evaluation. *Id.* at 121.

On September 16, 2004, Plaintiff underwent lab work at GDCP. *See* Mot. for Summ. J. Attach. 12, at 1, ECF No. 65-12. A person with Hepatitis B shows elevated levels of alanine aminotransferase ("ALT"), aspartate aminotransferase ("AST"), bilirubin, alkaline phosphatase, albumin, mean corpuscular volume ("MCV"), and mean corpuscular

hemoglobin ("MCH"). Fye Decl. ¶¶ 7-10, ECF No. 65-4. Plaintiff's lab work revealed normal levels of ALT, AST, bilirubin, alkaline phosphatase, and albumin, and low levels of MCV and MCH. Mot. for Summ. J. Attach. 12, at 1. On October 26, 2004, Plaintiff underwent lab work, which again revealed normal levels of ALT, AST, bilirubin, alkaline phosphatase, and albumin. Mot. for Summ. J. Attach. 13, at 1.

On or about September 18, 2007, Plaintiff was transferred to Ware State Prison ("WSP") in Waycross, Georgia. *See* Mot. for Summ. J. Attach. 7, at 164, ECF No. 65-7. Sometime between September 18, 2007, and August 24, 2010, Plaintiff and a WSP nurse completed a second medical history form. *See* Mot. for Summ. J. Attach. 11, at 2. Plaintiff did not indicate he suffered from bipolar disease or Hepatitis B. *Id.* Plaintiff and WSP nurses completed a third and fourth medical history form on August 24, 2010, and June 12, 2012, respectively. *Id.* at 3-4. Plaintiff did not indicate he suffered from bipolar disease or Hepatitis B on either form. *Id.*

Plaintiff states he was transferred to MSP on May 14, 2013. Pl.'s Dep. 11:05-17. Defendant Fye was the MSP medical director. Fye Decl. ¶ 3. Plaintiff alleges he informed Defendant Fye he had both Hepatits B and bipolar disease on the day he arrived at MSP. Pl.'s Dep. 11:08-21. Plaintiff underwent lab work on March 7, 2016, March 30, 2016, September 2, 2016, September 21, 2016, March 30, 2017, July 5, 2017, September 23, 2017, and December 27, 2017. Mot. for Summ. J. Attach. 12, at 2-15. Each round of lab work revealed normal levels of ALT, AST, bilirubin, alkaline phosphatase, and albumin, and low levels of MCV and MCH. *Id.* On September 27, 2017, a CT scan of Plaintiff's abdomen revealed a normal liver with "[n]o enhancing hepatic lesions." Mot. for Summ.

J. Attach. 14, at 1, ECF No. 65-14. Defendant Fye retired from MSP in October 2017. Fye Decl. ¶ 3. On February 16, 2018, Plaintiff and a MSP nurse completed a fifth medical history form. Mot. for Summ. J. Attach. 11, at 5. Plaintiff indicated he suffered from bipolar disease and Hepatitis B, among other conditions. *Id.* On the same day, he underwent lab work, which revealed normal levels of ALT, AST, bilirubin, alkaline phosphatase, and albumin, and low levels of MCV and MCH. Mot. for Summ. J. Attach. 12, at 16-17. Plaintiff signed and mailed his complaint four days later—on February 20, 2018. Compl. 6.

On August 8, 2018, Plaintiff was evaluated at the MSP clinic. Mot. for Summ. J. Attach. 9, at 83. The clinician noted that Plaintiff claimed to have suffered from Hepatitis B since 1995 and wrote question marks next to this note. *Id.* On November 19, 2018, Plaintiff underwent lab work and imaging. *Id.* at 88-91. His lab work revealed normal levels of ALT, AST, bilirubin, alkaline phosphatase, and albumin, and low levels of MCV and MCH. *Id.* at 90. On December 12, 2018, Plaintiff underwent testing for Hepatitis A, Hepatitis B, and the Hepatitis C Virus ("HCV"). Mot. for Summ. J. Attach. 15, at 1-3, ECF No. 65-15. The test revealed he never had Hepatitis A or B. *Id.* at 1-2. Plaintiff's HCV test was reactive, but the result indicated either (1) he is no longer infected and had resolved the infection, (2) the test was a false positive, or (3) he had not completely resolved the infection. *Id.* at 3.

On December 19, 2018, Plaintiff was evaluated at the MSP clinic concerning his return from an outside cardiology appointment. Mot. for Summ. J. Attach. 9, at 61. The evaluation form indicates Plaintiff has HCV, and the condition is controlled and stable. *Id.*

On May 22, 2019, Plaintiff underwent lab work and Hepatitis testing. *Id.* at 107-110. His lab work revealed normal levels of ALT, AST, bilirubin, alkaline phosphatase, and albumin, and low levels of MCV and MCH. *Id.* at 107-08. The Hepatitis tests could not identify Plaintiff's HCV genome, which "is usually due to low viral load, but could also be due to the presence of inhibitors or mutations in the viral genome." *Id.* at 110.

C. Statute of Limitations

Defendants argue they are entitled to summary judgment on Plaintiff's claims against Defendant Fye because Plaintiff filed his complaint after the applicable statute of limitations ("SOL") had expired. Defs.' Br. in Supp. of Mot. for Summ. J. 6. The Court recommends that Defendants' motion be denied on this ground.

1. Statute of Limitations Standard

It is well settled that the forum state's limitation period applicable to personal injury actions is applied to an action brought pursuant to § 1983. *Wallace v. Kato*, 549 U.S. 384, 386 (2007). The Georgia SOL for personal injury is two years. O.C.G.A. § 9-3-33; *see also Bell v. Metro. Atlanta Rapid Transit Auth.*, 521 F. App'x 862, 865 (11th Cir. 2013) ("The forum state's statute of limitations for personal injury actions applies to § 1983 claims, which in Georgia is two years."). A SOL begins to run when a cause of action accrues—in other words, when "the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Lovett v. Ray*, 327 F.3d 1181, 1182 (11th Cir. 2003) (internal quotation marks and citation omitted).

The time a plaintiff spends exhausting administrative remedies may toll the SOL. *See Leal v. Ga. Dep't of Corr.*, 254 F.3d 1276, 1280 (11th Cir. 2001) (vacating district court's dismissal of a § 1983 suit on SOL grounds because it was possible plaintiff's exhaustion of administrative remedies had tolled the limitations period); *Clark v. Fye*, 5:18-cv-71, 2019 WL 1354405 at *3-4 (M.D. Ga. Mar. 26, 2019) (denying a motion to dismiss on SOL grounds where defendants failed to show that the limitations period had not been tolled by plaintiff's pursuit of a prison grievance).

2. Defendants' Motion

Defendants argue Plaintiff's claims against Defendant Fye accrued in May 2013—when he had his only medical encounter with Defendant Fye. Defs.' Br. in Supp. of Mot. for Summ. J. 6. Plaintiff claims he has sought and been denied medical care since Defendant Fye evaluated him in 2013. Compl. 5 ("Prison officials have refused to treat me for Hepatitis B or for bi-polar disorder for going on [fifteen] years."). Plaintiff filed his complaint on February 20, 2018.[3] Compl. 6. Defendants contend his claims are barred by the two-year SOL because "[t]his case was filed almost five years after Plaintiff's one medical interaction with [Defendant] Fye." Defs.' Br. in Supp. of Mot. for Summ. J. 6.

Defendants previously raised this SOL defense in their motion to dismiss. *See* Defs.' Br. in Supp. of Mot. to Dismiss 2-4, ECF No. 39-1. The Court denied their motion

[3] Although the Court did not receive Plaintiff's complaint until February 26, 2018, Plaintiff signed the complaint on February 20, 2018. "Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *United States v. Glover*, 686 F.3d 1203, 1205 (11th Cir. 2012) (internal quotation marks omitted). "Unless there is evidence to the contrary, like prison logs or other records, we assume that a prisoner's motion was delivered to prison authorities on the day he signed it." *Id.*

on this ground, observing that Defendants effectively argued "the 2013 deprivation gave the Plaintiff notice of the Defendants' conduct, so the statute of limitations on any claims for those deprivations began running in 2013 (or not long thereafter), with the result that every claim for damages, whether it arose in 2013 or 2017, is time-barred." Order 6-7, Mar. 26, 2019, ECF No. 56. At the motion to dismiss stage, "Defendants cite[d] no authority for the proposition that a claim can accrue, run, and expire before the facts the claim is based on even occur." *Id.* at 7. In their motion for summary judgment, Defendants again fail to cite any authority supporting their argument that the alleged 2013 denial of medical care gave Plaintiff notice of future denials of medical care, which allegedly occurred during the two years preceding Plaintiff's filing of his complaint. Thus, they are not entitled to summary judgment for claims arising during this two-year time frame.

Additionally, Defendants are not entitled to summary judgment for Plaintiff's claims arising from denials of medical care which occurred before this two-year time frame because Plaintiff may be entitled to tolling of the SOL. Plaintiff alleges he filed multiple grievances concerning Defendants' denial of medical care, but Defendants refused to respond to his grievances. Compl. 3; Am. Compl. 1, ECF No. 12; Am. Claims for Relief 1, ECF No. 45. The SOL is tolled for the time Plaintiff spends exhausting administrative remedies. *Leal*, 254 F.3d at 1280. Because Plaintiff alleges he filed grievances concerning his claims against Defendants, and Defendants did not provide any evidence related to Plaintiff's grievance history, Defendants fail to show Plaintiff's claims are time-barred. *Lindley*, 515 F. App'x at 815. The Court recommends that Defendants' motion be denied on this ground.

D. Deliberate Indifference

Defendants argue they are entitled to summary judgment on Plaintiff's deliberate indifference claim because Defendant Fye was not deliberately indifferent to Plaintiff's serious medical needs. Defs.' Br. in Supp. of Mot. for Summ. J. 6-8. The Court recommends that Defendants' motion be granted on this ground.

1. Deliberate Indifference Standard

"The Eighth Amendment's prohibition against cruel and unusual punishments protects a prisoner from deliberate indifference to serious medical needs." *Kuhne v. Fla. Dep't of Corr.*, 745 F.3d 1091, 1094 (11th Cir. 2014) (internal quotation marks and citations omitted). "[T]o prevail on a deliberate indifference to serious medical need claim, [a plaintiff] must show: (1) a serious medical need; (2) the defendants' deliberate indifference to that need; and (3) causation between that indifference and the plaintiff's injury." *Mann v. Taser Int'l*, 588 F.3d 1291, 1306-07 (11th Cir. 2009). "A serious medical need is considered 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." *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003) (internal quotation marks and citation omitted). Deliberate indifference requires a showing of a "subjective knowledge of a risk of serious harm" and "disregard of that risk . . . by conduct that is more than mere negligence." *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004) (citation omitted).

Disagreement over the mode of treatment does not constitute deliberate indifference for the purposes of the Eighth Amendment. *See Hamm v. Dekalb Cty.*, 774 F. 2d 1527,

1575 (11th Cir. 1985) ("[A]n inmate's desire for a different mode of treatment does not rise to the level of deliberate indifference."). Negligence in treatment, even rising to the level of medical malpractice, is not deliberate indifference. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Instead, the treatment must be "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (internal quotation marks and citations omitted). "[C]onduct deliberately indifferent to serious medical needs has included: (1) grossly inadequate care; (2) a decision to take an easier but less efficacious course of treatment; and (3) medical care that is so cursory as to amount to no treatment at all." *Melton v. Abston*, 841 F.3d 1207, 1223 (11th Cir. 2016); *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986) ("Medical care so inappropriate as to evidence intentional maltreatment or refusal to provide essential care violates the eighth amendment.").

2. Defendants' Motion

Defendants argue Defendant Fye was not deliberately indifferent to Plaintiff's serious medical needs arising from his claimed conditions of Hepatitis B and bipolar disorder. Br. in Supp. of Mot. for Summ. J. 6-8. The Court agrees and recommends that Defendants' motion be granted on this ground.

i. Hepatitis B

First, Defendants argue Defendant Fye lacked subjective knowledge of Plaintiff's Hepatitis B and was not deliberately indifferent to the condition because Plaintiff did not claim to have Hepatitis B until after Defendant Fye retired. *Id.* at 7. Plaintiff alleges he was first diagnosed with Hepatitis B in 1995 at a plasma center in Las Vegas, Nevada. Pl.'s

Dep. 9:18-10:09. He contends that he told Defendant Fye he had Hepatitis B the day he arrived at MSP and that she refused to treat him. Pl.'s Dep. 11:05-12:11; Compl. 5.

The earliest medical record after Plaintiff's arrival at MSP and alleged conversation with Defendant Fye on May 14, 2013, documents an MSP clinic visit on June 10, 2013. Mot. for Summ. J. Attach. 8, at 55-56, ECF No. 65-8. The clinician evaluated Plaintiff for gastroesophageal reflux disease ("GERD"), and his notes do not mention Hepatitis B. *Id.* The first medical record to mention Hepatitis B since Plaintiff was incarcerated in 2004 is his fifth medical history form, which he completed on February 16, 2018—at least three months after Defendant Fye retired in October 2017. Mot. for Summ. J. Attach. 11, at 5; Fye Decl. ¶ 3. He completed four other medical history forms between 2004 and 2012, and he did not indicate he had Hepatitis B on any form. Mot. for Summ. J. Attach. 11, at 1-4. Other than Plaintiff's conclusory allegation that he informed Defendant Fye he had Hepatitis B, there is no evidence showing that he mentioned Hepatitis B before completing his February 16, 2018, medical history form. *See Morefield v. Brewton*, 442 F. App'x 425, 427 (11th Cir. 2011) (per curiam) (holding that the district court properly granted summary judgment to defendant prison officials on inmate plaintiff's deliberate indifference claim where plaintiff supported his claim with only "self-serving statements" and "conclusory allegations" concerning his medical condition). Because Plaintiff first alleged he suffered from Hepatitis B after Defendant Fye retired, she was not deliberately indifferent because she lacked "subjective knowledge of a risk of serious harm" to Plaintiff arising from a Hepatitis B infection. *Brown*, 387 F.3d at 1351 (citation omitted).

Second, Defendants argue Defendant Fye lacked subjective knowledge and was not deliberately indifferent to Plaintiff's Hepatitis B because Plaintiff never had Hepatitis B. Br. in Supp. of Mot. for Summ. J. 7 ("It cannot possibly be deliberate indifference to not treat someone for a medical condition they do not have . . . ."). Plaintiff contends that he was diagnosed with Hepatitis B in 1994, he informed Defendant Fye of his diagnosis, and she refused to treat his condition. Pl.'s Dep. 9:18-10:09, 11:05-12:25. On December 12, 2018, Plaintiff underwent Hepatitis testing, which revealed he never had Hepatitis B, although he may have had HCV at some point. Mot. for Summ. J. Attach. 15, at 1-3, ECF No. 65-15. Because Plaintiff never had Hepatitis B, Defendant Fye could not have had "subjective knowledge of a risk of serious harm" to Plaintiff arising from a Hepatitis B infection. *Brown*, 387 F.3d at 1351 (citation omitted).

Plaintiff may claim Defendant Fye was deliberately indifferent by failing to test Plaintiff for Hepatitis B or HCV between his arrival at MSP in May 2013 and her retirement in October 2017 because he informed Defendant Fye that he believed he had some form of Hepatitis. Even assuming Plaintiff believed he was diagnosed with some form of Hepatitis in 1994 and told Defendant Fye he suffered from some form of Hepatitis, Defendant Fye's actions do not constitute deliberate indifference. Since 2004, Plaintiff has had numerous encounters with GDOC medical staff to address conditions including allergies, hay fever, skin rashes, hammer toes, back pain, irritable bowel syndrome, GERD, and chronic pain syndrome. *See generally* Mot. for Summ. J. Attachs. 6-9. GDOC medical staff performed lab work to diagnose and treat these conditions. *See, e.g.,* Mot. for Summ. J. Attach. 12. According to Defendant Fye, a person with Hepatitis B shows elevated levels of ALT,

AST, bilirubin, alkaline phosphatase, albumin, MCV, and MCH. Fye Decl. ¶¶ 7-10. Plaintiff underwent nine rounds of lab work between his incarceration in 2004 and Defendant Fye's retirement in October 2017, and each revealed normal levels of ALT, AST, bilirubin, alkaline phosphatase, and albumin, and either normal or low levels of MCV and MCH. Mot. for Summ J. Attach. 12, at 1-13; Mot. for Summ. J. Attach. 13, at 1. Additionally, shortly before Defendant Fye retired, a September 27, 2017, CT scan revealed a normal liver with "[n]o enhancing hepatic lesions." Mot. for Summ. J. Attach. 14, at 1.

Therefore, even if Plaintiff told Defendant Fye he believed he had Hepatitis, none of his objective medical tests indicated he was infected. Accordingly, Defendant Fye's failure to test or treat Plaintiff for Hepatitis did not constitute treatment "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Harris*, 941 F.2d at 1505 (internal quotation marks and citations omitted). The Court recommends that Defendants' motion be granted on this ground as to Plaintiff's claims arising from his alleged Hepatitis B infection.

ii. Bipolar Disease

First, Defendants argue Defendant Fye lacked subjective knowledge of Plaintiff's bipolar disease and was not deliberately indifferent to the condition because Plaintiff did not claim to have bipolar disease until after Defendant Fye retired. *Id.* at 7. Plaintiff alleges he was diagnosed with bipolar disease as a child and rediagnosed at the Cobb County Health Department in 2000. Pl.'s Dep. 20:21-22:03. He contends that he told Defendant Fye he had bipolar disease on May 14, 2013—the day he arrived at MSP—and that she

refused to treat him. Pl.'s Dep. 11:05-12:02, 22:07-22:16; Compl. 5. When Plaintiff arrived at GDCP, he completed a mental health evaluation on September 15, 2004, and he indicated he had no history of mental health conditions or treatment. Mot. for Summ. J. Attach. 9, at 121-24. He also stated he did not desire mental health treatment, and the examining psychiatrist recommended no further mental health evaluation or treatment. *Id.* at 121. Additionally, Plaintiff completed four medical history forms before his arrival at MSP in 2013. Mot. for Summ. J. Attach. 11, at 1-4. He never indicated he suffered from bipolar disease. *Id.* Plaintiff's fifth medical history form is the only document which mentions bipolar disease. *Id.* at 5. Plaintiff completed this form on February 16, 2018—at least three months after Defendant Fye retired in October 2017. *Id.*; Fye Decl. ¶ 3.

The only other mental health records are three unrelated mental health referrals: (1) an October 19, 2009, referral concerning his unfair treatment in segregation, (2) a February 20, 2018, referral concerning a sexual allegation, and (3) a March 1, 2018, referral concerning his depression and suicidal thoughts resulting from his placement in lockdown. Mot. for Summ. J. Attach. 9, at 116-18. None of these documents mention bipolar disease. Other than Plaintiff's conclusory allegation that he informed Defendant Fye he had bipolar disease, there is no evidence showing that he mentioned this condition before completing his February 16, 2018, medical history form. *See Morefield*, 442 F. App'x at 427. Because Plaintiff first alleged he suffered from bipolar disease after Defendant Fye retired, she was not deliberately indifferent because she lacked "subjective knowledge of a risk of serious harm" to Plaintiff arising from this condition. *Brown*, 387 F.3d at 1351 (citation omitted).

Second, Defendants argue Defendant Fye was not deliberately indifferent to

Plaintiff's bipolar disorder because she was not was not authorized to diagnose or treat this condition and Plaintiff could have sought treatment from another prison official. Br. in Supp. of Mot. for Summ. J. 8. Fye Decl. ¶¶ 14-15. Defendant Fye avers she is "not a mental health professional" and "did not diagnose or treat inmates for mental health illnesses." Additionally, she states "[i]f [Plaintiff] thought he needed mental health treatment, he could and should have spoken with his counselor." *Id.* at 18.

GDOC Standard Operating Procedure ("SOP") VG35-0001 provides that "[a]ny staff member may initiate a referral for a routine mental health evaluation." Mot. for Summ. J. Attach. 16, at 3, ECF No. 65-16. Thus, under the SOP, Defendant Fye was permitted to refer Plaintiff for mental health treatment when he allegedly claimed to have bipolar disease. The SOP, however, also lists six "behaviors that should result in a [mental health] referral" and four behaviors "which must result in a [mental health] referral." *Id.* at 4. Neither lists an inmate's claim of mental illness as a basis for mandatory referral. *Id.* Therefore, even assuming Plaintiff told Defendant Fye he had bipolar disorder, her failure to refer him for a mental health evaluation did not constitute treatment "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Harris*, 941 F.2d at 1505 (internal quotation marks and citations omitted). The Court recommends that Defendants' motion be granted on this ground as to Plaintiff's claim arising from his alleged bipolar disease.

E. Qualified Immunity

Defendants argue they are entitled to summary judgment on Plaintiff's claims against Defendant Fye because she is entitled to qualified immunity. Defs.' Br. in Supp.

of Mot. for Summ. J. 8-9. In the alternative, the Court recommends that Defendants' motion be granted on this ground.

1. Qualified Immunity Standard

"[Q]ualified immunity completely protects government officials performing discretionary functions from suit in their individual capacities unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Gonzalez v. Reno*, 325 F.3d 1228, 1233 (11th Cir. 2003) (internal quotation marks and citation omitted). "The purpose of qualified immunity is to allow officials to carry out discretionary duties without the chilling fear of personal liability or harrassive litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating federal law." *McCullough v. Antolini*, 559 F.3d 1201, 1205 (11th Cir. 2009) (internal quotation marks and citation omitted).

"In order to receive qualified immunity, an official must first establish that he was acting within the scope of his discretionary authority when the alleged wrongful acts occurred." *Id.* Once the defendant shows that he was acting within his discretionary authority, the burden then shifts to the plaintiff to establish that qualified immunity does not apply. *Cottone v. Jenne*, 326 F.3d 1352,.1358 (11th Cir. 2004). To overcome a claim of qualified immunity, a plaintiff must "show[ ] (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Wood v. Moss*, 572 U.S. 744, 757 (2014) (internal quotation marks

and citation omitted).[4]

2. Defendant's Motion

Defendants argue Defendant Fye is entitled to qualified immunity for Plaintiff's deliberate indifference claim arising from her treatment of his alleged Hepatitis B and bipolar disease. Br. in Supp. of Mot. for Summ. J. 8-9. It is undisputed in this case that Defendant Fye acted within her discretionary authority in allegedly treating Plaintiff and serving as the medical director of MSP. Because that determination is made, the burden then shifts to Plaintiff to show that Defendant Fye is not entitled to qualified immunity. For the reasons stated above, the Court determines that Defendant Fye's treatment of Plaintiff does not constitute deliberate indifference to a serious medical need in violation of the Eighth Amendment or any other constitutional right. Therefore, Plaintiff has failed to meet that burden, and Defendant Fye is entitled to qualified immunity on Plaintiff's deliberate indifference claim. The Court recommends that Defendants' motion be granted on this ground in the alternative.

F. Equitable Relief

Defendants argue they are entitled to summary judgment on Plaintiff's claim for an injunction against Defendants Fye and Perry because Plaintiff is not entitled to equitable relief as a matter of law. Defs.' Br. in Supp. of Mot. for Summ. J. 9-11. Plaintiff argues he is entitled to an injunction to compel Defendants to provide him medical care for his alleged Hepatitis B and bipolar disease in a manner compliant with the Eighth Amendment.

[4] Courts should use their discretion in determining which prong of the qualified immunity inquiry to address first. *McCullough*, 559 F.3d at 1205.

Am. Compl. 1-3; Am. Claims for Relief 1-3. For the reasons stated above, the Court determines that Defendant Fye's conduct did not constitute deliberate indifference. Accordingly, Plaintiff is not entitled to an injunction against either Defendant Fye or Defendant Perry to remedy this conduct. The Court recommends that Defendants' motion be granted as to this ground.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for independent medical tests (ECF No. 63), motions to stay (ECF Nos. 75, 79, 84), and motions to compel (ECF Nos. 80, 81) are denied. The Court recommends that Defendants' motion for summary judgment (ECF No. 65) be granted. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, within fourteen (14) days after being served with a copy hereof. The District Judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO ORDERED and RECOMMENDED, this 13th day of January, 2020.

S/Stephen Hyles
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ROBERT L. CLARK, *

Plaintiff, *

v. Case No. 5:18-cv-71-MTT-MSH
*

CHIQUITA A. FYE, et al,

*

Defendants.

*

JUDGMENT

Pursuant to this Court's Order dated March 2, 2020, having accepted the recommendation of the United States Magistrate Judge, in its entirety, JUDGMENT is hereby entered dismissing this action.

This 2nd day of March, 2020.

David W. Bunt, Clerk

s/ Gail G. Sellers, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ROBERT L. CLARK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 5:18-cv-71 (MTT)**
	)	
	)	
CHIQUITA A. FYE, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

ORDER

United States Magistrate Judge Stephen Hyles recommends granting the Defendants' motion for summary judgment. Doc. 85. The Plaintiff filed an objection, so pursuant to 28 U.S.C. § 636(b)(1), the Court reviews de novo the portions of the Recommendation to which he objects.

In response to the Magistrate Judge's recommendation that the Court grant summary judgment on the Plaintiff's claim arising from his alleged bipolar disorder, the Plaintiff in his objection argues that in 2013 Dr. Fye discontinued his Elavil prescription, which had been prescribed to help him sleep and reduce his anxiety. Doc. 88 at 4. As the Recommendation makes clear, there is no evidence that the Plaintiff actually has a bipolar disorder, and there is no evidence that he claimed to have a bipolar disorder before February 2018, other than the Plaintiff's "conclusory" allegation that he told Dr. Fye in 2013 that he had bipolar disorder. Doc. 85 at 20. That the Plaintiff had a prescription to help him sleep and reduce anxiety would not have given Dr. Fye notice of his alleged bipolar disorder. Thus, in the face of no evidence that the Plaintiff has or

ever had a bipolar disorder and that he never claimed to have such a disorder until 2018, there stands only his conclusory allegation. Still, his alleged 2013 statement to Dr. Fye is some evidence that Dr. Fye was subjectively aware of his unsupported claim to have a bipolar disorder. But as the Recommendation makes clear, even if that were sufficient to create a fact issue regarding Dr. Fye's subjective awareness, her response or lack of response to that conclusory allegation does not, as a matter of law, constitute deliberate indifference. That Dr. Fye discontinued medication for sleep and anxiety relief does not change that.

Additionally, the Court finds that the Defendants' statute of limitations argument has merit. The Defendants argue that the Plaintiff's claims are time-barred because the only alleged refusal of medical care occurred in May 2013, the statute of limitations for deliberate indifference under 42 U.S.C. § 1983 is two years in Georgia, and the complaint was not filed until February 2018, almost five years later. Doc. 65-1 at 6. The Court agrees.

The Magistrate Judge rejected that argument for two reasons: first, that the Plaintiff alleged denials of medical care which occurred *after* May 2013; and second, that the Plaintiff's grievance history may have tolled the statute. The Court earlier found that those two arguments had sufficient merit at the motion to dismiss stage. Doc. 56 at 6-10. As to the first argument, the Court noted that absent tolling, any claims based on the alleged May 2013 denial were time-barred, but "construing his complaint liberally, [the Plaintiff] alleges [Defendant Fye] refused him medical care up until the time the complaint was filed." *Id.* at 8 (citing Docs. 1 at 5; 1-1 at 1). The pleadings cited by the Court referenced denials of treatment after May 2013 by unnamed prison medical staff,

