

APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI

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APPENDIX "A"

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 24 2022
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ARTHUR GLENN JONES, Sr.,

No. 21-15348

Plaintiff-Appellant,

D.C. No. 2:15-cv-00734-TLN-AC

v.

MEMORANDUM*

SAM WONG, Dr.; et al.,

Defendants-Appellees.

Appeal from the United States District Court

for the Eastern District of California

Troy L. Nunley, District Judge, Presiding

Submitted February 15, 2022**

Before: FERNANDEZ, TASHIMA, and FRIEDLAND, Circuit Judges.

California state prisoner Arthur Glenn Jones, Sr. appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging deliberate indifference to his serious medical needs. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2):

Cir. 2004). We affirm.

The district court properly granted summary judgment because Jones failed to raise a genuine dispute of material fact as to whether defendants were deliberately indifferent to his back and leg conditions. *See id.* at 1057-60 (a prison official is deliberately indifferent only if he or she knows of and disregards an excessive risk to inmate health; medical malpractice, negligence, or a difference of opinion concerning the course of treatment does not amount to deliberate indifference).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

All pending requests, set forth in the opening and reply briefs, are denied.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

ARTHUR GLENN JONES SR.,

CASE NO: 2:15-CV-00734-TLN-AC
v.

SAM WONG, ET AL.,

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 12/15/2020

Keith Holland
Clerk of Court

ENTERED: December 15, 2020

by: /s/ A. Coll

Deputy Clerk

APPENDIX "B"

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

10 ARTHUR GLENN JONES, Sr.,
11 Plaintiff,
12 v.
13 SAM WONG, et al.,
14 Defendants.

No. 2:15-cv-00734-TLN-AC

ORDER

16 Plaintiff Arthur Glenn Jones, Sr. (“Plaintiff”), a state prisoner proceeding *pro se*, has filed
17 this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United
18 States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

19 On July 14, 2020, the magistrate judge filed findings and recommendations herein which
20 were served on all parties and which contained notice to all parties that any objections to the
21 findings and recommendations were to be filed within 21 days. (ECF No. 120.) Defendant
22 Cuppy and Plaintiff have filed Objections to the Findings and Recommendations. (ECF Nos.
23 122, 123.) Defendants Heatley, Pace, Williams, and Wong filed a Response to Plaintiff's
24 Objections. (ECF No. 125.)

25 This Court reviews *de novo* those portions of the proposed findings of fact to which
26 objection has been made. 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore*
27 *Business Machines*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982); *see*
28 *also Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009). As to any portion of the proposed

1 findings of fact to which no objection has been made, the Court assumes its correctness and
2 decides the motions on the applicable law. *See Orand v. United States*, 602 F.2d 207, 208 (9th
3 Cir. 1979). The magistrate judge's conclusions of law are reviewed *de novo*. *See Britt v. Simi*
4 *Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

5 Having carefully reviewed the entire file under the applicable legal standards, the Court
6 finds the Findings and Recommendations to be supported by the record and by the magistrate
7 judge's analysis.

8 Plaintiff and Defendant Cuppy object to the recommendation to decline to exercise
9 pendent jurisdiction over Plaintiff's state claims and argue the Court should exercise its discretion
10 to retain the claims in the interest of judicial economy. (ECF No. 122 at 3-5; ECF No. 124 at
11 10.) The district court may decline to exercise supplemental jurisdiction where all claims over
12 which the court has original jurisdiction have been dismissed. 28 U.S.C. § 1337(c)(3). “[I]n the
13 usual case in which federal-law claims are eliminated before trial, the balance of factors to be
14 considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and
15 comity—will point toward declining to exercise jurisdiction over the remaining state law claims.”
16 *Carnegie-Mellon Univ. v. Cohill, Inc. (Carnegie-Mellon)*, 484 U.S. 343, 350 n.7 (1988)
17 (indicating disapproval of a district court's retention of jurisdiction to adjudicate a statute of
18 limitations issue); *Schneider v. TRW, Inc.*, 938 F.2d 986, 993 (9th Cir. 1991); *United Mine*
19 *Workers v. Gibbs*, 383 U.S. 715 (1966); *Bryant v. Adventist Health Sys./W.*, 289 F.3d 1162, 1169
20 (9th Cir. 2002) (holding once the federal claim on which jurisdiction exists has been proven to be
21 unfounded at summary judgment, this allows courts to avoid determining issues of state law).
22 The Court is unpersuaded that the instant matter is so “unusual” as to justify retaining the state
23 law claims. *Carnegie-Mellon*, 484 U.S. at 350 n.7; *see also Bryant*, 289 F.3d at 1169 (district
24 court did not abuse discretion in dismissing state law claims after granting summary judgment on
25 the federal claims, where plaintiffs asserted claims for violations of the Emergency Medical
26 Treatment and Active Labor Act, a similar state law, and negligence); *Padron v. Lara*, No. 1:16-
27 cv-00549-SAB, 2018 WL 2213462, at *16-17 (E.D. Cal. May 11, 2018) (declining to exercise
28 supplemental jurisdiction over state claims at summary judgment stage); *Gini v. Las Vegas Metro.*

1 *Police Dep't*, 40 F.3d 1041, 1046 (9th Cir. 1994) (affirming dismissal of state claims where case
2 was not "in any way unusual"). Thus, the Court concludes that declining to exercise
3 supplemental jurisdiction over the remaining state claims is supported by the interests of
4 economy, convenience, fairness, and comity. (See ECF No. 120 at 14); *Gini*, 40 F.3d at 1046;
5 *Bryant*, 289 F.3d at 1169; *Padron*, 2018 WL 2213462, at *16–17. Therefore, Plaintiff and
6 Cuppy's objections are overruled.

7 Plaintiff additionally contends the magistrate judge erred in concluding that the
8 declaration of Plaintiff's proffered "expert," Mr. Daly, did not constitute an admissible expert
9 opinion (ECF No. 120 at 13 n.10). (ECF No. 124 at 6.) Plaintiff argues Mr. Daly's declaration
10 should have been considered because, even though he lost his medical license, Mr. Daly's
11 knowledge and education was still relevant to the analysis. (*Id.*) The Court disagrees. Mr.
12 Daly's medical license was revoked in 2006, several years before the events relevant to this
13 matter occurred. (See ECF No. 87-4 at 2–4 (objecting to Daly as medical expert and his
14 declaration as lacking foundation and relevance)); *see also Alcala v. Martel*, No. 2:09-cv-03407-
15 KJM-JFM, 2013 WL 655161, at *7 (E.D. Cal. Feb. 21, 2013), *report and recommendation*
16 *adopted*, No. 2:09-cv-03407-KJM-JFM, 2013 WL 1325052 (E.D. Cal. Mar. 30, 2013) (judicially
17 noticing Mr. Daly was not a medical doctor because his license was revoked on February 24,
18 2006). Further, the cases cited by Plaintiff are distinguishable and therefore his reliance on them
19 is misplaced.¹ Regardless, the Court notes that even if Mr. Daly was accorded the weight of an
20 expert and his declaration was considered for purposes of the parties' cross-motions for summary
21 judgment, at most it merely establishes a difference in medical opinion which is insufficient to
22 establish a deliberate indifference claim and therefore defeat summary judgment. *See Sanchez v.*
23

24 ¹ In *Hasan v. Johnson*, No. 1:08-cv-00381-MJS, 2013 WL 6047985, at *2 (E.D. Cal. Nov.
25 14, 2013), the court expressly declined to rule on Mr. Daly's competence to testify as an expert.
26 In *Abreu v. Cate*, No. 2:10-cv-01621-JAM-CKD, 2013 WL 3331100, at *8 (E.D. Cal. Jul. 1,
27 2013), Mr. Daly's declaration was considered by the court as "essentially undisputed" where the
28 defendants did not object to the declaration or challenge Mr. Daly's qualifications. Finally, in
 Watson v. Torruella, No. CIV S-06-01475-LKK-EFB-P, 2009 WL 3246805 (E.D. Cal. Oct. 7,
 2009), Mr. Daly's declaration was appropriately considered because Mr. Daly was still licensed
 to practice medicine at the relevant times.

1 *Vild*, 891 F.2d 240, 242 (9th Cir. 1989) (mere difference in judgment between medical
2 professionals regarding appropriate medical diagnosis and treatment are not enough to establish a
3 deliberate indifference claim). Accordingly, Plaintiff's objections with respect to Mr. Daly's
4 declaration are overruled.

5 Plaintiff's remaining objections dispute the correctness of the medical opinions of
6 Defendants' expert witnesses. (See ECF No. 124 at 1-5, 7-10.) These arguments are unavailing,
7 as Plaintiff again fails to establish anything more than a difference in medical opinion. *Sanchez*,
8 891 F.2d at 242. Therefore, Plaintiff's remaining objections are overruled.

9 Accordingly, IT IS HEREBY ORDERED that:

10 1. The Findings and Recommendations filed July 14, 2020 (ECF No. 120), are adopted in
11 full;

12 2. Plaintiff's Motion for Summary Judgment (ECF No. 83) is DENIED;

13 3. Defendant Cuppy's Motion for Summary Judgment (ECF No. 94) is GRANTED as to
14 Plaintiff's deliberate indifference claim;

15 4. Defendants Heatley, Pace, Williams, and Wong's Motion for Summary Judgment
16 (ECF No. 95) is GRANTED as to Plaintiff's deliberate indifference claims;

17 5. The Court declines to exercise supplemental jurisdiction over Plaintiff's state law
18 claims and these claims are dismissed without prejudice; and

19 6. The Clerk of the Court is directed to enter Judgment for Defendants and close this case.

20 IT IS SO ORDERED.

21 DATED: December 14, 2020



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Troy L. Nunley
United States District Judge
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7 UNITED STATES DISTRICT COURT

8 FOR THE EASTERN DISTRICT OF CALIFORNIA

9
10 ARTHUR GLENN JONES, SR., No. 2:15-cv-0734 TLN AC P

11 Plaintiff,

12 v.,

13 SAM WONG, et al.,

14 Defendants.

FINDINGS & RECOMMENDATIONS

15
16 Plaintiff is a prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. §
17 1983. Currently before the court is plaintiff's motion for summary judgment, ECF No. 83;
18 defendants Heatley, Pace, Williams, and Wong's motion for summary judgment, ECF No. 95;
19 and defendant Cuppy's motion for summary judgment, ECF No. 94.

20 I. Procedural History

21 Plaintiff filed his first amended complaint alleging violations of the Eighth Amendment
22 and state tort law. ECF No. 14. Cuppy filed a motion to dismiss plaintiff's complaint which was
23 subsequently denied. ECF No. 43; ECF No. 62. Defendants Heatley, Pace, Williams, and Wong
24 answered the first amended complaint. ECF No. 23. Defendant Cuppy then answered the first
25 amended complaint. ECF No. 63. Plaintiff filed a motion for summary judgment, ECF No. 83,
26 as did Cuppy, ECF No. 94, and Heatley, Pace, Williams, and Wong, ECF No. 95. On August 15,
27 2019, defendants served plaintiff with notice of the requirements for opposing a motion pursuant
28 to Rule 56 of the Federal Rules of Civil Procedure. ECF No. 95 at 2-4; see Klingele v.

1 Eikenberry, 849 F.2d 409, 411 (9th Cir. 1988); Rand v. Rowland, 154 F.3d 952, 960 (9th Cir.
2 1998) (en banc) (movant may provide notice).¹

3 II. Plaintiff's Allegations

4 A. Plaintiff's General Allegations

5 At all times relevant to this action, plaintiff resided at Mule Creek State Prison. ECF No.
6 14 at 4, ¶ 12. In 2000, plaintiff alleges he injured his back while working at the prison coffee
7 facility at Mule Creek. Id. at 4, ¶ 18. In 2002, plaintiff was diagnosed with degenerative disc
8 disease and the bulging of L5-S1. Id. at 4, ¶ 19. From 2002 to present, plaintiff alleges his
9 condition has worsened and he has not received effective or proper medical treatment. Id. at 4, ¶
10 20. Plaintiff alleges that in December 2013 he sent a medical request complaining of his pain, but
11 nothing was done. Id. at 5, ¶ 21.

12 B. Allegations Against Defendant Cuppy

13 Plaintiff alleges that on January 11, 2014, he was seen at the medical facility by defendant Cuppy.
14 Id. at 5, ¶ 22. Plaintiff alleges that defendant Cuppy stated she would refer plaintiff to a specialist
15 at U.C. Davis, but that Cuppy failed to provide plaintiff with this referral. Id. at 5, ¶ 23. Plaintiff
16 alleges Cuppy was deliberately indifferent and professionally negligent to plaintiff's medical
17 condition when she allegedly did not treat plaintiff's condition. Id. at 8, ¶ 39.

18 C. Allegations Against Defendant Heatley

19 Plaintiff alleges that in March 2014, Plaintiff was interviewed by defendant Heatley at a
20 grievance hearing. Id. at 5, ¶ 25. Plaintiff alleges that he showed Heatley his involuntary muscle
21 twitching and spasming, and Heatley affirmatively acknowledged that Plaintiff has muscle
22 damage. Id. Plaintiff states that Heatley then prescribed plaintiff both Nortriptyline, a psycho-
23 tropic medication, and Cymbalta, instead of a pain medication; this treatment was ineffective. Id.
24 at 5-6, ¶¶ 26, 29. Plaintiff alleges that Nortriptyline and Cymbalta, taken together, can result in
25 lethal side effects, and despite this risk, Heatley continued to prescribe them. Id. at 6, ¶ 29.

26
27 ¹ Notice was provided by defendants Heatley, Williams, Wong, and Pace, two days after
28 defendant Cuppy filed her motion. See ECF Nos. 94 & 95. Plaintiff acknowledged receipt of this
notice on October 7, 2019, and stated he did not dispute the Rand warning. ECF No. 99 at 1.

1 Plaintiff states that Heatley refused plaintiff's requests for alternative medications such as
2 Methadone, Neurontin, or Baclofen. Id. Moreover, plaintiff alleges Heatley refused to renew
3 plaintiff's accommodations for a double mattress and lower bunk, and further refused to refer
4 plaintiff to a neurologist or surgery consultation. Id. at 5-6, ¶¶ 27-28. Plaintiff alleges Heatley
5 was deliberately indifferent and professionally negligent when he failed to treat plaintiff's
6 twitching and spasms. Id. at 8, ¶ 41. Moreover, plaintiff alleges Heatley was professionally
7 negligent in prescribing plaintiff medications that did not treat plaintiff's condition. Id.

8 D. Allegations Against Defendant Williams

9 Plaintiff alleges that on June 2, 2014, plaintiff was seen by defendant Williams, a
10 telemedicine doctor. Id. at 6, ¶ 30. Plaintiff alleges that Williams agreed to send plaintiff to pain
11 management, order plaintiff epidural shots, and provide plaintiff with shots in his right leg for his
12 spasms. Id. Plaintiff alleges that Williams submitted a false report to defendant Wong
13 contradicting his statements and saying that there was nothing wrong with plaintiff despite his
14 ongoing pain. Id. Plaintiff alleges Williams was deliberately indifferent and professionally
15 negligent when he did not treat plaintiff's condition and wrote a false report. Id. at 8, ¶ 40.

16 E. Allegations Against Defendant Wong

17 Plaintiff alleges he was seen by defendant Wong on August 1, 2014, and at that
18 appointment, Wong stated he would provide plaintiff with a back brace as well as a consultation
19 for pain management. Id. at 6, ¶ 30. Plaintiff alleges Wong was deliberately indifferent and
20 professionally negligent when he failed to treat plaintiff's condition. Id. at 8, ¶ 38.

21 F. Allegations Against Defendant Pace

22 Plaintiff alleges that in 2015, defendant Pace prescribed plaintiff Nortriptyline, Cymbalta,
23 and Gabapentin. Id. at 7, ¶ 35. Plaintiff states that despite plaintiff exhibiting side effects such as
24 anxiety and loss of sleep, Pace continues to prescribe these medications. Id. at 7, ¶¶ 35-36.
25 Plaintiff alleges Pace was deliberately indifferent and professionally negligent when he did not
26 treat plaintiff's twitching and spasms. Id. at 8, ¶ 41. Moreover, plaintiff alleges Pace was
27 professionally negligent in prescribing plaintiff medications that did not treat plaintiff's condition.
28 Id.

1 III. Legal Standards for Summary Judgment

2 Summary judgment is appropriate when the moving party “shows that there is no genuine
3 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
4 Civ. P. 56(a). Under summary judgment practice, “[t]he moving party initially bears the burden
5 of proving the absence of a genuine issue of material fact.” In re Oracle Corp. Sec. Litig., 627
6 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The
7 moving party may accomplish this by “citing to particular parts of materials in the record,
8 including depositions, documents, electronically stored information, affidavits or declarations,
9 stipulations (including those made for purposes of the motion only), admissions, interrogatory
10 answers, or other materials” or by showing that such materials “do not establish the absence or
11 presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to
12 support the fact.” Fed. R. Civ. P. 56(c)(1).

13 “Where the non-moving party bears the burden of proof at trial, the moving party need
14 only prove that there is an absence of evidence to support the non-moving party’s case.” Oracle
15 Corp., 627 F.3d at 387 (citing Celotex, 477 U.S. at 325); see also Fed. R. Civ. P. 56(c)(1)(B).
16 Indeed, summary judgment should be entered, “after adequate time for discovery and upon
17 motion, against a party who fails to make a showing sufficient to establish the existence of an
18 element essential to that party’s case, and on which that party will bear the burden of proof at
19 trial.” Celotex, 477 U.S. at 322. “[A] complete failure of proof concerning an essential element
20 of the nonmoving party’s case necessarily renders all other facts immaterial.” Id. at 323. In such
21 a circumstance, summary judgment should “be granted so long as whatever is before the district
22 court demonstrates that the standard for the entry of summary judgment, as set forth in Rule
23 56(c), is satisfied.” Id.

24 If the moving party meets its initial responsibility, the burden then shifts to the opposing
25 party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec.
26 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). In attempting to establish the
27 existence of this factual dispute, the opposing party may not rely upon the allegations or denials
28 of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or

1 admissible discovery material, in support of its contention that the dispute exists. See Fed. R.
2 Civ. P. 56(c). The opposing party must demonstrate that the fact in contention is material, i.e., a
3 fact "that might affect the outcome of the suit under the governing law," Anderson v. Liberty
4 Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809
5 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., "the evidence is such that a
6 reasonable jury could return a verdict for the nonmoving party," Anderson, 447 U.S. at 248.

7 In the endeavor to establish the existence of a factual dispute, the opposing party need not
8 establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed
9 factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the
10 truth at trial." T.W. Elec. Serv., 809 F.2d at 630 (quoting First Nat'l Bank of Ariz. v. Cities
11 Serv. Co., 391 U.S. 253, 288-89 (1968). Thus, the "purpose of summary judgment is to pierce the
12 pleadings and to assess the proof in order to see whether there is a genuine need for trial."
13 Matsushita, 475 U.S. at 587 (citation and internal quotation marks omitted).

14 "In evaluating the evidence to determine whether there is a genuine issue of fact, [the
15 court] draw[s] all inferences supported by the evidence in favor of the non-moving party." Walls
16 v. Cent. Costa Cnty. Transit Auth., 653 F.3d 963, 966 (9th Cir. 2011) (citation omitted). It is the
17 opposing party's obligation to produce a factual predicate from which the inference may be
18 drawn. See Richards v. Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to
19 demonstrate a genuine issue, the opposing party "must do more than simply show that there is
20 some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586 (citations
21 omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the
22 non-moving party, there is no 'genuine issue for trial.'" Id. at 587 (quoting First Nat'l Bank, 391
23 U.S. at 289).

24 IV. Undisputed Material Facts

25 At all times relevant, plaintiff has been in the custody of the California Department of
26 Corrections and Rehabilitation and housed at Mule Creek State Prison.² Defendant Cuppy's

27
28 ² Plaintiff objects to the statement that "plaintiff was an inmate" and disputes this because
plaintiff is still an inmate. ECF No. 98 at 1-2.

1 Statement of Undisputed Facts (Defendant Cuppy SUF) (ECF No. 94-2) ¶¶ 1-2. In 2000, plaintiff
2 injured his back while working at the prison coffee factory. Id. ¶ 3. Plaintiff has been a chronic
3 care patient since 2001, which means that plaintiff has an ongoing problem or ailment and has
4 regularly scheduled appointments with his primary care provider generally 14 to 20 days apart.
5 Id. ¶¶ 4-6. Prior to any of the incidents at issue, plaintiff was evaluated and diagnosed with low
6 back pain and degenerative disc disease. Id. ¶ 8.

7 On January 11, 2014, defendant Cuppy examined plaintiff and determined that plaintiff's
8 musculoskeletal and neurological testing were within normal limits. Id. ¶ 18.³ Cuppy prescribed
9 plaintiff with Nortriptyline and scheduled plaintiff for a chronic care patient follow-up
10 appointment within 80-90 days. Id. ¶¶ 19-20.

11 Plaintiff filed a CDCR Health Care Appeal form on February 3, 2014, requesting a
12 determination of the source of his back pain, epidural steroid injections, an MRI scan, a
13 neurological referral, and spinal surgery. Defendants Wong, Williams, Heatley, and Pace's
14 Statement of Undisputed Facts (DSUF), ECF No. 95-4 ¶ 9.

15 On March 3, 2014, defendant Heatley examined plaintiff, determined an MRI and surgical
16 consultation were not medically necessary, and scheduled plaintiff for a chronic care follow-up
17 appointment. DSUF, ¶¶ 10, 15.⁴ Heatley further recommended plaintiff continue taking
18 Nortriptyline and recommended Plaintiff continue with home stretching exercises.⁵ DSUF, ¶ 13,
19 16. Heatley declined to renew plaintiff's requests for a lower bunk and double mattress
20 accommodation, stating they were not within the scope of plaintiff's Appeal. Id. ¶ 17.⁶

21 ³ Plaintiff does not dispute the medical records and what they reflect. Instead, plaintiff purports
22 to dispute this fact by arguing that defendant Cuppy's examination was inadequate. Plaintiff's
Objections, ECF No. 103 at 2.

23 ⁴ Plaintiff agrees that he saw defendant Heatley on this date, but states the examination was
improper. Plaintiff has not submitted any evidence that creates a genuine dispute of material fact.
24 Moreover, Plaintiff's suggestion that Heatley falsified records is not supported with any evidence.

25 ⁵ Plaintiff does not appear to dispute that Heatley recommended home stretching but seems to
argue that Heatley took the suggestion for home exercises from a "Pain Management
Committee." ECF No. 98 at 8.

26 ⁶ Plaintiff does not dispute that defendant Heatley denied these accommodations and does not
27 dispute that they were not within the scope of the appeal. Plaintiff argues, in his objections, that
"it is common knowledge that while an inmate is at an interview or appointment . . . the inmate

1 Plaintiff saw defendant Williams on May 27, 2014 via telemedicine videoconference for a
2 consultation and evaluation of his chronic back pain. Id. ¶ 29. Following the appointment,
3 Williams prepared a report outlining his findings and recommendations.⁷ Id. ¶ 31. Williams
4 deferred pain management to plaintiff's primary care physician. Id. ¶ 35

5 Defendant Wong treated plaintiff as his primary care physician on numerous instances for
6 a variety of conditions including his low back condition from 2013 through 2014. Id. ¶ 50.
7 During the course of Wong's treatment of plaintiff, Wong recommended plaintiff continue both
8 Nortriptyline and Cymbalta to manage his low back condition. Id. ¶ 51. On August 1, 2014,
9 Wong determined plaintiff's request to see a neurosurgeon was not medically indicated but
10 ordered plaintiff a back-brace replacement.⁸ Id. ¶¶ 53, 56. Prior to the August 1 appointment,
11 Wong had referred plaintiff to defendant Williams' care. Id. ¶ 55.

12 Defendant Pace treated plaintiff as his primary care physician from November 2014
13 through mid-2016. Id. ¶ 70. In response to plaintiff's requests, Pace ordered that plaintiff's
14 Nortriptyline be either weaned or discontinued between July 28, 2015 and May 12, 2016. Id. ¶
15 71. On July 30, 2015, Pace requested a referral to an outside medicine and rehabilitation
16 specialist to further assess plaintiff's condition, and in response, plaintiff was seen by Dr. Michael
17 M. Salas on October 22, 2015, November 5, 2015, and January 4, 2016. Id. ¶¶ 76-78.

18 On December 3, 2014, plaintiff filed a government claim with the Government Claims
19 Program that was later rejected.⁹ Id. at 4. At no point has any physician recommended plaintiff
20 undergo surgery for his condition. Id. ¶ 49.

21 ////

22
23 can ask a [doctor] to renew an accommodation." ECF No. 98 at 8.

24 ⁷ Defendant' statement of undisputed facts states this report was "comprehensive." Plaintiff
25 objects to the thoroughness of the report and the consultation, but not as to whether a report was
26 prepared or consultation occurred. See ECF No. 98 at 13-14.

27 ⁸ Plaintiff does not dispute that defendant Wong ordered the brace but does appear to state that he
28 never received it. ECF No. 98 at 18.

29 Plaintiff disputes this, arguing that the letter sent February 12, 2015 did not actually reject the
30 claim, but instead said that "it was recommended by staff that the claim be rejected" and further
31 explained that it would send a final decision after a meeting on March 19, 2015. ECF No. 98 at
32 2-3.

1 V. Motions for Summary Judgment

2 A. Plaintiff's Arguments

3 It is well-established that the pleadings of pro se litigants are held to "less stringent
4 standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972)
5 (per curiam). Nevertheless, "[p]ro se litigants must follow the same rules of procedure that
6 govern other litigants." King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (citations omitted),
7 overruled on other grounds, Lacey v. Maricopa County, 693 F.3d 896, 928 (9th Cir. 2012) (en
8 banc). However, the unrepresented prisoners' choice to proceed without counsel "is less than
9 voluntary" and they are subject to "the handicaps . . . detention necessarily imposes upon a
10 litigant," such as "limited access to legal materials" as well as "sources of proof." Jacobsen v.
11 Filler, 790 F.2d 1362, 1364-65 & n.4 (9th Cir. 1986) (alteration in original) (citations and internal
12 quotation marks omitted). Inmate litigants, therefore, should not be held to a standard of "strict
13 literalness" with respect to the requirements of the summary judgment rule. Id. at 1364 n.4
14 (citation omitted).

15 The court is mindful of the Ninth Circuit's more overarching caution in this context, as
16 noted above, that district courts are to "construe liberally motion papers and pleadings filed by
17 pro se inmates and should avoid applying summary judgment rules strictly." Thomas v. Ponder,
18 611 F.3d 1144, 1150 (9th Cir. 2010).

19 Plaintiff moves for summary judgment on the grounds that defendants were deliberately
20 indifferent and professionally negligent to plaintiff's ongoing degenerative disc disease and
21 involuntary spasms on his leg. ECF No. 83, at 1.

22 B. Defendant Cuppy's Arguments

23 Defendant Cuppy, in her opposition to plaintiff's motion for summary judgment, argues
24 that she did not violate the applicable standard of care. ECF No. 86 at 6. Specifically, Cuppy
25 argues that in professional malpractice cases, "expert opinion testimony is required to prove or
26 disprove that the defendant performed in accordance with the prevailing standard of care." Id.
27 (quoting Kelley v. Trunk, 66 Cal. App. 4th 519, 523 (1998)). Cuppy asks the court to qualify
28 Chloe Powell, P.A., as an expert in this case. ECF No. 86 at 8. She further argues that the

1 individual plaintiff set forth as his expert, James Edmond Daly, is not an expert, but even if he
2 were, he failed to explain how Cuppy's conduct constituted a breach of the applicable standard of
3 care. Id. at 9. Cuppy further states that even if plaintiff had argued that Cuppy breached a
4 standard of care, and even if this were supported by an expert's opinion, plaintiff's motion should
5 still be denied as this would only create a genuine dispute of material fact. Id. With respect to
6 plaintiff's deliberate indifference claim, Cuppy argues this should be denied because Cuppy's
7 care was not medically unacceptable, and Cuppy did not disregard an excessive risk to plaintiff's
8 health or safety. Id. at 13.

9 In her motion for summary judgment, Cuppy argues that she saw and examined plaintiff
10 on a limited basis, and, upon examination, Cuppy found plaintiff's neurological testing within
11 normal limits. ECF No. 94-1 at 10. Upon examination, plaintiff requested Nortriptyline for his
12 pain because he had done well on this medication previously, so Cuppy prescribed Nortriptyline
13 and scheduled plaintiff with a chronic care follow up appointment for disc disease 80-90 days
14 later. ECF No. 94-1 at 10; ECF No. 94-3 at 12. Defendant Cuppy argues that summary judgment
15 should be granted for her because there is no genuine dispute of material fact as to whether she
16 was medically negligent as plaintiff has failed to refute the opinion of a well-qualified expert. Id.
17 at 17. Moreover, defendant Cuppy argues that her motion for summary judgment should be
18 granted as to her argument that she was not deliberately indifferent to plaintiff's needs as he has
19 been receiving appropriate medical care since injuring his back and has not been ignored. Id. at
20

21 C. Defendant Heatley, Williams, Wong and Pace's Arguments

22 Defendants argue that they were not deliberately indifferent to plaintiff's medical needs,
23 are entitled to qualified immunity, and that plaintiff's claims with respect to defendant Pace are
24 barred for failure to exhaust administrative remedies and failure to file a Government Claims
25 Form. ECF No. 95-3.

26 Specifically, defendants argue that plaintiff cannot establish that defendant Heatley was
27 deliberately indifferent to plaintiff's serious medical needs because Heatley examined plaintiff,
28 recommended a medication within the standard of care to plaintiff, and provided plaintiff with

1 appropriate and consistence care. Id. at 7-8.

2 Defendants argue plaintiff cannot establish defendant Williams was deliberately
3 indifferent because Williams met the applicable standard of care when he saw plaintiff for a
4 single consultation and evaluation via Telemedicine videoconferencing, observed plaintiff
5 performing several physical movements, and provided a comprehensive report determining that
6 plaintiff suffers from degenerative disc disease. Id. at 9. Williams stated in his report that
7 plaintiff's condition would either resolve or have no long-term harmful effects on plaintiff's
8 health, and as such, he deferred pain management to plaintiff's primary care physician. Id.
9 Defendants argue that these actions were consistent with plaintiff's symptoms, medical condition,
10 and the standard of care under similar circumstances. Id. at 10.

11 Defendants next argue that there is no evidence that defendant Wong was deliberately
12 indifferent to plaintiff's medical needs because during the course of Wong's treatment of
13 plaintiff, he recommended plaintiff take both Nortriptyline and Cymbalta to manage pain;
14 referred plaintiff to a specialist prior to August 2014; exercised his appropriate medical judgment
15 in declining to refer plaintiff to a neurosurgeon on August 1, 2014; and ordered plaintiff a back-
16 brace replacement. Id. at 11. Defendants argue that because Wong treated plaintiff consistent
17 with the standard of care, plaintiff cannot establish a deliberate indifference claim against
18 defendant Wong. Id. at 12.

19 Defendants next argue that plaintiff's claims against defendant Pace are barred for failure
20 to file a Government Claims Form and failure to exhaust remedies. Id. at 12. Defendants argue
21 that because plaintiff did not list defendant Pace in his December 3, 2014 Government Claim
22 Form, and did not file any other Government Claim Form, he did not comply with the
23 Government Claim Act. Additionally, defendants argue that plaintiff's 602 appeal was resolved
24 prior to Pace's involvement with and treatment of plaintiff. Id. at 12-13. As such, defendants
25 argue that with respect to Pace, plaintiff's claims should be barred for failure to exhaust his
26 administrative remedies. Moreover, defendants cite to the five occasions Pace saw and treated
27 plaintiff, the referral defendant Pace provided for plaintiff to see an outside specialist, and Pace's
28 responsiveness to plaintiff's requests regarding medication adjustments to argue that defendant

1 Pace was not deliberately indifferent to plaintiff's medical needs. Id. at 13-14.

2 Finally, defendants argue that defendants, as public employees, have qualified immunity
3 and are protected from suit.

4 D. Plaintiff's Proffered Evidence

5 In support of his motion, plaintiff has submitted the declaration of James Edmond Daly,
6 who offered his assessment of plaintiff's condition. ECF No. 83 at 20-23. Daly, a former
7 physician and current inmate at Chino State Prison, see id. at 25, opined that defendants did not
8 follow the standard of community care because, in part, plaintiff should not have been prescribed
9 Nortriptyline, should have received epidural nerve root steroid shots, and was not provided with
10 an MRI study since 2011. Id. at 25.

11 Defendants Wong, Williams, Heatley, and Pace object to this evidence because Daly's
12 license to practice medicine was revoked in 2006 and he has not practiced since 2004. ECF 87-4
13 at 2. Accordingly, defendants contend that Daly's opinion regarding the standard of care used to
14 treat plaintiff from 2013 through 2016 is not relevant or useful. Id. Defendants further object to
15 the evidence stating it lacks foundation, is speculative, conclusory, and/or is irrelevant. Id.

16 VI. Discussion

17 A. Deliberate Indifference Claim

18 In order to state a §1983 claim for violation of the Eighth Amendment based on
19 inadequate medical care, plaintiff "must allege acts or omissions sufficiently harmful to evidence
20 deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976).
21 To prevail, plaintiff must show both that his medical needs were objectively serious, and that
22 defendant possessed a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 298-99
23 (1991); McKinney v. Anderson, 959 F.2d 853, 854 (9th Cir. 1992). The requisite state of mind
24 for a medical claim is "deliberate indifference." Hudson v. McMillian, 503 U.S. 1, 5 (1992).

25 "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in
26 further significant injury or the 'unnecessary and wanton infliction of pain.'" McGuckin v.
27 Smith, 974 F.2d 1050, 1059 (9th Cir. 1992) (quoting Estelle, 429 U.S. at 104), overruled on other
28 grounds WMX Technologies v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc). Examples of a

1 serious medical need include “[t]he existence of an injury that a reasonable doctor or patient
2 would find important and worthy of comment or treatment; the presence of a medical condition
3 that significantly affects an individual’s daily activities; or the existence of chronic and
4 substantial pain.” Id. at 1059-60 (citing Wood v. Housewright, 900 F.2d 1332, 1337-41 (9th Cir.
5 1990) (citing cases); Hunt v. Dental Dept., 865 F.2d 198, 200-01 (9th Cir. 1989)).

6 In Farmer v. Brennan, 511 U.S. 825 (1994), the Supreme Court established a very
7 demanding standard for “deliberate indifference.” “While poor medical treatment will at a certain
8 point rise to the level of constitutional violation, mere malpractice, or even gross negligence, does
9 not suffice.” Wood, 900 F.2d at 1334. Even civil recklessness (failure to act in the face of an
10 unjustifiably high risk of harm which is so obvious that it should be known) is insufficient to
11 establish an Eighth Amendment violation. Farmer, 511 U.S. at 837 & n.5. It is not enough that a
12 reasonable person would have known of the risk or that a defendant should have known of the
13 risk. Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004). Rather, deliberate indifference is
14 established only where the defendant subjectively “knows of and disregards an excessive risk to
15 inmate health and safety.” Id. (citation and internal quotation marks omitted). Deliberate
16 indifference can be established “by showing (a) a purposeful act or failure to respond to a
17 prisoner’s pain or possible medical need and (b) harm caused by the indifference.” Jett v. Penner,
18 439 F.3d 1091, 1096 (9th Cir. 2006) (citation omitted).

19 A difference of opinion between an inmate and prison medical personnel—or between
20 medical professionals—regarding appropriate medical diagnosis and treatment are not enough to
21 establish a deliberate indifference claim. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989);
22 Toguchi, 391 F.3d at 1058. To establish a difference of opinion rises to the level of deliberate
23 indifference, plaintiff “must show that the course of treatment the doctors chose was medically
24 unacceptable under the circumstances.” Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

25 i. Plaintiff’s Claims

26 Despite plaintiff’s assertion that a genuine issue of material fact exists as to whether
27 defendants were deliberately indifferent to his serious medical needs, plaintiff has identified no
28 more than a difference of medical opinion regarding his treatment, and a “difference of opinion

1 does not amount to a deliberate inference to [plaintiff's] serious medical needs." Sanchez, 891
2 F.2d at 242. Plaintiff's evidence both in support of his motion and in opposition to defendants'—
3 such as his own declaration and that of Daly—fail to create a genuine dispute of material fact as
4 to whether defendants were deliberately indifferent to plaintiff's medical need.¹⁰

5 The evidence presented by the parties demonstrates that plaintiff had a large team of
6 medical professionals treating him. In both plaintiff's papers and the moving papers submitted to
7 the court by defendants, it is clear plaintiff has seen a physician's assistant, prison doctors, and
8 outside physicians. He has received back-braces, medications, and exercises. His primary care
9 physicians have referred him to specialists. Nothing in the evidence indicates that defendants
10 were indifferent to plaintiff's serious medical needs. Plaintiff's disagreement with defendants'
11 care does not rise to the level of a constitutional violation.

12 Plaintiff argues the defendants' statements of undisputed facts is inaccurate with respect to
13 the quality of the care received. See ECF No. 98. Specifically, plaintiff states that defendants
14 refused to appropriately treat plaintiff's pain, leg twitching, and muscle spasming, see ECF No.
15 98 at 5, 7, 9. Plaintiff's opinion on these matters is not enough to create a genuine dispute of
16 material fact, as needed to defeat defendants' motions for summary judgment—let alone enough
17 to prove by a preponderance of undisputed evidence that defendants were deliberately indifferent
18 to his medical needs, as needed to entitle plaintiff to summary judgment. In order to demonstrate
19 the existence of a triable issue of fact, plaintiff needs to identify evidence other than his own
20 opinion which contradicts defendants' evidence or would otherwise permit a jury to reject
21 defendants' evidence. Because plaintiff has not done so, the court recommends plaintiff's motion
22 for summary judgment on his deliberate indifference claim should be denied. The undersigned
23 further recommends that defendant Cuppy's motion for summary judgment, and defendants
24 Wong, Heatley, Williams, and Pace's motion for summary judgment, be granted. There is no

25 ¹⁰ Accordingly, the result would be the same whether or not the Daly declaration constitutes an
26 admissible expert opinion. The undersigned concludes that it does not. See Rule 702, Fed. Rules
27 Evidence. The undersigned also sustains defendants' objections to the Daly declaration as
28 irrelevant and lacking foundation. Again, the result would be same even if the declaration were
considered, as Daly merely expresses an opinion and provides no proper basis for a jury finding
that defendants' actions were medically unacceptable.

1 evidence from which a reasonable jury could conclude that any moving defendant violated
2 plaintiff's Eighth Amendment rights.

3 Because the court finds no violation of plaintiff's constitutional rights, it need not address
4 defendants' argument that they are entitled to qualified immunity, or defendant Pace's argument
5 that plaintiff failed to exhaust his administrative remedies and file a Government Claims Form.

6 B. Professional Negligence

7 Subject to the conditions set forth in 28 U.S.C. § 1337(c), district courts may decline to
8 exercise supplemental jurisdiction over state law claims. Acri v. Varian Assocs., Inc., 114 F.3d
9 999, 1000 (9th Cir. 1997) (en banc). The court's decision whether to exercise supplemental
10 jurisdiction should be informed by "values of economy, convenience, fairness, and comity." Id.
11 at 1001 (citations and internal quotation marks omitted). Further, primary responsibility for
12 developing and applying state law rests with the state courts. Therefore, when federal claims are
13 eliminated before trial, district courts should usually decline to exercise supplemental jurisdiction.
14 Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 & n.7 (1988) (citation omitted); Gini v. Las
15 Vegas Metro. Police Dep't, 40 F.3d 1041, 1046 (9th Cir. 1994) ("[I]n the *usual* case in which
16 federal-law claims are eliminated before trial, the balance of factors . . . will point toward
17 declining to exercise jurisdiction over the remaining state law claims." (emphasis and alteration
18 in original) (quoting Schneider v. TRW, Inc., 938 F.2d 986, 993 (9th Cir. 1991))). As outlined
19 above, it is recommended that defendants' motions for summary judgment be granted as to the
20 federal claim. Plaintiff has not identified any reason why his case is not a usual case and the
21 undersigned therefore recommends that the court decline to exercise supplemental jurisdiction
22 over plaintiff's state law claims.

23 VII. Plain Language Summary of this Order for a Pro Se Litigant

24 It is being recommended that defendants' motions for summary judgment be granted and
25 yours be denied, because you did not show that defendants were deliberately indifferent to your
26 serious medical needs. Disagreeing with your medical care providers or believing that their care
27 is not the best care, is not enough to show a constitutional violation. Because it is being
28 recommended that your Eighth Amendment claim be dismissed, the undersigned is also

1 recommending that the court decline to hear your state law negligence claim.

2 VIII. Conclusion

3 | Accordingly, IT IS HEREBY RECOMMENDED that:

4 1. Plaintiff's motion for summary judgment (ECF No. 83) be DENIED;

5 2. Defendant Cuppy's motion for summary judgment (ECF No. 94) be GRANTED;

6 3. Defendants Heatley, Pace, Williams and Wong's motion for summary judgment (ECF

7 No. 95) be GRANTED;

8 4. Judgment be entered for defendants.

9 These findings and recommendations are submitted to the United States District Judge
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
11 after being served with these findings and recommendations, any party may file written
12 objections with the court and serve a copy on all parties. Such a document should be captioned
13 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
14 objections shall be served and filed within fourteen days after service of the objections. The
15 parties are advised that failure to file objections within the specified time may waive the right to
16 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 | DATED: July 13, 2020

Allison Claire
ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE