NOT FOR PUBLICATION

FILED

JUN 19 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| MATTHEW JAMES GRIFFIN,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>UNKNOWN GREGOLINE, Licensed Doctor of Dental Surgery; CORRECTIONS CORPORATION OF AMERICA, Private corporation,<br><br>Defendants-Appellees. | No. 17-16398<br><br>D.C. No. 2:15-cv-01496-GMS<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the District of Arizona
G. Murray Snow, District Judge, Presiding

Submitted June 12, 2018**

Before: RAWLINSON, CLIFTON, and NGUYEN, Circuit Judges.

Matthew James Griffin, a New Mexico state prisoner formerly incarcerated in Arizona, appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging deliberate indifference to his dental needs and state

* 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).

law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th Cir. 2004), and we affirm.

The district court properly granted summary judgment for defendant Dr. Gregoline on Griffin's Eighth Amendment claim because Griffin failed to raise a genuine dispute of material fact as to whether Dr. Gregoline was deliberately indifferent to his dental needs. *See id.* at 1058-60 (a prison official is deliberately indifferent only if he or she knows of and disregards an excessive risk to an inmate's health; medical malpractice, negligence, or a difference of opinion concerning the appropriate course of treatment do not amount to deliberate indifference).

The district court properly granted summary judgment for defendant Corrections Corporation of America ("CCA") because Griffin failed to raise a genuine dispute of material fact as to whether CCA's custom or policy violated Griffin's Eighth Amendment rights. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (to establish a private entity's liability under § 1983, the plaintiff must show that the private entity's custom or policy violated plaintiff's constitutional rights).

The district court properly granted summary judgment on Griffin's

negligence and respondeat superior claims because Griffin failed to introduce expert testimony and therefore failed to establish a genuine dispute of material fact as to the elements of a negligence claim. *See Ryan v. S.F. Peaks Trucking Co.*, 262 P.3d 863, 869-70 (Ariz. Ct. App. 2011) (unless it is readily apparent to the trier of fact, expert medical testimony is required to establish that defendant's conduct fell below the standard of care and that defendant's conduct proximately caused plaintiff's injury); *Law v. Verde Valley Med. Ctr.*, 170 P.3d 701, 703-05 (Ariz Ct. App. 2007) (employer cannot be liable for conduct of employee under respondeat superior if employee's conduct does not give rise to liability).

The district court did not abuse its discretion by issuing orders to manage discovery. *See Jorgensen v. Cassiday*, 320 F.3d 906, 913 (9th Cir. 2003) (setting forth standard of review and noting that "[t]he district court is given broad discretion in supervising the pretrial phase of litigation"); *see also* Fed. R. Civ. P. 26(b)(2)(C) (district court may limit discovery sua sponte if the discovery sought "can be obtained from some other source that is more convenient, less burdensome, or less expensive"); *Getz v. Boeing Co.*, 654 F.3d 852, 867-68 (9th Cir. 2011) (discussing motions for discovery under Fed. R. Civ. P. 56(d) and explaining that a plaintiff must show that the discovery sought would have

precluded summary judgment).

Although the record reflects that Griffin was not provided with the opportunity to review and sign his deposition, he has not established any prejudice.

We reject as meritless Griffin's contention that the district court relied improperly on Gregoline's declaration in granting summary judgment.

**AFFIRMED.**

SH

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

Matthew James Griffin,

Plaintiff,

v.

Unknown Gregoline, et al.,

Defendants.

No. CV 15-01496-PHX-GMS (DKD)

**ORDER**

Plaintiff Matthew James Griffin, who is currently confined at the Alexander Correctional Institution in Taylorsville, North Carolina,[1] brought this civil rights case pursuant to 42 U.S.C. § 1983. (Doc. 1.) Defendants move for summary judgment, and Plaintiff opposes.[2] (Docs. 75, 88.)

The Court will grant Defendants' Motion for Summary Judgment and terminate the action.

## I. Background

In his five-count Complaint (Doc. 1), Plaintiff sued Defendant Dr. Gregoline for medical negligence (Count One) and Eighth Amendment deliberate indifference (Count Three) arising out of Dr. Gregoline's alleged failure to treat Plaintiff's dental pain. Plaintiff also brought a respondeat superior liability claim (Count Two), an Eighth

[1] At the time he initiated this action, Plaintiff was confined at the Saguaro Corrections Center, a Corrections Corporation of America facility in Eloy, Arizona.

[2] The Court provided notice to Plaintiff pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc), regarding the requirements of a response. (Doc. 78.)

Amendment custom, practice, or policy claim (Count Four), and a breach of contract claim (Count Five) against Defendant Corrections Corporation of America (CCA). On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated claims in Counts One through Four and directed Defendants Gregoline and CCA to answer. The Court dismissed Plaintiff's breach of contract claim against CCA. (Doc. 7.)

Defendants now move for summary judgment on the ground that Plaintiff received constitutionally appropriate treatment for his dental issues.

## II. Legal Standards

### A. Summary Judgment

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the movant fails to carry its initial burden of production, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however, it must "come forward with specific facts showing that there is a

genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court must believe the nonmovant's evidence and draw all inferences in the nonmovant's favor. *Id.* at 255. The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

**B. Deliberate Indifference**

To state a § 1983 medical claim, a plaintiff must show (1) a "serious medical need" by demonstrating that failure to treat the condition could result in further significant injury or the unnecessary and wanton infliction of pain and (2) the defendant's response was deliberately indifferent. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006).

"Deliberate indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must both know of and disregard an excessive risk to inmate health; "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." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Deliberate indifference in the medical context may be shown by a purposeful act or failure to respond to a prisoner's pain or possible medical need and harm caused by the indifference. *Jett*, 439 F.3d at 1096. Deliberate indifference may also be shown when a prison official intentionally denies, delays, or interferes with medical treatment or by the way prison doctors respond to the prisoner's medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Jett*, 439 F.3d at 1096.

Deliberate indifference is a higher standard than negligence or lack of ordinary due care for the prisoner's safety. *Farmer*, 511 U.S. at 835. "Neither negligence nor gross negligence will constitute deliberate indifference." *Clement v. California Dep't of*

*Corr.*, 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); *see also Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980) (mere claims of "indifference," "negligence," or "medical malpractice" do not support a claim under § 1983). "A difference of opinion does not amount to deliberate indifference to [a plaintiff's] serious medical needs." *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). A mere delay in medical care, without more, is insufficient to state a claim against prison officials for deliberate indifference. *See Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be substantial. The action must rise to a level of "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 105.

**C. Medical negligence**

To state a medical negligence claim under Arizona law, a plaintiff must show that (1) the health care provider failed to follow the accepted standard of care, and (2) the provider's failure was a proximate cause of the injury. Ariz. Rev. Stat. § 12-563. Duty of care is breached when a defendant's conduct "falls below the standard of ordinary care by creating an unreasonable risk of harm to the plaintiff." *Chavez v. Tolleson Elem. Sch. Dist.*, 595 P.2d 1017, 1020 (Ariz. App. 1979); REST 2d TORTS §§ 282, 284. A medical treatment provider is not negligent for mere mistakes in judgment. *State v. Ulin*, 548 P.2d 19, 21 (1976) (en banc). Breach of duty requires proof that a defendant failed to exercise the same care in performing his duties as is ordinarily possessed and exercised by other physicians practicing in the same class and community. *Seisinger v. Siebel*, 203 P.3d 483, 492 (Ariz. 2009). Arizona courts have long held that a physician's breach of the applicable standard of care must be shown by expert medical testimony unless the negligence is so grossly apparent that a layman would have no difficulty recognizing it. *Id.* Thus, a party opposing a motion for summary judgment must show that expert testimony is available to establish that the provider's treatment fell below the applicable standard of care. *McGuire v. DeFrancesco*, 811 P.2d 340, 342 (Ariz. App. 1990). Additionally, unless a causal relationship is readily apparent to the trier of fact, expert

medical testimony is required to establish proximate cause. *Gregg v. Nat'l Med. Health Care Servs., Inc.*, 699 P.2d 925, 928 (Ariz. App. 1985).

**III. Facts**

Plaintiff was confined at the Saguaro Corrections Center (SCC) from November 13, 2014 until October 2015. (Doc. 76 (Def.'s Statement of Facts) ¶ 2.) The entire time Plaintiff was incarcerated at SCC, he was housed in segregation. (*Id.* ¶ 3.) Defendant Dr. Gregoline was the dentist at SCC from July 30, 2007 until January 2015. (*Id.* ¶ 4.) Defendant was responsible for completing SCC inmates' initial dental examinations, comprehensive dental examinations, and other dental procedures, as necessary. (*Id.* ¶ 7.)

At SCC, initial dental examinations take place within 30 days of an inmate's arrival at the facility, and consist of examining the inmate's teeth, documenting the status of their teeth, and checking the gums and soft tissue. (*Id.* ¶¶ 8, 10.) The purpose of an initial examination is to identify serious dental issues and advise the inmate on obtaining future dental treatment and cleanings. (*Id.* ¶ 9.)

For segregation inmates, such as Plaintiff, initial examinations are conducted in the offices located in the segregation unit due to the security and time constraints of transporting segregation inmates to the dental unit. (*Id.* ¶ 11.) According to Gregoline, even though segregation inmates are initially examined in the segregation offices rather than the dental unit, the main purpose of the initial examination is still satisfied, and the procedure is within the standard of care. (Doc. 76-1 at 11, Ex. 2 (Gregoline Decl.) ¶ 9.)

During an initial examination of a segregation inmate, the inmate sits in an office chair, and Gregoline would examine the inmate's mouth with a mirror and pen light while wearing medical gloves. (Doc. 76 ¶ 12.) A dental assistant would be present and document Gregoline's findings on an examination form. (*Id.*) Upon completion of the initial examination, Gregoline would instruct inmates to submit medical requests for a more comprehensive examination, and if he felt an inmate needed an immediate appointment, he would personally submit a request for a follow-up appointment. (*Id.* ¶15.)

On November 19, 2014, Plaintiff submitted a Medical Request complaining of "dental pain cavity, need filling (new arrival examine & cleaning)." (*Id.* ¶ 23.)[3] The Medical Request form indicates that Plaintiff was referred to the dentist. (Doc. 76-1 at 42, Ex. 5.) On December 10, 2014, Plaintiff had his initial examination with Gregoline in a segregation office. (*Id.* ¶¶ 24-25.) Gregoline noted that Plaintiff had inflammation of the gums, which is treated with proper cleaning of the gums and teeth. (*Id.* ¶ 26.) Plaintiff complained of sensitivity around teeth #3 and #4, which are located in the upper right area of the mouth. (*Id.* ¶ 25.)[4] Gregoline did not observe evidence of any cavities in that area, or any other area, and attributed Plaintiff's reported sensitivity to his inflamed gums. (*Id.* ¶ 27.) The dental examination form does not indicate that Plaintiff complained of sensitivity or pain in the area of tooth #12, which is in the upper left area of the mouth. (*Id.* ¶ 28.) Based on his observations during the examination, Gregoline identified Plaintiff as a 3 out of 4 priority, which is a normal priority with routine preventative care. (*Id.* ¶ 29.) Gregoline recommended that Plaintiff have a scaling and root plaining, a procedure that consists of a deep cleaning of the teeth and gums in order to decrease gum inflammation. (*Id.* ¶ 30.) Gregoline concluded that Plaintiff's condition did not warrant immediate dental attention or that a prescription for any medication was necessary. (*Id.* ¶¶ 31, 35.) Gregoline asserts that, absent additional symptoms, such as throbbing, he does not prescribe pain medication for a simple toothache. (Doc. 76-1 at 13, Ex. 2 ¶ 28.) At the time Gregoline was a dentist at SCC, prison policy prohibited segregation inmates from possessing dental floss, floss picks, or floss loops due to security concerns. (*Id.* ¶ 16.) The December 10, 2014 appointment was Plaintiff's only

---

[3] Plaintiff states that he informed a nurse that he felt "moderately severe pain in the upper left quadrant" of his mouth, but he did not include this information in his Medical Request. (Doc. 89 (Pl.'s Decl.) ¶ 15.)

[4] Plaintiff states that during his appointment, he also told Defendant he felt "moderately severe pain in the upper left quadrant" of his mouth. (*Id.* ¶ 24.) The dental examination form does not indicate that Plaintiff complained of pain in this area of his mouth. (*See* Doc. 76-1 at 16-20.)

time being seen by Gregoline; Gregoline retired soon after in January 2015. (Doc. 76 ¶ 3.)

On July 9, 2015, Plaintiff was seen by SCC dentist Dr. Gill. (*Id.* ¶ 40.) During this appointment, Dr. Gill diagnosed Plaintiff with mild gum inflammation, moderate periodontal disease (bone loss), and with cavities in teeth #12, #21, and #23; tooth #12 is in the upper left area of the mouth, and teeth #21 and #23 are in the lower left area. (*Id.* ¶¶ 41-42; Doc. 76-1 at 23, Ex. 3 (Gill Decl.) ¶ 5.) Dr. Gill filled the cavity in tooth #12 that same day and recommended that Plaintiff make another appointment to fill the remaining cavities. (Doc. 76 ¶ 42.) Dr. Gill did not observe any nerve damage or infection, and assigned Plaintiff as a level 3 priority; he did not consider Plaintiff's condition to be urgent. (*Id.* ¶¶ 41, 44-45.) Dr. Gill attests that the main objectives of the initial examination are still met if the examination takes place in a segregation office and that such an examination meets the standard of care. (Doc. 76-1 at 23, Ex. 3 ¶ 5.)

According to SCC Assistant Warden Bradley, during the times relevant to Plaintiff's claim, SCC inmates housed in segregation were not permitted to have dental floss or floss picks. (Doc. 76-1 at 31, Ex. 4 (Bradley Decl.) ¶ 4.) Dental floss and floss picks could be used to strangle or cut inmates or staff, or to make other contraband. (*Id.* ¶ 5.)[5] However, dental loops, which pose less of a safety risk because they are small and limited in length, became available at SCC's commissary in August 2015, and could be purchased by segregation inmates. (*Id.* ¶ 7.)[6]

## IV. Eighth Amendment Claim

### A. Serious Medical Need

Plaintiff's dental records show that he suffered from dental pain, gum inflammation, and that he developed several cavities while he was confined at SCC.

---

[5] Plaintiff's disciplinary history includes an incident where he tied a razor to a piece of dental floss, tied the other end of the floss to his tooth, swallowed the razor, and later pulled up the razor which he used to cut a guard's face several times. (Doc. 76-1 at 31, Ex. 4 ¶ 6.)

[6] Plaintiff states that he was indigent and unable to afford dental loops. (Doc. 89 ¶ 61.)

Although Defendant Gregoline and Dr. Gill did not consider Plaintiff's condition to be urgent, Plaintiff states that he suffered moderately severe pain, and the record shows that he was referred for a deep cleaning and had to have a cavity filled. The Court finds that these facts are sufficient to show that "a reasonable doctor" would consider Plaintiff's condition to be "important and worthy of treatment" and are therefore sufficient to satisfy the objective prong of the deliberate indifference analysis. *McGuckin*, 974 F.2d at 1059-60.

**B. Deliberate Indifference**

After reviewing the available record, the undisputed facts do not show that Defendant Gregoline was deliberately indifferent to Plaintiff's serious medical needs.

Plaintiff alleges that Gregoline failed to conduct his initial examination in the dental office, where Gregoline would have had access to "dental instrumentation, [a] reclining dental exam chair, powerful lighting and a dental x-ray machine." (Doc. 89 ¶ 21.) Plaintiff also alleges that Gregoline failed to provide him with dental pain medication or prescribe dental floss. (*Id.* ¶¶ 28, 41.)

These allegations do not rise to the level of deliberate indifference. Other than Plaintiff's unsupported statements, there is no evidence that Gregoline conducting Plaintiff's initial examination in the segregation offices fell below the standard of care or that it constituted wanton disregard for Plaintiff's dental needs. Initial examinations serve the purpose of checking the status of an incoming inmate's dental condition, and if further treatment is needed, segregation inmates are scheduled for follow-up treatment in the dental unit. Gregoline attests that he was able to observe the inside of Plaintiff's mouth during the initial examination, and that he did not see any signs or evidence of cavities, only gum inflammation. Gregoline attributed Plaintiff's complaints of pain and sensitivity to the inflammation and recommended a deep cleaning. Plaintiff admits that Gregoline told him he did not see any cavities, but that he would schedule Plaintiff for x-rays to confirm whether Plaintiff had any cavities. (Doc. 89 ¶ 32.) Plaintiff subsequently had x-rays taken during his appointment with Dr. Gill. (Doc. 76-1 at 26, Ex. 3.) Based

on his professional opinion, Gregoline determined that Plaintiff's condition was a priority 3 out of 5 and that pain medication was not necessary at that time. Plaintiff may disagree with Gregoline's treatment decisions, but mere disagreement with the type of medical treatment Gregoline provided does not support a claim of deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989) ("A difference of opinion does not amount to deliberate indifference to [a plaintiff's] serious medical needs.")

Further, the record shows that Gregoline was prohibited from providing Plaintiff with a means to floss his teeth due to Plaintiff's segregation status. There is no evidence that Gregoline was responsible for promulgating this policy, or that he had the authority to bypass it. Plaintiff was denied dental floss based upon the security risk to other inmates and staff, not based on deliberate indifference to his serious medical need. *See Gomez v. Westchester County*, No. 12-CV-6869 (RA), 2015 WL 1054902 at *9 (S.D.N.Y. Mar. 10, 2015) ("The deprivation of dental floss . . . is simply not so 'repugnant to the conscience' or 'incompatible with the evolving standards of decency' that it satisfies the seriousness prong of a deliberate indifference claim."); *Francis v. Carroll*, 773 F.Supp.2d 483, 487 (D.Del. Mar. 29, 2011) (Finding denial of dental floss for security purposes did not amount to deliberate indifference where record showed inmate received continual dental care); *Burke v. Webb*, 2007 WL 419565 at *2 (W.D.Va. Feb. 1, 2007) (No constitutional violation where inmate denied dental floss for security purposes).

Finally, even if Plaintiff had cavities during his initial examination with Gregoline, absent any evidence that Gregoline was aware of the cavities and deliberately failed to treat them, Plaintiff's claim does not amount to an Eighth Amendment violation. *Wilhelm v. Rotman*, 680 F.3d 1113, 1123 (9th Cir. 2012) (allegation of negligent misdiagnosis is insufficient to establish deliberate indifference). The record shows that during his single interaction with Defendant Gregoline, Gregoline responded to Plaintiff's dental complaints by conducting an examination, recommending a deep cleaning, and agreeing to schedule Plaintiff for x-rays to definitively determine whether

Plaintiff had cavities. These actions do not constitute a deliberate disregard for Plaintiff's dental needs.

For the foregoing reasons, Plaintiff's Eighth Amendment claim against Defendant Gregoline will be dismissed.

**V. Negligence Claim**

Under Arizona law, to prove that an injury resulted from the failure of a health care provider to follow the accepted standard of care, a Plaintiff must prove that the "health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances" and that "such failure was a proximate cause of the injury." Ariz. Rev. Stat. § 12-563. "Ordinarily, a plaintiff must present expert evidence of the accepted conduct of the profession and the defendant's deviation from that standard unless the negligence is so grossly apparent that a layman would have no difficulty in recognizing it." *Nunsuch ex rel. Nunsuch v. U.S.*, 221 F. Supp. 2d 1027, 1032-33 (D.Ariz. 2001) (citations omitted).

Defendants have provided relevant portions of Plaintiff's dental records and the sworn testimony of Defendant Gregoline and Dr. Gill, which show that Plaintiff's dental needs were investigated and treated according to the professional judgment and experience of his treating dentists. Plaintiff has not presented any evidence demonstrating how Gregoline's negligence is so grossly apparent that expert medical testimony would not be required to assist the trier of fact. *See id.* at 1033.[7] Because Plaintiff has not disclosed an expert in this case and has not provided any expert testimony establishing that Gregoline "failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class

[7] To the extent Plaintiff moves the Court to defer its ruling on Defendants' Motion for Summary Judgment and reopen discovery so that Plaintiff can "conduct further discovery on the standard of care[,]" Plaintiff's request will be denied. (Doc. 88 at 9.) The parties have had ample time to conduct discovery, and the deadline to send discovery requests expired nearly a year ago on August 5, 2016. (Doc. 36.) Because Plaintiff has not shown good cause to reopen discovery, the Court will deny Plaintiff's request.

to which he belongs within the state acting in the same or similar circumstances" and that "such failure was a proximate cause of the injury," there is no disputed issue of material fact demonstrating that Gregoline's treatment of Plaintiff amounted to negligence. *See id.* Accordingly, the Court will grant Defendants' Motion for Summary Judgment as to Plaintiff's negligence claim. There being no claims remaining against Defendant Gregoline, he will be dismissed from the action.

## VI. Defendant CCA

### A. Respondeat Superior

Plaintiff alleges a claim for respondeat superior liability against Defendant CCA based on Defendant Gregoline's alleged negligence. The respondeat superior doctrine states generally that an employer is vicariously liable for the torts or conduct of its employees that are work related. *Engler v. Gulf Interstate Eng'g, Inc.*, 280 P.3d 599, 601 (Ariz. 2012). In other words, the conduct of the employee is imputed to the employer. *See Samaritan Found. v. Goodfarb*, 862 P.2d 870, 875-76 (Ariz. 1993). For liability under this theory, there must be an employer-employee relationship, there must be an underlying tort committed by the employee, and the employee's tortious act must have "occurred during the course and scope" of his or her employment. *State v. Superior Court*, 524 P.2d 951, 953 (Ariz. 1974); *see Engler*, 280 P.3d at 601.

Here, the Court has determined that Plaintiff has not established a genuine issue of material fact that Defendant Gregoline's dental treatment fell below the standard of care. Absent a finding of tortious conduct by Gregoline, Plaintiff's respondeat superior claim against CCA fails, and the Court will grant Defendants summary judgment as to that claim.

### B. Eighth Amendment

Plaintiff alleges that Defendant CCA violated his Eighth Amendment right to constitutionally adequate dental care when it promulgated a policy of not allowing segregation inmates to possess dental floss, dental picks, or dental loops prior to August

2015 and a policy of not providing narcotic pain medication to inmates. (Doc. 89 ¶¶ 18, 29.)

To prove a claim under § 1983 against a private entity performing a traditional public function, such as providing dental care to prisoners, a plaintiff must demonstrate facts to support that his constitutional rights were violated as a result of a policy, decision, or custom promulgated or endorsed by the private entity. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138-39 (9th Cir. 2012). In this case, Plaintiff must show: (1) that his Eighth Amendment rights were violated by an employee or employees of Corizon; (2) that CCA has customs or policies that amount to deliberate indifference; and (3) that the policies or customs were the moving force behind the violation of Plaintiff's constitutional rights in the sense that CCA could have prevented the violation with an appropriate policy. *See Gibson v. County of Washoe*, 290 F.3d 1175, 1193-94 (9th Cir. 2002).

Plaintiff's deliberate indifference claim is leveled against Defendants Gregoline and CCA. The allegations are intertwined because to maintain a claim against CCA as an entity, Plaintiff must first establish that he was deprived of a constitutional right; that is, that Gregoline's care or lack of care constituted deliberate indifference. *See Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1110-11 (9th Cir. 2001). If Plaintiff satisfies this first prong, he must then establish that CCA had a policy or custom; that the policy or custom amounted to deliberate indifference to Plaintiff's constitutional right; and that the policy or custom was the moving force behind the constitutional violation. *Id.*

With respect to Plaintiff's claim that CCA had a policy of denying narcotic pain medication to inmates, there is no evidence of the existence of such a policy. The facts merely indicate that Defendant Gregoline and Dr. Gill, as individuals, and based on their professional judgment, declined to prescribe narcotic pain medications to inmates. (Doc. 76-1 at 13, Ex. 2 ¶ 28; Doc. 76-1 at 23, Ex. 3.) There are no facts to suggest that

Gregoline and Gill's decision to not prescribe narcotics to inmates was based on a CCA policy. Accordingly, that portion of Plaintiff's claim against CCA will be dismissed.

Turning next to Plaintiff's access to dental floss, the denial of dental floss for security reasons did not amount to a constitutional violation. Because there is no material issue of fact as to whether Defendant Gregoline was deliberately indifferent, there can be no dispute as to whether his actions were pursuant to a policy or custom that deprived Plaintiff of a constitutional right. *Mabe*, 237 F.3d at 1110-11. Therefore, CCA is entitled to summary judgment.

**IT IS ORDERED** that the reference to the Magistrate Judge is withdrawn as to Defendants' Motion for Summary Judgment (Doc. 75) and the Motion is **granted**. The action is terminated with prejudice, and the Clerk of Court must enter judgment accordingly.

Dated this 27th day of June, 2017.

G. Murray Snow
Honorable G. Murray Snow
United States District Judge