which, liberally construed, the Court took to include Dr. Fye. But at the motion for summary judgment stage, the Plaintiff "may not rest upon the mere allegations or denials in its pleadings. Rather, its responses . . . must set forth specific facts showing that there is a genuine issue for trial." *Walker v. Darby*, 911 F.2d 1573, 1576–77 (11th Cir. 1990); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). In his deposition, the Plaintiff clarified that he only had one medical visit with Dr. Fye, in May 2013, and there is no evidence she refused him treatment after that. Doc. 65-3 at 11:8-12:11, 19:16-20:12. Although the Plaintiff also stated that Dr. Fye "wouldn't talk to me no more," that is not sufficiently specific to state a basis for a deliberate indifference claim. *Id.* at 20:10-12. The Court construed the complaint liberally at the motion to dismiss stage. But after further narrowing the issues through discovery and the Defendants' motion, it is clear that there is not sufficient evidence for a reasonable jury to find that Dr. Fye denied the Plaintiff medical care after May 2013.

The second ground for the Court's rejection of the Defendants' statute of limitations argument at the motion to dismiss stage was tolling. Doc. 56 at 8; *see Lindley v. City of Birmingham, Ala.*, 515 F. App'x 813, 815 (11th Cir. 2013) ("[a]t the motion-to-dismiss stage, a complaint may be dismissed on the basis of a statute-of-limitations defense only if it appears beyond a doubt that Plaintiff[] can prove no set of facts that toll the statute." (quotation marks and citation omitted)). The Court found that the possibility of tolling precluded granting the motion for two reasons: mental incapacity and exhaustion of administrative remedies. The Court noted that "the standard for *alleging* mental incapacity so as to invoke the tolling provision for mental incapacity and withstand a motion to dismiss is not so onerous." Doc. 56 at 9-10 (emphasis added)

(quoting *Meyer v. Gwinnett County*, 636 F. Appx. 487 (11th Cir. 2016)). But the Court in *Meyer* distinguished cases involving the Plaintiff's burden at the summary judgment stage, which is more onerous. *Meyer*, 636 F. App'x at 489–90 ("None of the cases relied on by the district court and the appellees are to the contrary because they all concern a plaintiff's ultimate burden of proof on appeal from summary judgment, not the sufficiency of allegations in the face of a motion to dismiss. *See Martin [v. Herrington Mill, LP],* 730 S.E.2d at 165–67; *Anglin v. Harris,* 244 Ga.App. 140, 534 S.E.2d 874, 875 (2000); *Carter v. Glenn,* 243 Ga.App. 544, 533 S.E.2d 109, 111–12 (2000); *Charter Peachford Behavioral Health Sys., Inc. *490 v. Kohout,* 233 Ga.App. 452, 504 S.E.2d 514, 519 (1998)."). Now that the record has been developed, it is clear there is no evidence of mental illness or disease, much less evidence the Plaintiff has "'such unsoundness of mind . . . as to incapacitate [him] from managing the ordinary business of life.'" *Meyer*, 636 F. App'x at 489 (quoting *Martin*, 316 Ga. App. at 698, 730 S.E.2d at 166).

As to grievances, the Court, liberally construing the Plaintiff's allegations, earlier concluded that the Plaintiff's grievances may have tolled the statute of limitations. *See Leal v. Georgia Dep't of Corr.*, 254 F.3d 1276, 1280 (11th Cir. 2001) ("Because the statute of limitations may have been tolled on account of [the Plaintiff's] exhaustion of administrative remedies, it does not appear beyond a doubt from the complaint itself that [the Plaintiff] can prove no set of facts which would avoid a statute of limitations bar."). But now Dr. Fye has moved for summary judgment on that issue, and the Plaintiff has failed to respond with specific facts, or any facts for that matter, to support an argument for tolling. Based on the two-year statute of limitations, in light of the

Plaintiff's failure to produce evidence supporting tolling or even to argue tolling at the summary judgment stage, the Court finds that the statute of limitations bars the May 2013 claims.

For those reasons, the Court finds the Defendants' statute of limitations defense is meritorious. As modified, the Court accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge. The Recommendation (Doc. 85) is **ADOPTED as modified** and made the Order of the Court. Accordingly, the Defendants' motion for summary judgment (Doc. 65) is **GRANTED**, and the Plaintiff's claims are **DISMISSED** with prejudice.

SO ORDERED, this 2nd day of March, 2020.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT