FILED
United States Court of Appeals
Tenth Circuit

September 30, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT JW MCCLELAND,

Plaintiff - Appellant,

v.

RICK RAEMISCH; RENAE JORDAN; SUSAN TIONA; DEBORAH BORREGO; JOANNE MCGREW; DAYNA JOHNSON,

Defendants - Appellees.

No. 20-1390
(D.C. No. 1:18-CV-00233-PAB-NYW)
(D. Colo.)

ORDER AND JUDGMENT*

Before **McHUGH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Robert JW McCleland, a Colorado prisoner proceeding pro se, alleges that various employees of the Colorado Department of Corrections (CDOC) violated the Eighth Amendment when they delayed treating his hepatitis C infection for about two years. The district court granted summary judgment in favor of all defendants. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. BACKGROUND

McCleland contracted the hepatitis C virus (sometimes abbreviated "HCV") before his incarceration. HCV can cause liver cirrhosis, liver cancer, and ultimately liver failure, but only about 16% of infected persons develop symptoms this severe. Even among those persons, "[l]iver damage from HCV can progress slowly, taking up to two or three decades." *Vasquez v. Davis*, 882 F.3d 1270, 1272–73 (10th Cir. 2018).

McCleland entered the Colorado prison system in August 2011 and has been housed at CDOC's Buena Vista Correctional Complex since October 2015. Beginning in June 2016 and continuing for the next two years, McCleland visited or corresponded with numerous medical professionals at Buena Vista, complaining of abdominal cramping, bladder pain, painful urination, night sweats, severe itching, shortness of breath, general malaise, and various other symptoms. McCleland believed these were extrahepatic (non-liver) manifestations of HCV, so he requested antiviral therapy to eradicate HCV from his system.

At that time, CDOC's policy for hepatitis C antiviral therapy required an inmate to score higher than 0.7 on a blood test known as the aspartate aminotransferase to platelet ratio index (APRI), which roughly indicates the extent of liver scarring. Buena Vista nurses Deborah Borrego and Joanne McGrew checked McCleland's APRI at least three times between June 2016 in December 2017, but it never rose higher than 0.422, so they denied antiviral therapy each time he requested it.

McCleland grieved these outcomes. Borrego and Dayna Johnson (a Buena Vista healthcare administrator who never treated McCleland) denied these grievances based on CDOC policy. The policy acknowledged that HCV may be associated with extrahepatic conditions such as "hematologic disease," "autoimmune disorders," "renal disease," and "dermatologic conditions," but deemed them "beyond the scope of this standard." R. vol. I at 274.

On July 1, 2018, CDOC revised its hepatitis C treatment policy, lowering the APRI threshold to 0.5. Apparently McCleland had recently received a blood test, and it showed an APRI of 0.502. On July 5, Borrego called McCleland to the medical clinic to tell him that he now qualified for antiviral therapy. Borrego began administering the antiviral therapy in late July 2018 and McCleland completed the course of treatment about three months later. Lab tests in January 2019 showed that he was clear of HCV.

II. PROCEDURAL HISTORY

McCleland filed this pro se lawsuit in early 2018, about five months before the CDOC policy change that made him eligible for antiviral therapy. He accused Borrego, Johnson, and McGrew of being deliberately indifferent to his medical needs, in violation of the Eighth Amendment. McCleland also sued Rick Raemisch (CDOC's then-executive director), Renae Jordan (CDOC's then-director of clinical correctional services), and Susan Tiona (CDOC's then-chief medical officer). McCleland argued that these three were responsible for CDOC's policy of

conditioning antiviral therapy on the inmate's APRI score, regardless of extrahepatic manifestations.

As noted, McCleland began receiving antiviral therapy in July 2018 and he was confirmed to be free of the virus in January 2019, about a year after filing suit. The focus of the action thus shifted from whether the defendants should be ordered to administer antiviral therapy to whether the delay in administering that therapy caused an actionable injury. McCleland claims the delay led to chronic kidney disease, Sjogren's syndrome (an autoimmune disorder that often causes dry eyes and a dry mouth), and shortened lifespan.

Early in the lawsuit and as the case proceeded through discovery, McCleland filed three motions for appointment of counsel. Perhaps assuming that appointed counsel was the gateway to obtaining expert witnesses, each motion emphasized the need for expert medical testimony. A magistrate judge denied these motions. McCleland filed a Federal Rule of Civil Procedure 72(a) objection to the second denial (which the district court overruled), but he filed no objection to the other two.

After the third denial, McCleland moved under Federal Rule of Evidence 706 for appointment of "an independent expert witness" to establish defendants' deviation from the standard of care and the resulting damage to his kidneys. Supp. R. at 35, 36–37. He named four expert witnesses he had written to (apparently to solicit their services), but stated he "ha[d] not heard from any of them." Supp. R. at 35.

The magistrate judge denied McCleland's Rule 706 motion, concluding that he was not seeking an independent expert to assist the court, but rather an expert to

support his interpretation of the evidence. The magistrate judge also found no mechanism under Rule 706 or elsewhere for paying such an expert's fees on McCleland's behalf. McCleland did not file a Rule 72(a) objection to this order.

McCleland then filed a fourth motion for appointment of counsel, pointing out that defendants were currently preparing their expert disclosures and that he needed expert testimony to counter what defendants' experts would likely assert. The magistrate judge construed this as a motion to reconsider her denial of McCleland's third motion for counsel and denied it, finding no new circumstances that would merit reconsideration.

Eventually defendants moved for summary judgment, with heavy reliance on expert declarations, particularly from Tiona (CDOC's former chief medical officer). In her opinion, the community standard of care for HCV infections has been evolving based on new research and new treatment, but CDOC's treatment policy has always adhered to that standard. As for extrahepatic manifestations, she asserted that "[n]o studies have proven that HCV causes specific extra-hepatic disease; at best, there is association, but no established causation." R. vol. I at 477, ¶ 10.

Defendants also relied on an expert declaration from CDOC's current chief medical officer (not a party here), who opined that various laboratory tests conducted on McCleland were mostly inconclusive or unremarkable for the conditions and diseases that McCleland believes were caused by the delay in his treatment. The expert acknowledged, however, that a nephrologist diagnosed McCleland with chronic kidney disease "of unknown etiology" in October 2019, months after

McCleland completed antiviral therapy. *Id.* at 386, ¶ 34; *see also id.* at 428.

McCleland responded by submitting medical literature that, at least as of 2019, expressed more confidence than defendants' experts about a causal relationship between HCV and diseases such as "[a]utoimmune disorders" and "[r]enal disease." *Id.* at 675. McCleland obtained this literature mostly from a website referenced in the 2015 version of CDOC's hepatitis C guidelines. (The versions in effect when McCleland sought care do not reference that website.) McCleland also attached two expert declarations filed in other lawsuits. These declarations assert that, at least as of 2017 or 2018, antiviral treatment was the standard of care for all chronic HCV patients, regardless of the degree of liver scarring.

The district court referred the summary judgment motions to the magistrate judge. In her recommendation, the magistrate judge found that she could not consider McCleland's medical literature because he offered no expert competent to interpret it and he did not possess the expertise himself. As for expert declarations from other lawsuits, the magistrate judge stated she could take judicial notice of their existence but could not consider them for the truth of the matters asserted. Thus, given McCleland's lack of medical evidence, she deemed defendants' evidence undisputed on the threshold question of whether the delay in receiving antiviral therapy caused any objectively sufficiently serious injury. The magistrate judge also recommended, alternatively, that McCleland could not carry his burden to show that defendants were subjectively aware of and disregarded the risks of not treating him sooner. For these reasons, the magistrate judge recommended summary judgment in

defendants' favor.

McCleland filed a timely Rule 72(b)(2) objection, contesting the magistrate judge's analysis point by point and generally arguing that his lack of expert evidence should not be held against him when he repeatedly moved for and was denied appointment of counsel and an expert. In its order resolving the objection, the district court stated that the issues of appointing counsel and an expert were "not properly before the Court" because McCleland never filed a Rule 72(a) objection to the order denying appointment of an expert and the court had already overruled an objection to an order denying appointment of counsel. R. vol. I at 931. But, "for purposes of completeness," the district court chose to "address[] plaintiff's expert-based objection" on the merits. *Id.*

On this issue, the district court found that it needed no independent expert to help it understand the evidence because defendants had submitted expert testimony "explaining plaintiff's medical records, his medical conditions, and his course of treatment." *Id.* at 932. As for McCleland's argument "that he needs an expert witness to rebut the defendants' arguments concerning the adequacy of his care, 'it cannot follow that a court must therefore appoint an expert under Rule 706 whenever there are allegations of medical malpractice.'" *Id.* (quoting *Rachel v. Troutt*, 820 F.3d 390, 398 (10th Cir. 2016)). The district court thus overruled McCleland's as-construed objection. It further adopted the magistrate judge's recommendation that McCleland could not prove he suffered any objectively sufficiently serious injury on account of the delay in receiving antiviral therapy. The district court

granted the defendants' summary judgment motions on that basis alone, finding that it did not need to address the magistrate judge's alternative recommendation about defendants' subjective awareness of McCleland's alleged need for care.

III. ANALYSIS

The district court held that without a medical expert, McCleland could not meet his burden on causation and therefore he had failed to identify a material issue of disputed fact. Given this, McCleland raises what he denominates as two issues:

- the magistrate judge erred when she denied his motions to appoint counsel and his Rule 706 motion; and
- the district court erred when it granted summary judgment based on defendants' expert testimony alone.

Under the circumstances, the second issue stands or falls with the first. Although McCleland argues that defendants' experts' opinions were flawed and therefore unworthy of being accepted as expert testimony, that is beside the point because he bears the burden of proof. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding that summary judgment must enter, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). If McCleland needs expert testimony to prove his claims—and he has never argued otherwise—then his failure to present expert causation testimony at summary judgment mandated judgment in defendants'

favor.[1] Our analysis below accordingly focuses on whether the district court should have appointed an expert, or should have appointed counsel who might have retained an expert.

A. Firm Waiver

McCleland filed no Rule 72(a) objection to the magistrate judge's orders denying appointment of counsel and an expert witness, except for the order denying his second motion for appointment of counsel. Defendants accordingly argue that McCleland has waived all counsel- and expert-related challenges other than the appointment-of-counsel question as presented at the time of his second motion.

"Under the firm waiver rule, a party who fails to make a timely objection to the magistrate judge's ruling waives appellate review of both factual and legal questions." *Sinclair Wyo. Refin. Co. v. A & B Builders, Ltd.*, 989 F.3d 747, 781 n.23 (10th Cir. 2021) (internal quotation marks and brackets omitted). We may apply the firm waiver rule even if a district court *sua sponte* reexamines a magistrate judge's order, *see Vega v. Suthers*, 195 F.3d 573, 579–80 (10th Cir. 1999), as the district

[1] In the Summary of Argument section of his brief, McCleland asserts, without elaboration, that his medical literature was judicially noticeable. *See* Aplt. Opening Br. at 3. "[S]tray sentences like these are insufficient to present an argument," *Eizember v. Trammell*, 803 F.3d 1129, 1141 (10th Cir. 2015), so we do not address this contention further. In a similar vein, McCleland argues that, "[t]hrough questioning, [the] medical literature could have been authenticated at trial, or during depositions." Aplt. Opening Br. at 6. Presumably he means through questioning of defendants' experts. Even if true (and we express no opinion on that), he does not explain how the relevant literature could be admitted for the truth of the matters asserted in his case-in-chief. And without this evidence as part of his case-in-chief, his claim fails. *See Celotex*, 477 U.S. at 323 (equating the summary-judgment and directed-verdict standards).

court did here with the magistrate judge's Rule 706 order.

But firm waiver is not jurisdictional, *see Sinclair*, 989 F.3d at 781–83, and "does not apply . . . when . . . a *pro se* litigant has not been informed of the time period for objecting and the consequences of failing to object," *Morales-Fernandez v. INS*, 418 F.3d 1116, 1119 (10th Cir. 2005). McCleland is pro se and none of the magistrate judge's relevant orders contained the necessary warning. We therefore reject defendants' firm-waiver assertion and turn to the merits of McCleland's arguments.

B. Appointment of an Expert Witness

We address the expert-witness question first because the analysis informs the appointed-counsel question.

Rule 706(a) states, "On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed . . . ." We review Rule 706 rulings for abuse of discretion. *Rachel*, 820 F.3d at 397.

The details of Rule 706 make clear that an appointed expert's role is to assist the court, not the parties. *See id.* 706(b) ("The court [*i.e.*, not a party] must inform the expert of the expert's duties."); *id.* 706(b)(1)–(2) ("The expert . . . must advise the parties of any findings the expert makes . . . [and] may be deposed by any party . . . ."); *id.* 706(e) ("This rule does not limit a party in calling its own experts."). Here, however, McCleland asked the district court to appoint an expert to testify about "the standard of medical care for the treatment of hepatitis C infection," and "that the defendants deviated from it, [causing] damage to [his] kidneys." Supp. R.

at 36–37. The district court did not abuse its discretion in finding that this was an inappropriate use of Rule 706.

In addition, McCleland does not address the problem of compensating the expert. In civil cases such as this, the rule requires the parties to pay the appointed expert's fee "in the proportion and at the time that the court directs—and the compensation is then charged like other costs." Fed. R. Evid. 706(c)(2). The district court permitted McCleland to bring his suit *in forma pauperis*, so this rule would effectively require the district court to apportion the entire expert's fee to defendants. The district court did not abuse its discretion in concluding that this case was not so extraordinary that it justified requiring one party to pay an expert to advocate the opposing party's position. Nor has McCleland given us any reason to reject the longstanding consensus that the court itself may not pay an *in forma pauperis* plaintiff's witness fees. *See Malik v. Lavalley*, 994 F.2d 90, 90 (2d Cir. 1993) (per curiam) (citing and agreeing with decisions on this issue from the First, Third, Sixth, Seventh, Eighth, and Ninth Circuits).

McCleland cites *Spann v. Roper*, 453 F.3d 1007, 1009 (8th Cir. 2006) (per curiam), which deemed it "incongruous that the district court denied [the prisoner-plaintiff's] motion for an expert witness and then granted summary judgment in part based on [his] failure to provide verifying medical evidence that the delay had detrimental effects." *Spann* does not provide any details about the plaintiff's motion, so we cannot say whether we agree with *Spann*'s reasoning as

Dempsey, 869 F.2d 543, 547 (10th Cir. 1989), but "[t]he court may request an attorney to represent any person unable to afford counsel," 28 U.S.C. § 1915(e)(1).[3] "[T]he factors to be considered in deciding whether to appoint counsel[] includ[e] the merits of the litigant's claims, the nature of the factual issues raised in the claims, the litigant's ability to present his claims, and the complexity of the legal issues raised by the claims." *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995). "We review the denial of appointment of counsel in a civil case for an abuse of discretion," *id.*, although abuse of discretion in this context is even more deferential than usual: "Only in those extreme cases where the lack of counsel results in fundamental unfairness will the district court's decision be overturned," *McCarthy v. Weinberg*, 753 F.2d 836, 839 (10th Cir. 1985).

Momentarily setting aside the question of whether appointed counsel was the gateway to obtaining an expert witness, we see no abuse of discretion. McCleland's filings in the district court and on appeal show he is a capable pro se litigant. He understands court procedure, writes cogently and concisely, and he knows how to find relevant cases and other authorities.

McCleland asserts, nonetheless, that "[o]ther courts have held that taking depositions, witness examinations, and applying the rules of evidence [are] needs [justifying] the appointment of counsel." Aplt. Opening Br. at 4 (citing extra-circuit cases). But these considerations mostly relate to trial skills. When McCleland

[3] Thus, when we refer to appointing counsel, we really refer to a request that an attorney take the case *pro bono*.

moved for appointment of counsel, the magistrate judge did not know if the case would go to trial, so we cannot say she abused her discretion by not taking the challenges of trial practice into account. *Cf. Perez v. Fenoglio*, 792 F.3d 768, 785 (7th Cir. 2015) (stating that the appointment-of-counsel calculus changes as the case reaches "advanced-stage litigation activities"). As for taking depositions (and the comparatively minimal need to apply the Rules of Evidence in that setting), the record convinces us that McCleland is intelligent and resourceful enough to discharge this task adequately.[4]

The question, therefore, is whether McCleland's need for an expert witness materially changes the analysis. His theory appears to be that his failure to retain an expert through his own efforts limited his "ability to present his claims," *Rucks*, 57 F.3d at 979, and appointed counsel would have had a better chance, *cf. Parham v. Johnson*, 126 F.3d 454, 460 (3d Cir. 1997) ("We recognize that it still may be difficult for appointed counsel to obtain and afford an expert; yet, we believe that appointed counsel will have a much better opportunity to obtain an expert than would an indigent prisoner. Consequently, this factor tips towards appointing counsel.").

As we have noted in the Rule 706 context, the district court does not have a duty to make up for a party's inability to find an expert. In this light, we find it was not "fundamental[ly] unfair[]," *McCarthy*, 753 F.2d at 839, to refuse to appoint

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[4] McCleland says he "was granted leave to depose the witnesses but he was never able to do so." Aplt. Opening Br. at 2. He offers no further explanation.

counsel merely to provide a better chance at finding an expert. Stated slightly differently, when all other factors weighed against granting McCleland's motions, it was within the district court's discretion to conclude that those factors were not outweighed by the need for a better opportunity to secure expert testimony—even if McCleland's case would fail but for expert testimony. We thus reject McCleland's argument that the district court should have appointed counsel.

IV. CONCLUSION

The district court did not abuse its discretion when it refused to appoint counsel or an expert. In turn, it properly granted summary judgment to defendants because McCleland lacked evidence necessary to prove the causation element of his case. For these reasons, we affirm the district court's judgment.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT JW MCCLELAND,

Plaintiff - Appellant,

v.

RICK RAEMISCH, et al.,

Defendants - Appellees.

No. 20-1390
(D.C. No. 1:18-CV-00233-PAB-NYW)
(D. Colo.)

ORDER

Before **McHUGH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.*

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

* Appellant also submitted an "Amendment to Petition for Rehearing."

Appendix

C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00233-PAB-NYW

ROBERT JW McCLELAND,

Plaintiff,

v.

RICK RAEMISCH,
RENAE JORDAN,
SUSAN TIONA,
DEBORAH BORREGO,
JOANNE McGREW, and
DAYNA JOHNSON,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AND ORDER

Magistrate Judge Nina Y. Wang

This matter comes before this court on the following three motions:

(1) Defendant Joanne McGrew's ("Defendant McGrew" or "Ms. McGrew") Motion for Summary Judgment, filed November 11, 2019, [#169];

(2) Defendants Rick Raemsich, Renae Jordan, Susan Tiona, Deborah Borrego, and Dayna Johnson's (collectively, the "CDOC Defendants") Motion for Summary Judgment, filed November 27, 2019, [#176]; and

(3) Plaintiff Robert JW McCleland's ("Plaintiff" or "Mr. McCleland") Motion to Defer Ruling on Summary Judgment, filed February 27, 2020, [#205].

The presiding judge, the Honorable Philip A. Brimmer, referred the Motions to the undersigned pursuant to 28 U.S.C. § 636(b) and the Memoranda dated November 12, 2019 [#170], January 2, 2020 [#193], and February 28, 2020 [#206]. This court concludes that oral argument

will not materially assist in the resolution of these matters. Having reviewed the Motions and associated briefing, applicable case law, and entire record, this court respectfully **RECOMMENDS** that Defendant McGrew's Motion for Summary Judgment be **GRANTED** and the CDOC Defendants' Motion for Summary Judgment be **GRANTED**; and this court **ORDERS** that the Motion to Defer Ruling on Summary Judgment is **DENIED.**[1]

PROCEDURAL BACKGROUND

This court has discussed the background of this matter in its prior Recommendation, *see* [#124], and therefore limits it discussion here to only the most salient facts. Mr. McCleland initiated this action by filing his pro se prisoner Complaint on January 29, 2018, alleging violations of his constitutional rights pursuant to 42 U.S.C. § 1983 based on Defendants' alleged deliberate indifference to his chronic Hepatitis-C. [#1]. Plaintiff has since, through both court order and Defendants' consent, filed several amended complaints, with his Fifth Amended Complaint becoming the operative pleading in this matter on February 28, 2019. *See* [#65].

The Fifth Amended Complaint asserts a single claim for relief under the Eighth Amendment, alleging that the CDOC's Clinical Standards and Procedures for Hepatitis-C Evaluation, Management, and Treatment (the "Policy") is unconstitutional because it intentionally delays and/or denies treatment for chronic Hepatitis-C, which resulted in Defendants intentionally denying/delaying Plaintiff treatment. *See generally* [#65]. This court interprets the Fifth Amended Complaint as asserting two distinct Eighth Amendment deliberate indifference claims pursuant to § 1983: (1) a challenge to the Policy against Defendants Raemisch, Jordan, and Tiona ("Claim 1")

[1] Plaintiff requests that this court defer ruling on the pending Motions for Summary Judgment until he has his appointment with a Rheumatologist about his Sjogren's Syndrome, because he believes his Sjogren's Syndrome is associated with his chronic Hepatitis-C and constitutes further evidence of Defendants' deliberate indifference. *See* [#205]. Given this court's recommendation that the Motions for Summary Judgment be granted, this court **DENIES** the Motion to Defer Ruling on Summary Judgment without further analysis.

and (2) a challenge to his medical care against Defendants McGrew, Tiona, Borrego, and Johnson ("Claim 2"). *See generally* [*id.*].[2] As relief, Mr. McCleland seeks compensatory and punitive damages against all Defendants.

On March 14, 2019, the CDOC Defendants filed their Answer to the Fifth Amended Complaint and Defendants Raemsich, Jordan, and Tiona filed a Motion to Dismiss. *See* [#66; #67]. This court recommended denying the Motion to Dismiss as to Plaintiff's challenges to the Policy but granting the Motion to Dismiss as to the deliberate indifference claim as to Defendant Tiona only based on the statute of limitations. *See* [#124 at 21]. Chief Judge Brimmer adopted the Recommendation on August 13, 2019. *See* [#139]. Accordingly, the Parties proceeded through discovery as to Plaintiff's remaining claims.

On November 11, 2019, Defendant McGrew filed her Motion for Summary Judgment. *See* [#169]. Plaintiff has since responded, and Defendant McGrew replied. *See* [#183; #188]. After receiving extensions of time, the CDOC Defendants filed their Motion for Summary Judgment on November 26, 2019. *See* [#176]. Plaintiff has since responded, and the CDOC Defendants replied. *See* [#197; #201]. The Motions for Summary Judge are now ripe for recommendation.

LEGAL STANDARDS

I. Rule 56 of the Federal Rules of Civil Procedure

Pursuant to Rule 56, summary judgment is warranted "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."

[2] In its Recommendation on Defendants Raemisch, Jordan, and Tiona's Motion to Dismiss, this court interpreted the Fifth Amended Complaint as also asserting a facial challenge to the Policy. *See* [#124 at 5]. Upon further review, however, this court interprets the Fifth Amended Complaint as asserting only an as-applied challenge to the Policy, i.e., Defendants Raemisch, Jorda, and Tiona are liable for promulgating an unconstitutional policy for treating Hepatitis-C and that this caused Mr. McCleland injuries. This is especially so given that Mr. McCleland seeks only compensatory and punitive damages for his alleged injuries.

Fed. R. Civ. P. 56(a). "A dispute is genuine if there is sufficient evidence so that a rational trier of fact could resolve the issue either way. A fact is material if under the substantive law it is essential to the proper disposition of the claim." *Crowe v. ADT Sec. Servs., Inc.*, 649 F.3d 1189, 1194 (10th Cir. 2011) (internal citations and quotation marks omitted). It is the movant's burden to demonstrate that no genuine dispute of material fact exists for trial, whereas the nonmovant must set forth specific facts establishing a genuine issue for trial. *See Nahno-Lopez v. Houser*, 625 F.3d 1279, 1283 (10th Cir. 2010). At all times, the court will "view the factual record and draw all reasonable inferences therefrom most favorably to the nonmovant." *Zia Shadows, L.L.C. v. City of Las Cruces*, 829 F.3d 1232, 1236 (10th Cir. 2016).

To satisfy his burden at summary judgment the nonmovant must point to competent summary judgment evidence creating a genuine dispute of material fact; conclusory statements based on speculation, conjecture, or subjective belief are insufficient. *See Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004); *see also* 10B Charles Alan Wright, et al., Federal Practice and Procedure § 2738 at 356 (3d ed. 1998) (explaining that the nonmovant cannot rely on "mere reargument of his case or a denial of an opponent's allegation" to defeat summary judgment). In considering the nonmovant's evidence, the court cannot and does not weigh the evidence or determine the credibility of witnesses. *See Fogarty v. Gallegos*, 523 F.3d 1147, 1165 (10th Cir. 2008). Further, the court may consider only admissible evidence, *see Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995), though the evidence need not be in a form that is admissible at trial, only the substance must be admissible at trial, *see Brown v. Perez*, 835 F.3d 1223, 1232 (10th Cir. 2016). Indeed, "[t]o determine whether genuine issues of material fact make a jury trial necessary, a court necessarily may consider only the evidence that would be available

to the jury." *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006).[3]

II. Qualified Immunity

The doctrine of qualified immunity protects government officials from individual liability for actions carried out while performing their duties so long as their conduct does not violate clearly established constitutional or statutory rights. *Washington v. Unified Gov't of Wyandotte Cty.*, 847 F.3d 1192, 1197 (10th Cir. 2017). To facilitate the efficient administration of public services, the doctrine functions to protect government officials performing discretionary actions and acts as a "shield 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To overcome an invocation of qualified immunity at summary judgment, although the court reviews "the evidence in the light most favorable to the nonmoving party, the record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden." *Felder ex rel. Smedley v. Malcom*, 755 F.3d 870, 877-78 (10th Cir. 2014) (internal quotations and citation omitted). That is, the plaintiff must establish that the defendants violated his constitutional rights and that those rights were clearly established. *See Cox v. Glanz*, 800 F.3d

[3] Mr. McCleland's exhibits in support of his Responses to the Motions for Summary Judgment include his medical records, large amounts of scientific literature, his rebuttals to the expert opinions of Defendant Tiona and Dr. Randolph O. Maul, and documents from separate lawsuits. *See, e.g.*, [#183 at 27-90; #184; #185; #197-1]. Plaintiff, however, fails to offer any witness competent to interpret his medical records or the scientific literature, and this court concludes Mr. McCleland fails to demonstrate the requisite expertise to interpret these documents himself or to offer rebuttal opinions to those of Defendant Tiona and Dr. Maul. *See* Fed. R. Evid. 701-703, 803(18); *cf. Gibson v. Vanjani*, No. 17-CV-01705-EMC, 2018 WL 4053458, at *9 & n.5 (N.D. Cal. Aug. 24, 2018) (sustaining the defendants' hearsay objections to the pro se plaintiff's use of internet medical articles regarding Hepatitis-C since the plaintiff was not competent to testify as an expert as to these articles). Further, while the court can take judicial notice of documents publicly filed in other lawsuits, the court may not consider them for the truth of the matter asserted. *See Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006).

1231, 1246 (10th Cir. 2015). Courts have discretion to consider the prongs in either order. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

III. Pro Se Litigants

In applying these legal principles, this court is mindful that Mr. McCleland proceeds pro se and is entitled to a liberal construction of his papers. *Smith v. Allbaugh*, 921 F.3d 1261, 1268 (10th Cir. 2019). But the court cannot and does not act as an advocate for a pro se party. *United States v. Griffith*, 928 F.3d 855, 864 n.1 (10th Cir. 2019). Nor does a party's pro se status exempt her from complying with the procedural rules that govern all civil actions filed in this District, namely, the Federal Rules of Civil Procedure and the Local Rules of Practice for the District of Colorado. *See Requena v. Roberts*, 893 F.3d 1195, 1205 (10th Cir. 2018); *Murray v. City of Tahlequah*, 312 F.3d 1196, 1199 n.2 (10th Cir. 2008).

MATERIAL FACTS

The court draws the following material facts from the record before it. These material facts are undisputed for purposes of the instant Motion.

1. Mr. McCleland, an inmate incarcerated within the Colorado Department of Corrections ("CDOC"), suffered from chronic Hepatitis-C and sought treatment from the CDOC upon his incarceration in 2011. *See* [#176-1 at p.1, ¶ 3 & p. 6; #176-2 at p. 2, ¶ 7; #197-1 at pp. 85-86, ¶¶ 2-18].

2. Roughly 80% of people infected with Hepatitis-C have ongoing viral detection and are considered to have chronic Hepatitis-C, but Hepatitis-C is a slowly progressive disease, with only approximately 20% of such persons eventually suffering severe complications, such as liver cirrhosis, liver cancer, bleeding esophageal varices, portal hypertension, and end-stage liver failure. *See* [#169-1 at ¶¶ 8-9; #169-6 at 6-8; #176-5 at p. 3, ¶¶ 7-9; #179 at 4-5; #197-1 at p. 207].

3. The prevalence of chronic Hepatitis-C is much higher among the incarcerated, and the CDOC estimated that there were 2,324 inmates diagnosed with Hepatitis-C within the CDOC on or about January 15, 2015. *See* [#197-1 at pp. 10-11].

4. To address and treat Hepatitis-C, the CDOC developed the Policy, which the CDOC claims serves as "a guide for minimal standards that must be maintained" and as a "boundar[y] beyond which clinical practice is not generally recognized as medically necessary." [#176-5 at p. 4, ¶ 14]; *see generally* [#169-6; #178; #179; #183 at 10-26; #197-1 at p. 209].

5. Each iteration of the Policy reflects the ongoing changes in the effective treatment of Hepatitis-C, including the availability of new medications, new or revised information, and differing perspectives on the correct medical standards of care, and though there may be several ways to treat Hepatitis-C, each iteration has met the appropriate community standard of care. *See* [#176-5 at pp. 3-4, ¶¶ 11-14].

6. Plaintiff claims Defendants Raemisch, as Executive Director of the CDOC and exercising his statutory responsibilities pursuant to Colo. Rev. Stat. § 17-1-103; Defendant Jordan, as the Director of Clinical Correctional Services for the CDOC and who signed the 2015, 2016, and 2017 versions of the Policy; and Defendant Tiona, as the Chief Medical Officer for the CDOC and who signed the 2015 and 2016 versions of the Policy, were responsible for promulgating the Policy. *See generally* [#65]; *see also* [#66 at p. 2, ¶¶ 1, 3-4; #169-6; #176-5 at p. 1, ¶ 1; #178; #183 at 10; #197-1 at pp. 10-11. 168-75, 197-204].

7. Defendants McGrew and Johnson were not involved in the creation or promulgation of the Policy, and neither had authority to prescribe treatment in contravention of the Policy. *See* [#169-1 at ¶ 17; #176-4 at p. 2, ¶ 6].

8. The Policy prioritizes the evaluation, surveillance, and treatment of chronic Hepatitis-C that manifests the most severe complications, such as liver cirrhosis, liver cancer, portal hypertension, and esophageal varices, and focuses on concomitant viruses that can accelerate liver damage, such as human immunodeficiency virus ("HIV") and Hepatitis-B. [#176-5 at p. 4, ¶ 15; #197-1 at p. 209]; *see generally* [#169-6; #178; #179; #183 at 10-26].

9. Though some literature may link chronic Hepatitis-C to extra-hepatic (non-liver) manifestations, such as cryoglobulinemia, autoimmune disorders, renal disease, chronic inflammation, and abnormal protein production, *see* [#169-6 at 8; #176-5 at p. 3, ¶ 10; #179 at 5], the Policy does not cover these extra-hepatic conditions because no appropriate tests have been conducted to test these theories and so inmates must otherwise be eligible under the Policy to receive treatment. *See* [#169-6 at 8; #178 at 8; #179 at 5; #176-5 at pp.4-5, ¶ 16].

10. Eligibility under the Policy depends on an inmate's aspartate aminotransferase to platelet ration index ("APRI") score, a cost-effective and reliable predictor of current and future liver fibrosis based on the ratio of the liver enzyme AST to blood platelets. *See* [#169-6 at 4; #178 at 4; #179 at 3; #183 at 13; #197-1 at p. 209].

11. Based on the best available literature at the time, the 2015, 2016, and 2017 versions of the Policy considered only inmates with an APRI score 0.7 or greater for treatment and referred these inmates to the Infectious Disease Committee; lower scores yielded yearly APRI score screenings and a possible referral to drug and alcohol education classes. *See* [#169-6 at 4-5, 9; #178 at 4-5, 9; #179 at 4-5, 9 #183 at 13-14, 18; #197-1 at p. 209].

12. The Infectious Disease Committee reviews the eligible inmates each quarter and prioritizes those inmates that have completed all prerequisites for treatment and those with advancing liver damage (i.e., a higher APRI score), those co-infected with HIV, those at higher

risk of rapid progression of Hepatitis-C, and those with decompensated cirrhosis. *See* [#169-6 at 12; #178 at 12; #179 at 7; #183 at 21].

13. Inmates that are eligible but not selected for treatment remain in the cohort of eligible inmates for the following quarter. *See* [#169-6 at 12; #178 at 12; #179 at 7; #183 at 21]; *see also* [#197-1 at p. 209, 211 (explaining that the CDOC estimated that 735 inmates currently qualified for treatment as of January 2017)].

14. Inmates selected for treatment receive a regiment of direct-acting antivirals ("DAAs"), surveillance labs, follow-up appointments, and post-treatment screenings for at least five years to ensure the inmate is negative for Hepatitis-C. *See* [#169-6 at 13-14; #178 at 13-14; #179 at 8; #183 at 22-24].

15. In or about October 2015, Mr. McCleland was transferred to Buena Vista Correctional Complex, where Defendant Borrego, a mid-level medical provider for the CDOC, reviewed Plaintiff's medical charts, ordered Hepatitis-A and B vaccinations, and noted that Mr. McCleland's chronic Hepatitis-C was "stable, without evidence of cirrhosis." [#176-1 at p. 1, ¶¶ 1-3 & pp. 6-7; #197-1 at p. 87, ¶¶ 22-24].

16. On June 10, 2016, Nurse Leah Oglesby, a non-party, reviewed Mr. McCleland's medical chart in response to Plaintiff's medical kite; noted that Mr. McCleland denied abnormal signs and symptoms and felt okay but wanted to know about a liver biopsy; and ordered a further chart review. *See* [#169-1 at ¶ 10; #169-4; #197-1 at p. 87, ¶ 24].

17. On June 29, 2016, Defendant McGrew, a Nurse Practitioner, conducted a further chart review for Mr. McCleland, ordered blood work to obtain Mr. McCleland's APRI score, and set a follow-up appointment per the Policy. *See* [#169-1 at ¶¶ 1, 11; #169-5].

18. Around July 7, 2016, Mr. McCleland's APRI score was 0.137. *See* [#169-1 at ¶ 12; #169-7; #176-1 at p. 2, ¶ 4].

19. On July 20, 2016, Defendant Borrego informed Plaintiff that he did not qualify for treatment under the Policy and noted that Plaintiff denied any complaints and appeared well. *See* [#169-1 at ¶ 13; #169-8; #176-1 at p. 2, ¶ 4 & p. 8; #197-1 at p. 87, ¶¶ 24-25].

20. In or around November 2016, Plaintiff sent a medical kite complaining of fatigue, night sweats, and general malaise. [#197-1 at p. 87, ¶ 26].

21. On December 1, 2016, Plaintiff submitted a kite requesting an update on his Hepatitis-C levels and requesting treatment, to which Defendant McGrew responded that Plaintiff's APRI score was 0.240 and thus he was not eligible for treatment under the Policy. *See* [#169-1 at ¶¶ 14-15; #169-10].

22. Between January 4 and 13, 2017, Mr. McCleland sent three grievances complaining of "profuse night sweating, stomach pain, loss of appetite, [] loss of sleep, [] loss of energy" and "very bad itching" and requesting Hepatitis-C treatment—Defendant Borrego denied the first two grievances and Defendant Johnson, the Health Services Administrator at Buena Vista Correctional Complex, denied the third. *See* [#176-1 at p. 2, ¶¶ 7-8 & pp.10-11; #176-4 at p. 2, ¶¶ 8-10 & p.4; #197-1 at p. 87, ¶¶ 27-31].

23. On February 3, 2017, Mr. McCleland had his final appointment with Defendant McGrew, at which he explained he was doing well, was not jaundiced, had no clay colored stools, had some abdominal cramping on and off for years but no overt abdominal pain, and again requested Hepatitis-C treatment; Defendant McGrew noted that Plaintiff's APRI score was 0.240 and ordered yearly APRI score screenings per the Policy. *See* [#169-1 at ¶ 16; #169-11; #197-1 at p. 88, ¶ 32].

24. On June 19, 2017, Defendant Borrego ordered blood work to obtain Mr. McCleland's APRI score; and then on July 3, 2017, in response to Mr. McCleland's medical kite, Defendant Borrego informed Mr. McCleland that his APRI score was 0.422, that he was not eligible for treatment under the Policy, and that she was referring Plaintiff for drug and alcohol education classes. *See* [#176-1 at pp. 2-3, ¶¶ 8-9 & pp. 12-21].

25. On August 25, 2017, Mr. McCleland denied abdominal pain and other symptoms and again requested Hepatitis-C treatment but was denied because his APRI score did not qualify under the Policy and was scheduled for his 2018 blood work. *See* [#176-2 at p. 3, ¶ 12 & pp. 12-16].

26. On or about December 19, 2017, Mr. McCleland filed an informal grievance against Defendant Raemisch, complaining that the Policy was unconstitutional and requesting DAAs, which Defendant Johnson denied, citing Plaintiff's 0.422 APRI score that did not qualify for treatment under the Policy. *See* [#197-1 at p. 88, ¶¶ 36-37 & pp. 112-13].

27. Between January and June 2018, Mr. McCleland regularly complained about pain in his groin/bladder area, painful and difficult urination, high amounts of protein in his urine, renal pain, shortness of breath, and confusion—all symptoms he believed associated with his Hepatitis-C. *See* [#197-1 at pp. 88-89, ¶¶ 38-43 & p. 114].

28. Despite his complaints, no medical evidence confirmed these beliefs, and instead largely revealed normal liver and renal functioning despite renal disease of an unknown etiology. *See* [#176-2 at pp. 3-6, ¶¶ 14-34 & pp. 17-50; #176-5 at p. 5, ¶¶ 18-21 & pp. 14-16].

29. On April 11, 2018, Defendant Borrego reviewed Plaintiff's medical chart, including his renal and bladder complaints, and ordered additional tests and an abdomen x-ray that revealed no acute findings. *See* [#176-1 at p. 3, ¶¶ 10-11 & pp. 22-27].

30. On July 1, 2018, the CDOC updated the Policy and lowered the requisite ARPI score to 0.5 or greater. *See* [#176-1 at p. 3, ¶¶ 12-13 & pp. 28-32].

31. On or about July 5, 2018, Defendant Borrego informed Mr. McCleland that he was now eligible for Hepatitis-C treatment because his APRI score was 0.502, and Defendant Borrego ordered additional labs and documented Plaintiff's complaints of dizziness and fatigue. [#176-1 at p. 3, ¶¶ 12-13 & pp. 28-32; #197-1 at p. 89, ¶ 44].

32. On July 31, 2018, Defendant Borrego started Plaintiff on DAAs. *See* [#176-1 at p. 4, ¶ 15 & pp. 33-37; #197-1 at p. 89, ¶ 47].

33. On August 13, 2018, Defendant Borrego reviewed Plaintiff's complaints of renal pain and ordered labs and scheduled an appointment with a Physician's Assistant to address Plaintiff's renal issues; Defendant Borrego had no further contact with Plaintiff, though she continued to order lab work and monitor the results. *See* [#176-1 at p. 4, ¶¶ 16-18 & pp. 38-41].

34. On or about October 24, 2018, Mr. McCleland completed his Hepatitis-C treatment, and lab work reveals he was negative for Hepatitis-C in September 2018 and confirmed clear of Hepatitis-C on or about January 30, 2019. *See* [*id.* at p. 4, ¶¶ 19-20 & pp. 42-44; #176-2 at p. 2, ¶ 9 & pp. 9-10; #197-1 at p. 89, ¶ 48].

35. Throughout 2019, Plaintiff underwent testing on his renal functionality, which revealed some fluctuations but normal functioning as of April 20, 2019, and there was no evidence that Plaintiff's Hepatitis-C caused his renal disease. [#176-2 at pp. 3-6, ¶¶ 16-34 & pp. 25-50; #176-5 at p. 5, ¶¶ 20-21 & pp. 15-16].

ANALYSIS

I. Eighth Amendment Deliberate Indifference Claims Under 42 U.S.C. § 1983

While the elements necessary to establish a § 1983 violation depend on the constitutional provision at issue, a plaintiff must first establish each defendants' personal participation in the constitutional violation. *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013) ("It is particularly important that plaintiffs make clear exactly *who* is alleged to have done *what* to *whom*, as distinguished from collective allegations." (emphasis in original) (brackets, ellipsis, and internal quotation marks omitted)). For supervisory liability, it is not enough that a defendant was merely a supervisor for purposes of personal participation, as § 1983 does not "authorize liability under a theory of respondeat superior." *Perry v. Durborow*, 892 F.3d 1116, 1121 (10th Cir. 2018) (internal quotation marks omitted). Rather, a plaintiff must establish an affirmative link between the supervisor and the constitutional violation, "which requires proof of three interrelated elements: (1) personal involvement; (2) causation; and (3) state of mind." *Keith v. Koerner*, 843 F.3d 833, 838 (10th Cir. 2016). Personal participation is a fundamental element of any § 1983 claim, because the defendants' liability and entitlement to qualified immunity hinges on an assessment of each defendant's conduct and culpability. *See Pompeo v. Bd. of Regents of the Univ. of New Mexico*, 852 F.3d 973, 982 (10th Cir. 2017); *A.M. v. Holmes*, 830 F.3d 1123, 1136 (10th Cir. 2016).

Mr. McCleland's claims arise under the Eighth Amendment and allege Defendants were deliberately indifferent to his serious medical need of chronic Hepatitis-C. "'Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.'" *Walker v. Mohiuddin*, 947 F.3d 1244, 1249 (10th Cir. 2020) (brackets omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). To prove deliberate indifference under Claims 1 and 2, Mr. McCleland must satisfy both an

objective component and a subjective component. *Requena*, 893 F.3d at 1215. That is, Mr. McCleland must show that Defendants were "subjectively aware" of an objectively serious medical need and "recklessly disregarded that risk." *Wilson v. Falk*, 877 F.3d 1204, 1209 (10th Cir. 2017) (brackets and internal quotation marks omitted).

With this legal framework in mind, this court considers whether Mr. McCleland makes the requisite showing for his deliberate indifference claims. That is, has Mr. McCleland demonstrated that each Defendant knew of a substantial risk of harm posed by his chronic Hepatitis-C and yet disregarded that risk? *See Vasquez v. Davis*, 882 F.3d 1270, 1275 (10th Cir. 2018) ("To recover as to a particular Defendant, Vasquez had to prove as to that Defendant both an objective and a subjective element of his claim."). Because each claim requires Mr. McCleland to establish both an objective and subjective component, the following analysis considers Claims 1 and 2 together within the two prongs of an Eighth Amendment deliberate indifference claim. For the following reasons, this court respectfully concludes that Mr. McCleland fails to satisfy his burden under either prong.

A. Objective Component

"The objective component of deliberate indifference is met if the 'harm suffered rises to a level "sufficiently serious" to be cognizable under the Cruel and Unusual Punishment Clause.'" *Burke v. Regalado*, 935 F.3d 960, 992 (10th Cir. 2019) (quoting *Mata v. Saiz*, 427 F.3d 745, 753 (10th Cir. 2005)). If a plaintiff alleges a denial of medical care, he must "produce objective evidence that the deprivation at issue was in fact sufficiently serious." *Estate of Booker v. Gomez*, 745 F.3d 405, 430 (10th Cir. 2014) (internal quotation marks omitted). "'A medical need is objectively serious if it is 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.'" *Clark v. Colbert*, 895 F.3d 1258, 1267 (10th Cir. 2018) (quoting *Martinez v. Garden*, 430 F.3d 1302, 1304 (10th Cir. 2005)). If "the claim involves a delay in treatment, [a plaintiff] ha[s] to show 'that the delay resulted in substantial harm.'" *Vasquez*, 882 F.3d at 1275 (quoting *Al-Turki v. Robinson*, 762 F.3d 1188, 1193 (10th Cir. 2014)). A showing of "lifelong handicap, permanent loss, or considerable pain" may satisfy the substantial harm requirement. *McCowan v. Morales*, 945 F.3d 1276, 1291 (10th Cir. 2019) (internal quotation marks omitted).

Defendant McGrew and the CDOC Defendants argue Mr. McCleland fails to satisfy the objective component of his deliberate indifference claims, because he cannot demonstrate that his chronic Hepatitis-C required immediate medical intervention or that the delay in treatment caused significant harm. *See* [#169 at 8-9; #176 at 17-19; #188 at 3-4; #201 at 6-8]. Mr. McCleland responds that his chronic Hepatitis-C became an objectively serious medical need as early as 2014 when his blood work revealed abnormal renal functioning, which left untreated developed into chronic renal disease. *See* [#183 at 2-3; #197 at 8]. He also argues he was diagnosed with the autoimmune disorder Sjogren's Syndrome due to the delay in treating his chronic Hepatitis-C. *See* [#183 at 3-4; #197 at 8-11]. According to Mr. McCleland, he displayed serious extra-hepatic symptoms that are causally connected to the delay in treating his chronic Hepatitis-C. *See* [#197 at 8-13]. I respectfully disagree.

There is no dispute that Plaintiff suffered from chronic Hepatitis-C upon his incarceration in 2011 or that only approximately 20% of people affected with chronic Hepatitis-C suffer severe complications, including liver cirrhosis. *See* Material Facts *supra*, at ¶¶ 1-2. Nor can the Parties dispute that chronic Hepatitis-C that manifests liver cirrhosis or similar complications likely constitutes an objectively serious medical need. *See, e.g., Rodriguez v. Wiley*, No. CIV.A08CV02505PABCBS, 2010 WL 1348017, at *9 (D. Colo. Feb. 25, 2010) ("It cannot be

disputed that hepatitis C is a serious disease."); *accord Hilton v. Wright*, 673 F.3d 120, 123 (2d Cir. 2012) (describing Hepatitis-C as a "slowly progressive but potentially fatal disease affecting the liver").

But persuasive authority from within this District and the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") suggests a diagnosis of chronic Hepatitis-C, without more, does not constitute an objectively serious medical need for purposes of an Eighth Amendment deliberate indifference claim. *See, e.g.*, *Whitington v. Moschetti*, 423 F. App'x 767, 773 (10th Cir. 2011) (concluding Hepatitis-C was not an objectively serious medical need because there was no evidence the plaintiff suffered substantial harm from any delay in treatment); *Vasquez v. Davis*, 226 F. Supp. 3d 1189, 1207 (D. Colo. 2016) (concluding the plaintiff's Hepatitis-C was not an objectively serious medical need before 2006, because there was no evidence he suffered serious complications), *aff'd in part, vacated in part on other grounds*, 882 F.3d 1270 (10th Cir. 2018); *Wright v. Hodge*, No. 12-CV-02214-CMA-MJW, 2015 WL 1408753, at **5-6 (D. Colo. Mar. 25, 2015) (concluding the plaintiff failed to present any evidence of substantial harm caused by the delay in receiving Hepatitis-C treatment). "Plaintiff must show (rather than merely allege) that he is actually at risk for developing complications from his Hepatitis C." *Roberts v. Raemisch*, No. 18-CV-2224-WJM-KLM, 2018 WL 4334014, at *4 (D. Colo. Sept. 11, 2018). I find Mr. McCleland fails to do so here.

Despite his chronic Hepatitis-C diagnosis, the undisputed evidence reveals:

- Plaintiff's chronic Hepatitis-C was "stable, without evidence of cirrhosis" in 2015;
- Plaintiff's APRI score was 0.137 on or about July 7, 2016;
- Plaintiff denied any complaints and appeared well on July 20, 2016;
- Plaintiff complained of fatigue, night sweats, and general malaise in November 2016;

- Plaintiff complained of, *inter alia*, night sweats and stomach pain in January 2017;
- Plaintiff stated he was doing well and had no overt stomach pain on February 3, 2017;
- Plaintiff's APRI score was 0.422 on July 3, 2017;
- Plaintiff denied abdominal pain and other symptoms on August 25, 2017;
- Plaintiff complained of bladder/groin and renal pain between January and June 2018;
- Plaintiff complained of renal and bladder pain in April 2018;
- Plaintiff's liver function was normal about May 30, 2018;
- Plaintiff's APRI score was 0.502 about July 5, 2018;
- Plaintiff complained of dizziness and fatigue around July 5, 2018;
- Plaintiff began treatment with DAAs around July 31, 2018;
- Plaintiff was negative for Hepatitis-C in or around September 2018;
- Plaintiff was cleared of Hepatitis-C as of January 2019;
- Plaintiff's kidney functionality fluctuated but was largely normal; and
- Plaintiff's medical evidence did not link his Hepatitis-C to his renal disease.

See Material Facts *supra*, at ¶¶ 15-35]. This evidence does not demonstrate a medical need "'so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Clark*, 895 F.3d at 1267 (quoting *Martinez*, 430 F.3d at 1304). Indeed, the record demonstrates that Mr. McCleland received consistent care with respect to his chronic Hepatitis-C. Further, Mr. McCleland's intermittent complaints of diffuse body and renal pain do not demonstrate substantial pain for purposes of the objective component of a deliberate indifference claim. *See Al-Turki*, 762 F.3d at 1193 (finding the objective component satisfied where the evidence established that the plaintiff's "pain was so severe that he collapsed, vomited, and believed he was dying," and which lasted for several hours without any medical attention).

Nor does this evidence demonstrate that Mr. McCleland suffered substantial harm from the delay in receiving treatment, as he produces no admissible evidence linking his chronic Hepatitis-C to his renal disease and/or his Sjogren's Syndrome or to his claimed emotional distress. *See Walters v. Wal-Mart Stores, Inc.*, 703 F.3d 1167, 1173 (10th Cir. 2013) ("While [the court] liberally construe[s] [Plaintiff's] pro se filings, [it] will not assume the role of advocate and make his arguments for him." (internal quotation marks omitted)). Rather, Mr. McCleland merely speculates that his renal disease and Sjogren's Syndrome are causally related to his Hepatitis-C based on his own subjective beliefs, which is insufficient.[4] *See Gee v. Pacheco*, 627 F.3d 1178, 1192 (10th Cir. 2010) (finding "no medical support for the existence of the disorders" and "no symptoms that would alert a lay person to the need for treatment," but rather "only a failure to treat self-diagnosed ailments, which is insufficient to establish an Eighth Amendment violation."); *Eldridge v. Osagie*, No. 15-CV-02744-CMA-KMT, 2017 WL 744023, at *2 (D. Colo. Feb. 27, 2017) (concluding the plaintiff's Hepatitis-C was not an objectively serious medical need because the plaintiff's "personal belief or self-diagnosed ailment, standing alone, cannot sustain an Eighth Amendment claim."). Indeed, his medical records indicate his renal disease is of an unknown etiology and there was "[n]o evidence of [Hepatitis-C] causing renal disease," [#176-2 at p. 48], and he attests that his Sjogren's Syndrome (not his Hepatitis-C) "has been causing the plethora of symptoms I have been suffering from," [#197-1 at p. 90, ¶ 55]. *Cf. Troutt v. Corr. Healthcare Mgmt., Inc.*, 248 F. App'x 910, 914 (10th Cir. 2007) ("To the extent that Mr. Troutt claims harm from contracting shingles due to . . . not being medically treated for Hepatitis C, it is undisputed that he contracted shingles before ever learning that he had Hepatitis C. Consequently, any denial

[4] The fact that Mr. McCleland is awaiting an appointment with a Rheumatologist regarding his Sjogren's Syndrome does not change that he fails to present any admissible evidence that his Hepatitis-C caused his Sjogren's Syndrome or that his Sjogren's Syndrome constitutes a long-life handicap, permanent loss, or considerable pain.

of care for Hepatitis C could not have resulted in Mr. Troutt's shingles." (brackets and internal citations and quotation marks omitted)).

Based on the foregoing, I conclude that Mr. McCleland fails to establish he suffered "lifelong handicap, permanent loss, or considerable pain" because of the delay in receiving Hepatitis-C treatment. *See McCowan*, 945 F.3d at 1291 (internal quotation marks omitted). He therefore fails to establish a necessary element of his deliberate indifference claim, which means his claim against Defendant McGrew fails as a matter of law and the CDOC Defendants enjoy qualified immunity. Thus, I respectfully **RECOMMEND** that Defendant McGrew's Motion for Summary Judgment and the CDOC Defendants' Motion for Summary Judgment be **GRANTED**.

B. Subjective Component

Notwithstanding this court's conclusion above, I consider whether Mr. McCleland satisfies the subjective component for Claims 1 and 2 for the sake of completeness. For the following reasons, I conclude that he does not.

"To satisfy the subjective component, the plaintiff must show that the defendant knew that the plaintiff faced a substantial risk of harm and disregarded that risk, by failing to take reasonable measures to abate it." *The Estate of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1112 (10th Cir. 2016) (internal quotation marks omitted). "The subjective prong is met if prison officials intentionally deny or delay access to medical care or intentionally interfere with the treatment once prescribed." *Redmond v. Crowther*, 882 F.3d 927, 940 (10th Cir. 2018) (brackets and internal quotation marks omitted). Further, a plaintiff may satisfy the subjective component if the need for treatment is so obvious that any delay or denial equates to recklessness; mere negligence, even if constituting medical malpractice, is not enough. *See Self v. Crum*, 439 F.3d 1227, 1231-33 (10th Cir. 2006). Nor do prison officials "act with deliberate indifference when they provide medical

treatment even if it is subpar or different from what the inmate wants." *Lamb v. Norwood*, 899 F.3d 1159, 1162 (10th Cir. 2018). Ultimately, to prove a culpable mindset, a plaintiff "must show a prison official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Walker*, 947 F.3d at 1249 (internal quotation marks omitted).

i. Defendants Raemisch, Jordan, and Tiona – Claim 1

Defendants Raemisch, Jordan, and Tiona argue that Mr. McCleland fails to satisfy the subjective component of his deliberate indifference claim against them, because he fails to establish their personal participation or their culpable state of mind. For the following reasons, I respectfully agree. And because establishing personal participation in the context of a supervisor defendant's alleged deliberate indifference requires an examination of Defendants Raemisch, Jordan, and Tiona's culpable state of mind, I consider the personal participation arguments in the context of the subjective component of Claim 1. *See Perry*, 892 F.3d at 1122 (explaining that a plaintiff may demonstrate a supervisor defendant's personal participation by establishing the supervisor-defendant acted with deliberate indifference).

As explained, supervisory-level defendants like Defendants Raemisch, Jordan, and Tiona cannot be liable under a theory of respondeat superior for the conduct of their subordinates, and instead are liable only for their own misconduct. *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013). Mr. McCleland not need establish direct participation so long as he can establish that Defendants Raemisch, Jordna, and Tiona "set in motion a series of events that [they] knew or reasonably should have known would cause others to deprive [Mr. McCleland] of [his] constitutional rights," such as "creat[ing], actively endors[ing], or implement[ing] a policy

which is constitutionally infirm." *Doe v. Woodard*, 912 F.3d 1278, 1290 (10th Cir. 2019) (internal quotation marks omitted) (quoting *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990); *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010)). Mr. McCleland must therefore establish: "(1) personal involvement; (2) causation; and (3) state of mind." *Keith*, 843 F.3d at 838.

To start, in viewing the evidence in a light most favorable to Mr. McCleland, it appears that Defendants Raemisch, Jordan, and Tiona were personally involved in the "creat[ion], promulgat[ion], implement[ion], or in some other way possesse[d] responsibility for the continued operation of" the Policy. *Compare Dodds*, 614 F.3d at 1199, 1203 *with* Material Facts *supra*, at ¶ 6. This court agrees, however, that Mr. McCleland fails to establish that the Policy caused any Eighth Amendment violation or that Defendants Raemisch, Jordan, and Tiona were consciously aware of the Policy's constitutional infirmity yet disregarded that risk. *See Woodard*, 912 F.3d at 1290.

Regarding causation, it is undisputed that the Policy's ARPI score requirement was the main reason Mr. McCleland remained ineligible for treatment for as long as he did, as the Policy does not provide immediate treatment based on extra-hepatic manifestations of chronic Hepatitis-C. *See generally* [#183 at 14, 17-19]. But the undisputed evidence does not establish that Mr. McCleland's chronic Hepatitis-C constituted an objectively serious medical need or that any delay in treatment caused him substantial harm. *See* Part I.A *supra*. This is because Mr. McCleland proffers no admissible evidence linking his Sjogren's Syndrome to his chronic Hepatitis-C (indeed, the literature provided seems to contradict his assertions, *e.g.*, [#201 at 7]), and the undisputed evidence refutes Mr. McCleland's claim that his renal disease is a product of his untreated Hepatitis-C. *See* Material Facts *supra*, at ¶¶ 28, 35. Thus, failure to establish a causal connection between the Policy and any constitutional violation undermines Plaintiff's claim

against Defendants Raemisch, Jordan, and Tiona. *See Poolaw v. Marcantel*, 565 F.3d 721, 732-33 (10th Cir. 2009) ("The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights.").

Relatedly, there is no evidence that the Policy is constitutionally infirm or that Defendants Raemisch, Jordan, and Tiona were aware of this risk and consciously disregarded it. Rather, it is undisputed that the Policy:

- reflects the ongoing changes in the effective treatment of Hepatitis-C;
- utilizes a reliable and cost-effective predicator of liver fibrosis (i.e., the APRI score);
- prioritizes the treatment of inmates with the most severe complications; and
- provides for yearly monitoring of chronic Hepatitis-C that does not warrant treatment.

See Material Fact *supra*, at ¶¶ 5, 8, 10-14. This evidence fails to satisfy the "stringent standard of fault" required for deliberate indifference claims against supervisory-level defendants and does not establish that Defendants Raemisch, Jordan, or Tiona "knowingly created a substantial risk of constitutional injury." *Schneider*, 717 F.3d at 769 (internal quotation marks omitted). Indeed, there is no evidence that Defendants Raemisch, Jordan, or Tiona treated Plaintiff or consulted with Defendants McGrew or Borrego who actually treated Plaintiff and were thus aware of his medical needs. *See Cox*, 800 F.3d at 1249-54 (finding no evidence of the supervisor defendant's culpable state of mind where there was no evidence of his subordinates' deliberate indifference).

Nor does this court find convincing Mr. McCleland's suggestions that the "CDOC limits the amount of funding it requests based upon the limited number of offenders 'qualified' for treatment under its very restrictive policy," and then uses a lack of funding as a justification for treating so few inmates. *See* [#197 at 15]. The evidence cited by Plaintiff does not support such

an assertion. *See* [#197-1 at pp. 10-11, 20-22]. Rather, it explains the increase in pharmaceutical purchases based on newly available DAAs used to treat Hepatitis-C, and there is no evidence to suggest that the CDOC uses funding as a determination for which inmates may be eligible for treatment under the Policy. *See* [*id.*]; *cf. Fields v. Corizon Health, Inc.*, 490 F. App'x 174, 185 (11th Cir. 2012) (noting that "cost is not a factor which can justify the lack of timely medical treatment for something as serious as [Hepatitis-C][.]").

Finally, while a plaintiff may demonstrate the conscious disregard of a substantial risk of harm where there is a pattern of tortious conduct or where the constitutional violation is plainly obvious, *see Schneider*, 717 F.3d at 770-71, such is not the case here. Any statements by Defendant Tiona acknowledging the seriousness of Hepatitis-C's severe complications and the CDOC's aspirations to eliminate inmate deaths due to Hepatitis-C complications, *see* [#197 at 15-17], suggests at the least that the CDOC took the risk seriously and implemented a plan to combat future risks. *Cf. duBois v. Payne Cty. Bd. of Cty. Comm'rs*, 543 F. App'x 841, 849 (10th Cir. 2013) ("[T]here is simply no evidence that any policy or custom of PCJ was the moving force behind, or caused or enabled, Peter's suicide. Rather, the Jail had policies and practices in place to provide adequate medical care for all inmates. Those policies were followed in Peter's case."). And Plaintiff fails to proffer any admissible evidence suggesting the Policy violates established medical guidelines or was deliberately indifferent to his serious medical needs. *Cf. Lewis v. N. Carolina Dep't of Pub. Safety*, No. 1:15-CV-284-FDW, 2018 WL 310142, at *10 (W.D.N.C. Jan. 4, 2018) ("Plaintiffs have also adequately alleged that Defendants are deliberately indifferent by enacting and enforcing policies and procedures that have delayed needed treatment [for their Hepatitis-C] based on non-medical reasons, and are purposefully requiring Plaintiffs to incur irreversible and severe health complications before considering them for treatment.").

Ultimately, Plaintiff's disagreement with the course of treatment prescribed by the Policy, without more, does not establish Defendants Raemisch, Jordan, or Tiona's conscious disregard of a substantial risk of harm for purposes of the subjective component of Claim 1. *See Lamb*, 899 F.3d at 1162 (explaining that neither subpar treatment nor disagreement with prescribed treatment constitutes deliberate indifference); *Callahan v. Poppell*, 471 F.3d 1155, 1160 (10th Cir. 2006) (stating that inmates do not have a constitutional right to a particularly prescribed course of treatment). Thus, these Defendants enjoy qualified immunity as to Claim 1, and this court respectfully **RECOMMENDS** that the CDOC Defendants' Motion for Summary Judgment be **GRANTED** in favor of Defendants Raemisch, Jordan, and Tiona.

ii. Defendant McGrew – Claim 2

Defendant McGrew argues that Mr. McCleland cannot satisfy the subjective component of his deliberate indifference claim against her, because he fails to provide any "evidence that plausibly suggests that [Defendant] McGrew consciously disregarded a serious risk to Mr. McCleland's health." [#169 at 11]; *see also* [#188 at 4]. Defendant McGrew contends her brief interactions with Mr. McCleland did not reveal any overt medical symptoms that would have suggested Defendant McGrew was aware of the need for medical treatment yet disregarded that risk. *See* [#169 at 11]. Moreover, Defendant McGrew did not have authority to override the Policy and prescribe treatment with DAAs before Mr. McCleland's APRI score surpassed the requisite threshold. *See* [*id.* at 12].

Plaintiff responds that Defendant McGrew was aware of his need for medical treatment because his blood work revealed renal dysfunction, which Defendant McGrew could infer was an extra-hepatic manifestation of his chronic Hepatitis-C that required treatment. *See* [#183 at 5-7]. Plaintiff further argues that even though Defendant McGrew could not recommend treatment with

DAAs because of Plaintiff's APRI score, she could have and should have treated and/or recommended treatment for his extra-hepatic manifestations. *See* [*id.* at 6-7]. According to Mr. McCleland, this conduct suggests Defendant McGrew was aware of a substantial risk of harm and then disregarded that risk. *See* [*id.* at 7-8]. I respectfully disagree.

The undisputed material facts reveal Mr. McCleland had limited encounters with Defendant McGrew. For instance, Defendant McGrew reviewed Plaintiff's charts and ordered blood work on June 29, 2016; she responded to Plaintiff's kite and informed him that his APRI score was 0.240 and he was not eligible for treatment on December 1, 2016; and she noted that Plaintiff explained that he was doing well, was not jaundiced, had no clay colored stools, had some abdominal cramping on and off for years but no overt abdominal pain, and informed Plaintiff that his APRI score was 0.240 and thus he was not eligible for treatment under the Policy and ordered yearly APRI score screening. *See* Material Facts *supra*, at ¶¶ 17, 21, 23. This evidence does not establish Defendant McGrew's conscious disregard of a substantial risk of harm. Again, Mr. McCleland relies on his renal dysfunction as a purported consequence of his untreated chronic Hepatitis-C. But he fails to provide any competent or admissible evidence linking his renal dysfunction to his chronic Hepatitis-C. *See* Material Facts *supra*, at ¶¶ 28, 35; *see also Walters*, 703 F.3d at 1173. Nor is there any evidence that Defendant McGrew knew of any link between Plaintiff's renal symptoms and his chronic Hepatitis-C, any risk posed by such a link, and still chose to disregard that risk.

Moreover, Plaintiff fails to proffer any admissible evidence that his medical records made clear to Defendant McGrew that his renal dysfunction was so severe as to warrant immediate medical assistance, such that Defendant McGrew's failure to act constitutes something more then mere negligence or malpractice. *See Self*, 439 F.3d at 1231-33. Indeed, it is undisputed that,

despite some fluctuations, Plaintiff retained largely normal renal functionality. *See* Material Facts *supra*, at ¶¶ 28, 35. And although the Policy acknowledges extra-hepatic manifestations of chronic Hepatitis-C, which may include renal disease, the Policy does not prescribe treatment for such conditions. *See id.* at ¶ 9. As discussed *supra* Part I.B.i., Mr. McCleland offers no admissible evidence to suggest the Policy was constitutionally infirm in this regard. Further, there is no evidence Defendant McGrew could prescribe DAAs in contravention of the Policy, or even if she did, that the Infections Disease Committee would then approve Plaintiff for treatment. *See Vasquez*, 226 F. Supp. 3d at 1206 ("Absent evidence from which a jury could conclude that a specific Defendant's actions at any particular point in time would have removed the barriers preventing Vasquez from obtaining HCV treatment, Vasquez's claim against that Defendant must fail.").

At bottom, Mr. McCleland argues Defendant McGrew should have done more or provided a different course of treatment, but this cannot satisfy the subjective component of his deliberate indifference claim. *See Gee*, 627 F.3d at 1192 ("Disagreement with a doctor's particular method of treatment, without more, does not rise to the level of an Eighth Amendment violation."). Accordingly, I respectfully **RECOMMEND** that Defendant McGrew's Motion for Summary Judgment be **GRANTED**.

iii. Defendant Borrego – Claim 2

The CDOC Defendants argue Mr. McCleland cannot establish Defendant Borrego's culpable state of mind, because the undisputed evidence reveals Defendant Borrego followed the Policy and provided adequate treatment for Plaintiff's chronic Hepatitis-C. *See* [#176 at 23-25; #201 at 11-12]. Plaintiff counters that Defendant Borrego was "aware of Mr. McCleland's abnormal immune response to the untreated [Hepatitis-C], the kidney dysfunction, and the risk of

further harm. Yet, she denied treatment for Mr. McCleland's [Hepatitis-C] based upon his APRI score." [#197 at 20]. He further avers that Defendant Borrego ignored Plaintiff's abnormal blood work, his kites and grievances, and his concerns at appointments. *See* [*id.*]. Despite ordering blood work, Plaintiff asserts Defendant Borrego denied treatment for his chronic Hepatitis-C and largely denied treatment for his extra-hepatic manifestations. *See* [*id.* at 20-22].

It is undisputed that Mr. McCleland had the longest treatment relationship with Defendant Borrego. This treatment relationship, however, does not demonstrate that Defendant Borrego consciously disregarded a substantial risk of harm to Mr. McCleland. Rather, the undisputed evidence reveals Defendant Borrego:

- provided Hepatitis-A and B vaccines and noted Plaintiff's Hepatitis-C was stable;
- informed Plaintiff he did not qualify for treatment with an APRI score of 0.137;
- denied two of Plaintiff's grievances on procedural grounds for requesting DAAs;
- routinely reviewed Plaintiff's charts and ordered blood work to monitor his APRI score;
- informed Plaintiff he did not qualify for treatment with an APRI score of 0.422;
- documented Plaintiff's complaints of renal pain and ordered an x-ray;
- informed Plaintiff he was eligible for treatment with an APRI score of 0.502;
- provided Plaintiff with DAAs; and
- referred Plaintiff to a Physician's Assistant to address his renal issues.

See Material Facts *supra*, at ¶¶ 15, 19, 22, 24, 29, 31, 33. Moreover, there is no evidence to suggest Defendant Borrego had the authority to prescribe treatment in contravention of the Policy.

Mr. McCleland fails to proffer any admissible evidence to refute these undisputed material facts, and he again relies on his subjective beliefs that his chronic Hepatitis-C caused his extra-hepatic manifestations for which he should have received treatment. This is insufficient to

establish that Defendant Borrego "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety"—*viz.* she was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [s]he . . . also dr[e]w the inference." *Walker*, 947 F.3d at 1249 (internal quotation marks omitted). Defendant Borrego provided medical treatment consistent with the Policy, and Plaintiff has failed to adduce admissible evidence that the Policy was constitutionally infirm. Nor is there any evidence suggesting Plaintiff's medical records clearly revealed medical needs that demanded immediate treatment.

At most, any inadequate treatment provided by Defendant Borrego amounts to mere negligence or even malpractice—neither of which is enough. *See Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003) ("Deliberate indifference requires more than a showing of simple or heightened negligence."). At the least (and the more likely reality), Plaintiff merely disagreed with Defendant Borrego's prescribed treatment, treatment consistent with the Policy, which does not amount to a constitutional violation. *See Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999) ("Moreover, a prisoner who merely disagrees with a diagnosis or a prescribed course of treatment does not state a constitutional violation."). Accordingly, I conclude Defendant Borrego enjoys qualified immunity as to Claim 2, and this court respectfully **RECOMMENDS** that the CDOC Defendants' Motion for Summary Judgment be **GRANTED** in favor of Defendant Borrego.

iv. Defendant Johnson – Claim 2

The CDOC Defendants argue that Mr. McCleland fails to establish Defendant Johnson's culpable state of mind, because Defendant Johnson's only interactions with Plaintiff were her responses to Plaintiff's grievances. *See* [#176 at 22-23; #201 at 10-11]. According to the CDOC Defendants, Plaintiff cannot demonstrate Defendant Johnson's conscious disregard of a substantial

risk of harm or her creation or implementation of an unconstitutional policy. *See* [#176 at 22-23; #201 at 10-11]. For the following reasons, I respectfully agree.

It is undisputed that Defendant Johnson was the Health Services Administrator at Buena Vista Correctional Complex, who did not provide medical treatment to Plaintiff, and her only interactions with Plaintiff were her responses to Plaintiff's January 2017 grievance and his December 2017 informal grievance. *See* Material Facts *supra*, at ¶¶ 22, 26. Plaintiff argues this is enough to show Defendant Johnson was aware of yet disregarded a substantial risk of harm. This is because Defendant Johnson's position requires her to provide constitutionally adequate medical care and not to impede access to medical care, which she did by denying his request for DAAs. *See* [#197 at 18-19]. Further, because he complained of several symptoms in those grievances, Defendant Johnson was aware of Plaintiff's medical needs yet denied treatment. *See* [*id.*].

To start, Mr. McCleland must demonstrate Defendant Johnson personally violated his constitutional rights. This court agrees that Defendant Johnson's position as Health Services Administrator does not necessarily render her liable for any inadequate medical care provided at Buena Vista Correctional Complex. This is because § 1983 does not authorize liability under a theory of respondeat superior and, as discussed, there is no evidence that the Policy was constitutionally infirm such that Defendant Johnson's reliance on the Policy in denying Plaintiff's informal grievance constitutes deliberate indifference. *See Brown v. Montoya*, 662 F.3d 1152, 1163-64 (10th Cir. 2011). Nor is there any evidence that Defendant Johnson reviewed Plaintiff's medical records or consulted with Defendants McGrew or Borrego who actually treated Plaintiff. *See Cox*, 800 F.3d at 1249-54 (finding no evidence of the supervisor defendant's culpable state of mind where there was no evidence of his subordinates' deliberate indifference).

Next, this court is not persuaded that Mr. McCleland's disclosure of his symptoms of "profuse night sweating, stomach pain, loss of appetite, loss of energy/vigor, and very bad itching" in his January 2017 grievance provided notice to Defendant Johnson of an immediate need for medical attention that she consciously disregarded. Rather, Defendant Johnson directed Plaintiff to send a kite to medical for his medical needs. *See* [#176-4 at p. 4]. Further, there is no indication that these complaints were in any way related to Plaintiff's chronic Hepatitis-C, as the crux of his deliberate indifference claim focuses on his renal dysfunction and Sjogren's Syndrome. *See Stewart v. Beach*, 701 F.3d 1322, 1328 (10th Cir. 2012) ("The denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by plaintiff, does not establish personal participation under § 1983." (internal quotation marks omitted)).

Finally, there is no dispute that Mr. McCleland eventually received treatment for the health issues raised in his January 2017 grievance and December 2017 informal grievance. *See* Material Facts *supra*, at ¶¶ 32. And again, Plaintiff fails to establish any substantial harm that resulted from the initial denials or delay in receiving this treatment. He therefore fails to establish Defendant Johnson's conscious disregard of a substantial risk of harm. *See Rachel v. Troutt*, 764 F. App'x 778, 784 (10th Cir. 2019) (finding no deliberate indifference by Health Services Administrator who denied emergency grievance where the plaintiff eventually received treatment for that health issue). Accordingly, I conclude Defendant Johnson enjoys qualified immunity as to Claim 2, and this court respectfully **RECOMMENDS** that the CDOC Defendants' Motion for Summary Judgment be **GRANTED** in favor of Defendant Johnson.

CONCLUSION

For the reasons stated herein, this court respectfully **RECOMMENDS** that:

(1) Defendant McGrew's Motion for Summary Judgment [#169] be **GRANTED**;

(2) The CDOC Defendants' Motion for Summary Judgment [#176] be **GRANTED**; and

(3) Plaintiff's claims and Fifth Amended Complaint [#65] be **DISMISSED WITH PREJUDICE**.[5]

Further, **IT IS ORDERED** that:

(1) Plaintiff's Motion to Defer Ruling on Summary Judgment [#205] is **DENIED**; and

(2) A copy of this Recommendation and Order shall be sent to:

ROBERT JW MCCLELAND #155317
BUENA VISTA CORRECTIONAL FACILITY (BVCF)
P.O. BOX 2017
BUENA VISTA, CO 81211

DATED: April 23, 2020

BY THE COURT:

Nina Y. Wang
United States Magistrate Judge

[5] Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the District Court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the District Judge of the Magistrate Judge's proposed findings of fact, conclusions of law, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (District Court's decision to review a Magistrate Judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *International Surplus Lines Insurance Co. v. Wyoming Coal Refining Systems, Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the Magistrate Judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the Magistrate Judge's ruling). *But see Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).

Appendix

B