NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY DONNELL DUNLAP, Plaintiff - Appellant, v. SIJI THOMAS, Nurse Practitioner; KARANJA ADAMS, Nurse Practitioner; Doctor RONALD STEWART; NAPHCARE, INC., Medical Provider, Defendants - Appellees.	No. 25-2946 D.C. No. 2:23-cv-00666-DJH MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Diane J. Humetewa, District Judge, Presiding

Submitted July 31, 2026**

Before: MURGUIA, Chief Judge, and WARDLAW and JOHNSTONE, Circuit Judges.

Larry Donnell Dunlap, a prisoner in the custody of the Arizona Department of Corrections, appeals from the district court's summary judgment in his action

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* 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).

alleging inadequate medical care claims under the Eighth Amendment. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

We review a district court's grant of summary judgment de novo. *Dees v. County of San Diego*, 960 F.3d 1145, 1151 (9th Cir. 2020). "We must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inference in the nonmoving party's favor." *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 459 (9th Cir. 2018). Summary judgment is appropriate when there is no genuine dispute of any material fact. *Id.*

The Eighth Amendment prohibits "cruel and unusual punishment, which prevents government officials from acting with deliberate indifference to a prisoner's health and safety or serious medical needs." *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1248 (9th Cir. 2016) (internal citations omitted). The district court properly granted summary judgment.

First, Dunlap failed to raise a genuine issue of material fact as to whether Nurse Practitioners Siji Tomas and Grace Adams were deliberately indifferent in treating his medical conditions. *See Peralta v. Dillard*, 744 F.3d 1076, 1081 (9th Cir. 2014) (en banc). Dunlap's disagreement with his medical plan, without more, does not create a triable issue as to whether Defendants were deliberately indifferent to his medical needs. *See Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004) (holding that "a prisoner must show that the chosen course of treatment was

medically unacceptable under the circumstances, and was chosen in conscious disregard of an excessive risk to the prisoner's health" (citation and internal quotation marks omitted) (alterations omitted)).

Second, as to Dunlap's claim against NaphCare, the prison's contracted healthcare provider, Dunlap failed to identify evidence that demonstrates existence of a NaphCare policy that requires healthcare providers monitor chronic conditions, as opposed to recommend treatment. *See Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) ("Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy.").

To the extent Dunlap argues that NaphCare improperly withheld medical records, the claim is not preserved, as Dunlap raised the argument for the first time in his motion for reconsideration. *See Hendricks & Lewis PLLC v. Clinton*, 766 F.3d 991, 998 (9th Cir. 2014).

AFFIRMED[1]

[1] Dunlap's Motion for a Copy of the Informal Brief (Dkt. No. 4) is denied as moot.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing and Petition for Rehearing En Banc (Fed. R. App. P. 40; 9th Cir. R. 40-1 to 40-4)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
  - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
  - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing or rehearing en banc must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(d).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(d). The deadlines for seeking reconsideration of a non-dispositive order are set forth in 9th Cir. R. 27-10(a)(2).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-4.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
  - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

Name of party/parties requesting costs to be taxed:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	**REQUESTED** *(each column must be completed)*			
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Principal Brief(s) *(Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief)*			$	$
Reply Brief / Cross-Appeal Reply Brief			$	$
Supplemental Brief(s)			$	$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee / Appeal from Bankruptcy Appellate Panel Docket Fee/Appeal from District Court filing portion of fee ($5)				$
			TOTAL:	$

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:*
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TOTAL: 4 x 500 x $.10 = $200.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Larry Donnell Dunlap,

Plaintiff,

v.

Siji Thomas, et al.,

Defendants.

No. CV-23-00666-PHX-DJH (DMF)

ORDER

Plaintiff Larry Donnell Dunlap, who is currently confined in the Arizona State Prison Complex-Lewis, brought this civil rights action under 42 U.S.C. § 1983. Defendants NaphCare, Inc. ("NaphCare") and Nurse Practitioners (NPs) Siji Thomas and Grace Adams move for summary judgment on the merits of Plaintiff's Eighth Amendment medical care claims. (Doc. 98.) Plaintiff was informed of his rights and obligations to respond pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc) (Doc. 100), and he opposes the Motion. (Doc. 115.) Defendants filed a Reply. (Doc. 116.)

The Court will grant the Motion for Summary Judgment.

I. Background

In his Complaint, Plaintiff alleges that Defendants provided constitutionally inadequate medical care for his kidney failure, hernia, bunion, glaucoma, hypertension, and leukopenia. (Doc. 1.) On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated an Eighth Amendment claim in Count Two against Defendants Thomas and Adams and a policy claim in Count Three against Defendant NaphCare and directed

them to answer the claims. (Doc. 5.) The Court dismissed Count One and Defendant Stewart. (*Id.*)

II. Summary Judgment Standard

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).

III. Facts

Plaintiff is in the custody of the Arizona Department of Corrections, Rehabilitation and Reentry (ADCRR). Plaintiff has multiple medical conditions, including thrombocytopenia, a platelet deficiency; a low white blood cell count (leukopenia); kidney failure; an inguinal groin hernia; an "extreme bunion that injured his hip and back"; and glaucoma. (Compl, Doc. 1.) Plaintiff has had low or abnormal white blood cell counts and low platelet counts since 2012. (Doc. 2-1 at 6.) In 2015, a prison provider consulted with a hematologist about Plaintiff's ongoing leukopenia. (Doc. 2-2 at 6.) In December 2015, the hematologist sent an e-mail stating that Plaintiff should have a hematology evaluation and asked for complete blood count (CBC) test results "from as far back as you can obtain." (*Id.*)

On July 24, 2019, Defendant Thomas requested an offsite consultation for a hematology evaluation for ongoing thrombocytopenia, leukopenia, and neutropenia with a negative history of hepatitis C, HIV, ANA (antinuclear antibody), or rheumatoid arthritis. (*Id.*) Defendant Thomas noted that Plaintiff denied bleeding episodes or repeated infection and reported pain in the hip and in the lower lateral side of the back on the right side and moderate swelling in the right hip. (*Id.*) Lab tests performed on July 27, 2019 showed Plaintiff's platelet count was 95, and his white blood cell count was 2.68, with a normal range of 4.0-10.0, and was noted as "below lower panic levels" in the test results. (*Id.* at 49.) Defendant Thomas reviewed the results on July 29, 2019 and noted, "Will review results with patient at next chronic care visit." (*Id.* at 50.)

Blood tests performed on October 15, 2019 indicated a decreased number of platelets, but the lab was unable to obtain a numeric result. (Doc. 2-2 at 2.) The results noted, "Please submit a lavender and blue top if quantitative result if desired. Please indicate on order – blue for platelet clumping." (*Id.*) Plaintiff's white blood cell count was 2.59. (*Id.*) Defendant Thomas reviewed the test results on October 16, 2019 and noted, "will follow up labs on cc visit." (*Id.* at 3.)

On November 1, 2019, Defendant Thomas entered an urgent consultation request for a bone marrow biopsy that had been recommended by hematology/oncology. (*Id.* at 10.) Authorization for the bone marrow biopsy was obtained on December 2, 2019. (*Id.*) Blood tests performed on January 6, 2020 showed that Plaintiff's platelet count was 128, and his white blood cell count was 3.48. (*Id.* at 21-22.) Defendant Thomas reviewed the results on January 8, 2020 and noted, "Will review results with patient at next chronic care visit." (*Id.* at 24.) A prothrombin time plus INR test was normal. (*Id.* at 25.)

A February 12, 2020 record from a hematologist/oncologist indicates Plaintiff's chronic leukopenia and thrombocytopenia were due to benign leukopenia (normal variant) and pseudo thrombocytopenia (platelet dumping). (Doc. 99-1 at 65.) The hematologist/oncologist recommended annual labs for monitoring. (*Id.* at 66.)

On April 28, 2020, Angel Merriman entered a special needs order (SNO) for prescribed footwear for one year. (Doc. 2-4 at 12.)

On May 18, 2020, Plaintiff's white blood cell count was 3.05. (Doc. 2 at 45.) Plaintiff's platelet estimate again indicated a decreased number of platelets, but the lab was unable to obtain a numeric result. (*Id.* at 46.) On May 20, 2020, Defendant Thomas reviewed the test results and noted the results were "essentially normal, no further follow up needed." (*Id.*)

On June 17, 2020, Defendant Thomas entered a SNO for tennis shoes to be worn for offsite appointments for one year. (Doc. 2-4 at 23.)

On September 16, 2020, Plaintiff's complete blood count (CBC) showed his white blood cell count was 2.92. (*Id.* at 14.) Plaintiff's platelet estimate indicated a decreased number of platelets, but the lab was unable to obtain a numeric result. (*Id.* at 16.) Defendant Thomas reviewed the results of the tests on September 27, 2020 and noted the results were "essentially normal, no further follow up needed." (*Id.* at 15.)

Blood tests conducted on November 4, 2020 showed that Plaintiff's platelet count was 88, and his white blood cell count was 2.99. (Doc. 2-1 at 8.) Defendant Thomas reviewed the results and noted, "results consistent with established diagnoses, no further

follow up needed." (*Id.* at 10.) On December 23, 2020, a fluorescence in situ hybridization (FISH) for acute myeloid leukemia (AML) test was within normal limits.[1] (Doc. 2-2 at 16-17.) Defendant Thomas reviewed the results on January 11, 2021 and noted, "results essentially normal no further follow up needed." (*Id.* at 18.)

On December 29, 2020, Defendant Thomas entered a SNO for tennis shoes for one year. (Doc. 22-4 at 13.)

On February 1, 2021, Plaintiff's blood tests showed his platelet count was 128, and his white blood cell count was 4.13, within the normal range. (*Id.* at 30.) Pamela Olmstead reviewed the blood test results on February 3, 2021 and noted, "Abnormal results but expected and stable for chronic condition. Will review at next chronic care visit." (*Id.* at 32.) Blood tests conducted on February 16, 2021 showed that Plaintiff's platelet count was 93, and his white blood cell count was 3.95. (Doc. 2 at 26-27.) A urinalysis was normal. (*Id.* at 48.) Defendant Thomas reviewed the urinalysis on February 18, 2021 and reviewed the blood test results on May 2, 2021, noting for each that result was "essentially normal," and no further follow up was needed. (*Id.* at 29, 50.)

On October 2, 2021, NP Natalie Bell entered a SNO for medical glasses for one year and a SNO for prescribed footwear to be worn offsite for medical purposes. (Doc. 2-4 at 21, 28.) On May 10, 2021, Defendant Thomas entered a SNO for a lower bunk for one year. (*Id.* at 16.) On May 26, 2021, Defendant Thomas entered a SNO for insoles for one year. (*Id.* at 15.)

On February 6, 2022, Plaintiff met with Defendant Thomas to discuss his thrombocythemia. (Compl. at 3.) Defendant Thomas told Plaintiff that the condition was life-threatening and that a blood test was needed to determine "how Plaintiff['s] condition has deteriorated." (*Id.*)

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[1] The FISH test is a technique that pathologists use for some types of genetic testing. Pathologists mark DNA with fluorescent labels so they can see the areas they're interested in under a microscope. Providers use it to diagnose chromosomal abnormalities and gene mutations in cancer. *See* https://my.clevelandclinic.org/health/diagnostics/fluorescence-in-situ-hybridization-fish-test (last visited Jan. 29, 2025).

On March 8, 2022, Plaintiff saw Edward Kilosky. (Doc. 115 at 8.) Plaintiff told Kilosky that he had blood in his stool and in the toilet. (*Id.*) Kilosky told Plaintiff to submit a health needs request (HNR) "when it happen[ed] again." (*Id.*) Kilosky also ordered repeat bloodwork. (*Id.* at 9.)

According to Plaintiff's medical records, on March 8, 2022, he saw Defendant Thomas to follow up on his recent lab results.[2] (Doc. 99-1 at 2.) Plaintiff was concerned about his platelet count not appearing on the results and denied any history of bleeding. (*Id.*) Defendant Thomas ordered repeat bloodwork, which was collected on March 16, 2022. (Doc. 2 at 18.) The results showed Plaintiff's white blood cell count was low at 3.58. (*Id.*) Plaintiff's platelet estimate indicated a decreased number of platelets, but the lab was unable to obtain a numeric result. (*Id.*) A partial thromboplastin time test[3] was within the normal range. (*Id.* at 23.) On March 18, 2022, Defendant Thomas reviewed the results of the repeat bloodwork and noted that Plaintiff would be scheduled for a follow-up appointment. (Doc. 99-1 at 10.) Plaintiff was not notified of the results of the blood tests. (Doc. 115 at 10.)

On March 30, 2022, Plaintiff followed up with Defendant Thomas. (Doc. 99-1 at 12.) Defendant Thomas documented in the notes for the visit that the lab "could not get platelet results with previous labs" and that she had ordered repeat blood tests with instructions for the lab to send the specimen in a specific type of container. (*Id.* at 16.) Plaintiff and Defendant Thomas discussed moles on his head, "purple pinpoint bruising" on his legs, bleeding gums, and continued blood in his stool. (Doc. 113 at 16; Doc. 115 at 10-11.) Defendant Thomas and another nurse took pictures of Plaintiff's legs and feet, and Thomas told him that the purple pinpoint bruising was due to Plaintiff's low platelet

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[2] Edward Kilosky's name appears on the Health Services Encounter for March 8, 2022 as "Review Staff." (Doc. 99-1 at 6.) According to Plaintiff, that means he saw Kilosky, not Defendant Thomas, that day. However, the Health Services Encounter indicates that Kilosky only reviewed Defendant Thomas's notes for any pending orders. (*Id.*)

[3] A partial thromboplastin time test is used to determine how long it takes blood to clot. *See* https://my.clevelandclinic.org/health/diagnostics/25101-partial-thromboplastin-time (last visited Jan. 29, 2025).

counts. (Doc. 115 at 11.) Thomas did not discuss a treatment plan to resolve Plaintiff's white blood cell and platelet problems, and she did not inform him of the results of the repeat bloodwork. (*Id.* at 10-11.)

On April 20, 2022, Plaintiff submitted an HNR describing the symptoms from his low platelet count, including fever; achy joints; small areas of purplish spots on his feet, legs, arms, and buttocks; and swollen ankles, hips, knees, wrists, and elbows. (Compl. at 4.) On May 10, 2022, Plaintiff followed up with Defendant Thomas to discuss his request for SNO renewals. (Doc. 99-1 at 22.) Defendant Thomas noted that she would renew Plaintiff's SNOs for a shower chair, medical footwear, and a lower bunk for one year. (*Id.* at 25-26.) The lower bunk SNO was for Plaintiff's "very painful and dangerous inguinal groin hernia" and "daily climbing up and down could cause [his] intestin[al] hernia to twist[,] cutting off blood flow and causing Plaintiff death from the shock of such injury." (Compl. at 9-10.) That same day, Defendant Thomas entered SNOs for medical footwear and a shower chair for one year. (Doc. 2-4 at 10, 30.) However, Plaintiff did not receive the SNOs until October 31, 2022. (Doc. 115 at 13.)

On May 18, 2022, Defendant Thomas had more blood drawn. (Compl. at 4.) On May 30, 2022, Plaintiff spoke with Defendant Thomas about the results of the May 18 blood test. (*Id.*) Defendant Thomas told him that "they could not get a reading" of his platelet count and that she believed his bone marrow was not producing enough platelets or that Plaintiff might have leukemia or aplastic anemia. (*Id.*) Plaintiff asked what Defendant Thomas was going to do. (*Id.*) Defendant Thomas explained that she "has to follow [the] policy of Centurion," which was the prison healthcare provider at the time; the policy only allowed her to "monitor Plaintiff['s] condition"; and she "wasn't going to get into trouble by submitted request[s] that won't get approved." (*Id.*) When Plaintiff asked if his condition was life-threatening, Defendant Thomas confirmed that it was and "suggest[ed] strongly that Plaintiff . . . not get into a fight and suffer injury," cut himself, or exercise. (*Id.* at 4-5.) She also suggested that he "document" when he is bleeding from his gums; "monitor" the amount of blood in his stool and how much blood he is urinating;

and "document" on which days this occurs. (*Id.* at 5.) When Plaintiff asked if he should submit an HNR every time he saw blood in his stool or urine, Defendant Thomas told him, "no, just keep a journal of the condition." (*Id.*) Plaintiff received no treatment. (*Id.*)

On June 9, 2022, Plaintiff attended his routine chronic care appointment with Defendant Thomas. (Doc. 99-1 at 28.) Plaintiff did not deny bleeding or bruising, and Defendant Thomas took pictures of the bruising on his legs. (Doc. 115 at 14.) According to the records for the visit, Defendant Thomas noted Plaintiff's medical history and medications, that he was taking his medications, and that he denied any bleeding or bruising. (Doc. 99-1 at 28.) Defendant Thomas reviewed Plaintiff's most recent labs and noted that his thrombocytopenia was "clinically stable." (*Id.* at 32.) Defendant Thomas also noted that Plaintiff's hypertension was under "good control." (*Id.* at 34.)

On June 24, 2022, Plaintiff's blood was tested. (*Id.* at 18.) His platelet count was 129. (*Id.* at 19.) Defendant Thomas noted that the results were "essentially normal" and "no further follow up [was] needed." (*Id.*) In July 2022, Plaintiff submitted HNRs seeking treatment for his medical condition, but medical staff did not respond. (Compl. at 5.)

On August 12, 2022, Plaintiff saw Defendant Thomas to discuss his request for SNOs for sunscreen and a hat. (*Id.* at 37.) Defendant Thomas told Plaintiff that he did not need sunscreen or a wide brim hat to shield him from the sun because Plaintiff is Black, and Black skin offers more protection from the sun. (Doc. 115 at 14.) According to the notes for the visit, Defendant Thomas noted that there was no clinical necessity for the SNOs. (Doc. 99-1 at 41.)

On August 20, 2022, Plaintiff submitted an HNR informing Defendant Thomas that he was "bleeding more in his urine and found more blood in his stool in [August]." (Compl. at 5.) He received no response. (*Id.*) On September 16, 2022, Defendant Thomas saw Plaintiff for complaints of left hip pain. (Doc. 99-1 at 43-47.) Plaintiff and Thomas discussed an MRI of his right hip, and Thomas told Plaintiff that it was "NaphCare's" policy to use alternate treatment for hip injuries before ordering MRIs, that Plaintiff is old and should expect hip problems due to his age, and that aspirin was "enough" for him.

(Doc. 115 at 15.) Defendant Thomas told Plaintiff she would not recommend an MRI. (*Id.*) At that visit, Plaintiff also asked about his white blood cell and platelet issues and when he was "going to any outside medical appointment." (*Id.*) Plaintiff told Defendant Thomas he had experienced an increase in bruising in both of his legs and caught colds almost weekly. (*Id.*) Defendant Thomas told Plaintiff she would order another blood test in October because Centurion would no longer be ADC's healthcare provider and Defendant NaphCare would "take over" ADC's "medical system." (Compl. at 6.)

On November 8, 2022, Plaintiff's blood was collected. (Doc. 2 at 20.) The test results showed his platelet count was 124 with a normal range of 140-400. (*Id.* at 22.) Plaintiff's white blood cell count was normal. (*Id.*) Defendant Thomas reviewed the results on November 10, 2022 and noted that she would follow up with Plaintiff during his chronic care visit. (*Id.*) On November 22, 2022, Defendant Thomas met with Plaintiff and told him that the blood test indicated his "platelet count ha[d] fallen to the level that he need[ed] treatment"; his life was "in danger of life-threatening bleeding in the brain" even if Plaintiff was not injured; and he was in danger of kidney damage and possible bleeding in his gastrointestinal tract that might cause abdominal cramps and tenderness. (Compl. at 6.) Defendant Thomas told Plaintiff she was going to be transferred to a different unit but had submitted a request for a "medical consultation for [a] blood evaluation at the cancer center." (*Id.*) When Plaintiff asked why Defendant Thomas had "wait[ed] so long" to submit a request for outside treatment, Defendant Thomas explained that she had followed Centurion's policy. (*Id.*)

On December 1, 2022, Plaintiff saw Defendant Adams for chronic care. (Doc. 99-1 at 55.) During the visit, Plaintiff and Defendant Adams "got into an argument" because Adams refused to discuss Plaintiff's white blood count and platelet results. (Doc. 115 at 16.) Plaintiff asked Defendant Adams to examine him, and she refused because he was "in chronic care only to discuss what she felt was medical issue as her discussion of [his] medical conditions is dictated by [NaphCare] policy." (*Id.*) According to the records for the visit, Defendant Adams noted that Plaintiff had been seen by oncology and "ruled a

normal variant." (Doc. 99-1 at 55.) Defendant Adams also noted that his bone marrow biopsy showed normal maturation of the trilineage series and that lymphoma, leukemia and MDS (a type of blood cancer) had all been ruled out. (*Id.* at 56.)

On December 8, 2022, Plaintiff saw NP Michael Brathwaite via telemed for a blood pressure check. (*Id.* at 70.) Plaintiff's blood pressure was high at 138/80, but his "other" reading was 120/80 because he had been fasting for three days to get his blood pressure under control. (Doc. 115 at 17.) NP Braithwaite "acknowledge[d]" Plaintiff's life-threatening medical issues," and Plaintiff did not say he was "well" or "feeling good." (*Id.*) Rather, Plaintiff told NP Braithwaite "the truth [about] how bad he was feeling." (*Id.*) According to the records for the visit, Plaintiff did not complain of any symptoms and reported good compliance with his medications. (Doc. 99-1 at 70.)

At some point, after Plaintiff caught a cold for the sixteenth time since January 2022 because of his low white blood cell and platelet counts, he submitted an HNR requesting emergency medical treatment. (Doc. 115 at 18.) On December 11, 2022, nurse Trenise Jacobs saw Plaintiff for follow up for a referral to the provider line. (*Id.*; Doc. 99-1 at 70.) Jacobs told Plaintiff that his condition was not worse, but there "need[ed] to be a treatment plan to resolve [his] many issues." (*Id.*) According to the notes from the visit, Plaintiff reported no new or worsening complaints. (Doc. 99-1 at 70.)

After Plaintiff's blood was drawn again on December 18, 2022, he met with Defendant Thomas on December 26, 2022. (Compl. at 7.) Defendant Thomas told him that his condition had worsened, her request for outside treatment had been denied, she "wasn't going to push for Plaintiff to get treatment," and she was going to leave it to Defendants NaphCare and Adams to "make the de[c]ision for Plaintiff to get treatment[] for his medical condition." (*Id.*) Defendant Thomas told Plaintiff, "good luck." (*Id.*)

On January 28, 2023, Defendant Adams ordered an emergency blood test regarding Plaintiff's platelets. (*Id.* at 7-8.) On February 1, 2023, Defendant Adams told Plaintiff his platelets were "danger[ous]ly low" and he needed "immediate treatment and evaluation of his condition." (*Id.* at 8.) However, Adams told Plaintiff that, "in her medical opinion,"

she wanted to wait another sixty days to "see if there [are] any changes." (*Id.* at 9.) Adams also explained that due to Defendant NaphCare and ADCRR's policies, she had to "continue to monitor Plaintiff['s] condition." (*Id.* at 8.) Plaintiff told Adams that he had been experiencing a weekly loss of blood; had bruising and blood around his ankles, feet, and legs from "internal bleeding;" and was "weak from the loss of blood." (*Id.*) Defendant Adams told Plaintiff to continue to monitor his bleeding and not to exercise, get in any fights, or get any cuts. (*Id.* at 9.)

On February 2, 2023, Plaintiff submitted an HNR regarding his "concerns" about his platelet counts. (Doc. 20-1 at 19.) Plaintiff noted that on five occasions when his blood was tested, his platelet count "did not show up." (*Id.*) On February 25, 2023, Plaintiff saw NP Maggie Austin for chronic care. (*Id.* at 21.) NP Austin noted that there were "no signs of renal insufficiency" in Plaintiff's January 2023 lab work. (*Id.* at 22.) NP Austin noted that Plaintiff's cholesterol and blood pressure were within normal limits, and he denied any signs or symptoms of his chronic conditions or any other symptoms or concerns. (*Id.* at 22.) NP Austin noted that Plaintiff was "stable" and was to continue his current medications and would follow up in approximately 90 days. (*Id.* at 27.)

On February 28, 2023, Plaintiff submitted an HNR requesting that the SNO that allowed him to wear medical tennis shoes to offsite appointments be updated. (Doc. 2-4 at 26.) The Plan of Action on the HNR states, "SNO expired in May 22." (*Id.*) In March 2023, Plaintiff submitted a request for Defendant Adams to renew the SNO for a lower bunk so that he did not injure himself falling from a top bunk due to his low platelet count. (Compl. at 9-10.) Defendant Adams did not respond to the request. (*Id.*) A nurse told Plaintiff that "[Defendant] Adams do[es] not believe that certain inmate[s] should get special treatment in her personal opinion" and she had not been renewing bottom bunk waivers "even for the blind inmates." (*Id.*)

On May 3, 2023, Plaintiff submitted two HNRs to request SNO renewals for a medical chair and medical tennis shoes. (Doc. 99-1 at 70.) Defendant Adams noted that

per the Site Medical Director, medical chairs were not provided to prisoners at the Cook Unit and renewed his SNO for medical tennis shoes. (*Id.*)

On May 4, 2023, Plaintiff submitted an HNR requesting updated labs, which were completed on May 6, 2023. (Doc. 20-1 at 29.) An updated CBC was taken on May 6, 2023; the lab was unable to obtain a numeric result for a platelet count, and his white blood count was 3.42. (*Id.* at 31.)

On June 6, 2023, Plaintiff saw NP Nicole Johnson. (Doc. 20-1 at 2.) NP Johnson noted Plaintiff was being seen for reported bloating, his request for a SNO for sunglasses, a urology consult for "kidney disease," labs for the "status of platelets," inserts for his shoes, and a podiatry consultation. (*Id.* at 3.) NP Johnson noted that she would order H. pylori testing for Plaintiff's reported bloating, the medical necessity for sunglasses would be determined by optometry, she would renew the SNO for a medical chair, and a urology appointment was not medically indicated for "kidney disease." (*Id.*) NP Johnson noted that she would order new labs to check Plaintiff's renal and platelet status, the insoles for his shoes were previously ordered, and she would order updated imaging for his foot. (*Id.*) She noted the status of his bleeding or coagulation disorder was "fair" and "unchanged" and that his platelet levels would continue to be monitored for thrombocytopenia. (*Id.*) Plaintiff's level of disease control for high blood pressure, CAD, and hypertension was "good" and his status was "unchanged" – no new symptoms or problems associated with these diagnoses were reported since his last chronic care appointment. (*Id.* at 5-6.) Plaintiff's level of disease control for bleeding or coagulation disorders and renal insufficiency were noted to be "fair," and his status was "unchanged" – no new symptoms or problems associated with these conditions were reported since his last appointment. (*Id.* at 6-7.)

On June 8, 2023, Plaintiff's updated labs were drawn. (*Id.* at 14-15.) His platelet and white blood count were both below low normal, which NP Braithwaite noted was "consistent with [Plaintiff's] chronic conditions." (*Id.* at 15.) NP Brathwaite noted the lab

results would be discussed at Plaintiff's next chronic care appointment within 30 days. (*Id.*)

Also on June 8, Plaintiff submitted an inmate letter stating: "I got all my medical SNOs updated except for my plastic insoles that were issued to me. I didn't get my SNO renewed that allows me to wear my medical tennis shoes like other inmates with diabetes and other illness are allowed to wear their medical tennis shoes on medical runs." (*Id.* at 33.)

On June 9, 2023, Plaintiff underwent a right foot x-ray, which showed no evidence of acute fracture or dislocation, no significant degenerative changes, and unremarkable soft tissues. (*Id.* at 17.)

On August 15, 2023, Plaintiff saw an offsite nephrologist. (Doc. 48-1 at 61-62.) The nephrologist recommended prescription carvedilol instead of losartan, daily blood pressure and heart rate checks, repeat labs in six weeks, for Plaintiff to avoid NSAIDs, a colonoscopy, and to follow up in two months with copies of renal imaging if it could be located. (*Id.* at 62.) When Plaintiff returned to the prison after his appointment with the nephrologist, a provider reviewed the specialist's recommendations and prescribed carvedilol, entered a request for Plaintiff to follow up with the nephrologist in two months and to see a gastroenterologist for a colonoscopy, updated labs, daily vitals, no NSAIDs, and requested that his renal imaging be forwarded to the nephrologist. (*Id.* at 78-79.)

On August 22, 2023, Plaintiff was seen on the nursing line for multiple HNRs. (*Id.* at 58-59.) On August 25, 2023, he received a SNO for sunglasses. (Doc. 99-1 at 70.) On September 3, 2023, Plaintiff saw NP Adolfo Ortiz for chronic care. (Doc. 48-1 at 48.) NP Ortiz noted Plaintiff's hypertension level of disease control was good and disease status was unchanged; his bleeding or coagulation disorder level of disease control was good and disease status was unchanged; and his renal insufficiency level of disease control was good and disease status was unchanged. (*Id.* at 52-53.) NP Ortiz ordered a CBC with diff/platelets. (*Id.* at 55.)

On September 26, 2023, Plaintiff saw a gastroenterology physician's assistant (PA)

via televisit for a consultation for a screening colonoscopy. (*Id.* at 44.) The PA noted that Plaintiff denied any GI symptoms of frequent nausea, vomiting, gastroesophageal reflux disorder, abdominal pain, diarrhea, or blood/black in his stools, and he reported no family history of gastroenterological diseases. (*Id.* at 44-45.) The PA noted that Plaintiff would be scheduled for a colonoscopy to screen for colon cancer. (*Id.*)

On September 29, 2023, Plaintiff saw a nephrology PA. (Doc. 48-1 at 39.) The PA noted that at his previous visit, it had been discovered that Plaintiff had never received a colonoscopy and that he had seen a renal cancer doctor about a mass, but no biopsy had been completed. (*Id.*) The PA noted there was no platelet count because of an inadequate specimen collection. (*Id.*) The plan was to draw a CBC with the appropriate lavender topped tube, follow up with the provider regarding the renal mass, and follow up with the nephrologist in six months. (*Id.* at 40.)

On December 8, 2023, Plaintiff saw NP Braithwaite via telemed to discuss his most recent nephrology appointment. (Doc. 99-1 at 69.) NP Braithwaite documented that Plaintiff expressed concern regarding his low platelet count, which caused his colonoscopy to be cancelled twice. (*Id.*) NP Braithwaite noted that Plaintiff would be scheduled for a follow-up appointment with the nephrologist in six months per the specialist's recommendation and that he would continue to be monitored through regular chronic care appointments. (*Id.* at 69-70.) NP Braithwaite also noted that Plaintiff's platelet count would be monitored over the next 90 days with a referral to hematology/oncology if thrombocytopenia persisted. (*Id.* at 70.) NP Braithwaite recommended repeat labs and a follow-up appointment to "reconcile the GI aspect." (*Id.*)

On December 23, 2023, Plaintiff saw NP Valerie Pong for "critical platelet level." (Doc. 48-1 at 29.) NP Pong noted Plaintiff's platelet level was "normal" for him, but he could not undergo a colonoscopy until his platelet level was above 150. (*Id.*) NP Pong documented that Plaintiff's most recent platelet count, from November 17, 2023, was 75, and noted that she would place a consultation to follow up with hematology/oncology. (*Id.* at 30.)

On December 27, 2023, Plaintiff saw Dr. Vikki Owen for his routine chronic care appointment. (Doc. 48-1 at 20.) Dr. Owen noted that Plaintiff's platelet count was 75 and that he would continue to be monitored and follow-up with chronic care appointments as scheduled and that updated labs were already scheduled. (*Id.* at 27.) His disease status for bleeding or coagulation disorders was noted as "unchanged" and his level of disease control was noted as "good." (*Id.* at 24.)

On March 7, 2024, Plaintiff was transported to Palo Verde Cancer Specialists for an appointment with Dr. Amol Rakkar, an internist and oncologist. (Doc. 89-1 at 2.) Dr. Rakkar noted that Plaintiff was referred for evaluation of thrombocytopenia and that his CBCs over the previous year had shown variable platelet counts of 58, 78, and 120. (*Id.*) Dr. Rakkar noted that sometimes his platelets could not be read because of clumping. (*Id.*) Dr. Rakkar documented that Plaintiff reported some bruises on the ankle but no bleeding and that he "continue[d] to feel well." (*Id.*) Dr. Rakkar assessed Plaintiff with "artifactual thrombocytopenia" and noted that the variable platelet counts were "not clinically significant" because of clumping. (*Id.* at 3.) Dr. Rakkar noted that Plaintiff did not need any further hematology evaluation. (*Id.*)

On March 29, 2024, Plaintiff saw NP Valerie Pong to discuss his most recent lab results. (Doc. 99-1 at 68.) NP Pong noted that Plaintiff reported he was "doing fine." (*Id.*) NP Pong documented Plaintiff's most recent platelet count as 102, below low normal, and his white blood count as 2.88, below low normal. (*Id.*) She noted the treatment plan was to repeat the CBC with specific instructions to use a non-EDTA container and that if the results were abnormal, to refer Plaintiff to hematology/oncology. (*Id.*)

IV. Discussion

A. Eighth Amendment Legal Standard

To prevail on an Eighth Amendment medical claim, a prisoner must demonstrate "deliberate indifference to serious medical needs." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). There are two prongs to this analysis: an objective prong and a subjective prong. As to the objective prong, a

prisoner must show a "serious medical need." *Jett*, 439 F.3d at 1096 (citations omitted). Examples of indications that a prisoner has a serious medical need include "[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *McGuckin*, 974 F.2d 1050, 1059–60 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

As to the subjective prong, a prisoner must show that the defendant's response to that need was deliberately indifferent. *Jett*, 439 F.3d at 1096. An official acts with deliberate indifference if she "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." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "Prison officials are deliberately indifferent to a prisoner's serious medical needs when they deny, delay, or intentionally interfere with medical treatment," *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (internal citations and quotation marks omitted), or when they fail to respond to a prisoner's pain or possible medical need, *Jett*, 439 F.3d at 1096. But the deliberate-indifference doctrine is limited; an inadvertent failure to provide adequate medical care or negligence in diagnosing or treating a medical condition does not support an Eighth Amendment claim. *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (citations omitted); *see Estelle*, 429 U.S. at 106 (negligence does not rise to the level of a constitutional violation). Further, a mere difference in medical opinion does not establish deliberate indifference. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996).

To prevail on a claim against NaphCare as a private entity fulfilling a public function, Plaintiff must additionally meet the test articulated in *Monell v. New York Department of Social Services*, 436 U.S. 658, 690–94 (1978). *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (applying *Monell* to private entities acting under color of state law). Accordingly, NaphCare can only be held liable under § 1983 for their

employees' civil rights deprivations if Plaintiff can show an official policy or custom caused the constitutional violation. *Monell*, 436 U.S. at 694. To make this showing, Plaintiff must demonstrate the following: (1) he was deprived of a constitutional right; (2) the entity had a policy or custom; (3) the policy or custom amounted to deliberate indifference to Plaintiff's constitutional right; and (4) the policy or custom was the moving force behind the constitutional violation. *Mabe v. San Bernardino Cnty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1110 (9th Cir. 2001).

B. Analysis

1. Serious Medical Need

Defendants do not dispute that Plaintiff's medical conditions amounted to serious medical needs. The evidence supports the existence of serious medical needs. *See McGuckin*, 974 F.2d at 1059–60.

2. Deliberate Indifference

a. Defendant Thomas

Defendants argue that Defendant Thomas "frequently and adequately addressed Plaintiff's medical needs," and there is no evidence that Thomas "*purposefully* denied, delayed, or intentionally interfered with Plaintiff's medical treatment, or that she failed to respond to his reported medical needs." (Doc. 98 at 14.) In his Response, Plaintiff asserts that he "will present the documents that will show that [his] medical issues could be fixed" and that Defendants' actions are "deliberate indifference to [his] life[-]threatening conditions." (Doc. 115 at 41.)

The available evidence demonstrates that Defendant Thomas treated Plaintiff's ongoing leukopenia and thrombocytopenia from at least July 2019 until December 2022. After Defendant Thomas requested a specialist consultation and Plaintiff underwent a bone marrow biopsy, which showed normal maturation of the trilineage series and ruled out lymphoma, leukemia and MDS, a hematologist/oncologist determined that Plaintiff's chronic leukopenia and thrombocytopenia were due to benign leukopenia (normal variant) and pseudo thrombocytopenia (platelet dumping) and recommended annual labs for

monitoring. Thereafter, in accordance with the specialist's determination that Plaintiff's conditions were not life-threatening and only required monitoring, Defendant Thomas routinely ordered updated lab tests and monitored Plaintiff's conditions through chronic care visits. Plaintiff's medical records demonstrate that between July 2019 and December 2022, Defendant Thomas ordered and/or reviewed updated blood tests at least nine times. Plaintiff cites no evidence in the record to support that it was medically unacceptable in the circumstances for Defendant Thomas to follow the specialist's recommendation with respect to monitoring Plaintiff's condition. As a nurse practitioner, Thomas had neither the training nor the authority to disregard the specialist's assessment that Plaintiff had benign leukopenia and pseudo thrombocytopenia, which are *not* life-threatening conditions, as Plaintiff insists.

Although Plaintiff asserts he "will present the documents that will show that [his] medical issues could be fixed," he does not, and the time for producing any such documents has long passed. Plaintiff clearly disagrees with Defendant Thomas's decision to follow the specialist's recommendation and monitor his conditions, but as Defendants argue, a difference of opinion between a prisoner and a medical provider about appropriate treatment generally does not establish deliberate indifference. *See Colwell v. Bannister*, 763 F.3d 1060, 1068 (9th Cir. 2014) ("A difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.") (quoting *Snow v. McDaniel*, 681 F.3d 978, 982 (9th Cir. 2012), *overruled in part on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014) (en banc); *Jackson*, 90 F.3d at 332; *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)). To show that a difference of opinion rose to deliberate indifference, a plaintiff must show that a medical provider's chosen treatment was medically unacceptable under the circumstances and the provider chose the treatment in conscious disregard of an excessive risk to the plaintiff's health. *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004); *Jackson*, 90 F.3d at 332. But if medical personnel have been "consistently responsive to [a prisoner's] medical needs," and there has been no showing

that the medical personnel had "subjective knowledge and conscious disregard of a substantial risk of serious injury," summary judgment is appropriate. *Toguchi*, 391 F.3d at 1061. The available evidence demonstrates that Defendant Thomas was consistently responsive to Plaintiff's medical needs with respect to his benign leukopenia and pseudo thrombocytopenia.

With respect to the MRI of Plaintiff's right hip, the available evidence indicates that on September 16, 2022, Plaintiff and Defendant Thomas discussed an MRI of his right hip, and Thomas told Plaintiff that it was NaphCare's policy to use alternate treatment for hip injuries before ordering MRIs, that Plaintiff is old and should expect hip problems due to his age, and that aspirin was "enough" for him. Assuming the truth of these facts, Defendant Thomas's refusal to order an MRI did not amount to deliberate indifference to a serious medical need. There is no evidence that Defendant Thomas or any other provider had diagnosed Plaintiff with a condition that required an MRI. Although Plaintiff apparently took offense to Thomas's statement that Plaintiff should expect hip problems because he is old, in the absence of evidence of a medical condition that required an MRI to diagnose or assess, Thomas's statement, even if unprofessional, does not constitute an Eighth Amendment violation.

With respect to Plaintiff's SNOs, the evidence demonstrates that on December 29, 2020, Defendant Thomas entered a SNO for tennis shoes for one year. On May 10, 2021, Thomas entered a SNO for a lower bunk for one year, and on May 26, 2021, she entered a SNO for insoles for one year. On May 10, 2022, Defendant Thomas entered SNOs for medical footwear and a shower chair for one year. Plaintiff states that he did not receive the SNOs until October 31, 2022, but he points to no evidence in the record to support that Defendant Thomas was responsible for the delay. On August 12, 2022, Plaintiff saw Defendant Thomas to discuss his request for SNOs for sunscreen and a hat. Defendant Thomas told Plaintiff that he did not need sunscreen or a wide brim hat to shield him from the sun because Plaintiff is Black, and Black skin offers more protection from the sun. According to Plaintiff's medical records, Defendant Thomas determined there was no

clinical necessity for the SNOs. Again, although Plaintiff appears to take offense to Thomas's statement that Plaintiff does not need the same amount of protection from the sun as white people because he is Black, that does not constitute deliberate indifference to a serious medical need. Plaintiff points to no evidence in the record to support that any provider determined a wide-brim hat was medically necessary to protect him from sun exposure. On this record, there is no genuine dispute of material fact regarding whether Defendant Thomas was deliberately indifferent to Plaintiff's serious medical needs with respect to his SNOs.

For the foregoing reasons, the Court will grant Defendants' Motion for Summary Judgment as to Defendant Thomas.

b. Defendant Adams

Plaintiff alleges that in February 2023, Defendant Adams told him that he needed "emergency treatment" for his low platelet levels but that she was going to continue to monitor him for 60 days. Plaintiff claims Defendant Adams "refused" to see him for his alleged kidney failure and that he should have been sent to a urologist. Plaintiff also asserts that Defendant Adams did not respond to his request to have his lower bunk SNO renewed in March 2023.

According to Plaintiff's medical records, Plaintiff did not see Defendant Adams in February 2023. The available medical records show that on December 1, 2022, Plaintiff saw Defendant Adams for chronic care, and subsequently, Adams renewed Plaintiff's SNO for medical shoes but apparently denied an SNO for a medical chair because, according to the Site Medical Director, medical chairs were not provided to inmates at the Cook Unit. There is also no documentary evidence that Plaintiff ever discussed with Defendant Adams a consultation with a urologist or that Adams determined he needed to see a urologist. However, even accepting as true that Defendant Adams told Plaintiff on one occasion that he needed "emergency treatment" for his low platelet levels, that alone cannot support a deliberate indifference claim. There is no other evidence to support that Defendant Adams subjectively believed Plaintiff needed emergency treatment for low platelet levels and that

Adams intentionally disregarded that need. Plaintiff has demonstrated only that he disagreed with Defendant Adams's treatment decisions, but that does not constitute deliberate indifference. On this record, there is no genuine dispute of material fact regarding whether Defendant Adams was deliberately indifferent to Plaintiff's serious medical needs. The Court will therefore grant Defendants' Motion for Summary Judgment as to Defendant Adams.

3. Defendant NaphCare

Plaintiff alleges that Defendant NaphCare has implemented policies, customs, rules and regulations it expects doctors, nurse practitioners, and nurses to follow "when the[y] provide medical treatment, medical outside consultations, medical equipment[], medical education for inmates, medication schedules and special needs orders . . . in support of the inmates[']' complete health and well[-]being." (Compl. at 18.) Plaintiff asserts Defendant NaphCare's policies have also prevented the evaluation and treatment of Plaintiff's platelets, kidneys, and bunion; a timely cancer evaluation and MRI; and the renewal of his SNOs. (*Id.* at 18-19.)

A policy is "a deliberate choice to follow a course of action" made by the officials or entity "responsible for establishing final policy with respect to the subject matter in question." *Oviatt v. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992). A policy can be one of action or inaction. *Long v. Cnty. of L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006). A "custom" for purposes of municipal liability is a "widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well-settled as to constitute a custom or usage with the force of law." *St. Louis v. Praprotnik,* 485 U.S. 112, 127 (1988). "Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Although one or two incidents are insufficient to establish a custom or practice, the Ninth Circuit has not established what number of similar incidents would be sufficient to constitute a custom or policy. *See Oyenik v. Corizon Health Inc.*,

No. 15-16850, 2017 WL 2628901, at *2 (9th Cir. June 19, 2017) (a reasonable jury could conclude that at least a dozen instances of defendant Corizon denying or delaying consultations and radiation treatment for cancer patient over a year amount to a custom or practice of deliberate indifference) (citing *Oviatt*, 954 F.2d at 1478).

Deliberate indifference is exhibited where prison officials deny or delay medical treatment and harm results. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990). It follows that an ongoing policy or practice that denies specialist care or effective treatment for serious medical needs and thereby causes harm would amount to a reckless disregard and constitute an objectively deliberately indifferent policy.

To establish that a policy or custom is the "moving force" behind a constitutional violation, a plaintiff must demonstrate a direct causal link between the policy or custom and the constitutional deprivation. *See Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404 (1997). An obvious consequence of a policy or custom of denying specialist care and failing to address worsening serious symptoms may be the denial of constitutionally adequate medical care. On this basis alone, the moving-force element is satisfied. *See id.* at 405 ("the conclusion that the action taken or directed by the [entity] . . . itself violates federal law will also determine that the [entity] action was the moving force behind the injury of which the plaintiff complains").

In his Response, Plaintiff argues that NaphCare's delivery of medical care is constitutionally inadequate because of insufficient staffing levels, "almost nonexistent" training and supervision of medical staff, poorly implemented prisoner health screening, significant delays in treatment, lack of protocol or training for NaphCare staff in dealing with emergencies or trauma, and lack of effective procedures for managing chronic illness, deficient medical recordkeeping. (Doc. 115 at 36.) Plaintiff contends NaphCare providers "are not subject to use 'prevented medical care'" but instead use the "monitoring" medical system under the Nursing Encounter Tools System (NETS), which allows medical staff to delay critical treatment as long as possible due to cost. (*Id.*) Plaintiff asserts that NaphCare used this system to delay treatment of his life-threatening diseases and prescribe

alternative, ineffective treatment to save money. (*Id.*) Plaintiff argues that NaphCare's policy with respect to prisoners with chronic conditions is to monitor for deterioration, not for preventative treatment. (*Id.* at 39.)

In their Reply, Defendants contend that Plaintiff "fails to provide any competent evidence a reasonable jury could rely on to find in his favor that he was 1) deprived of a constitutional right or 2) that NaphCare had a pattern or practice of unconstitutional conduct." (Doc. 116 at 4.) Defendants point out that Plaintiff "has never presented any explanation, let alone any evidence, as to what specific medical treatment he believes he should have received or why monitoring his platelet levels during his routine chronic care appointments somehow violated his constitutional rights," and although he "continues to argue that he suffers from a 'life threatening condition,' he has never identified what that 'condition' is," (*Id.* at 4-5.) The Court agrees with Defendants.

First, with respect to his bunion, Plaintiff received a shower chair, a SNO for medical footwear, which was renewed in May 2023, and underwent a right foot x-ray. Plaintiff has not pointed to any evidence in the record to support that any treatment decisions were made pursuant to a NaphCare policy or custom or that he suffered any injury with respect to his bunion as a result.

Second, Plaintiff requested medical sunglasses on June 6, 2023, and he received a SNO for the sunglasses on August 25, 2023. Plaintiff does not cite any evidence in the record to support that he suffered any injury due to any NaphCare policy or custom with respect to the medical sunglasses.

Third, with respect to the "cancer screening," Plaintiff appears to be referring to the screening colonoscopy that was cancelled due to his low platelet counts. But even if NaphCare was responsible for cancelling the colonoscopy, as opposed to the gastroenterologist, the evidence indicates the cancellation was based on Plaintiff's medical presentation, not for any non-medical reason.

Fourth, Plaintiff asserts that he did not receive an MRI of his hip, but he points to no evidence in the record that supports that a provider determined an MRI was medically

necessary. Defendant Thomas told Plaintiff that he should expect hip problems due to his age. Even if Defendant Thomas refused to order an MRI because she believed NaphCare would deny the MRI, that alone does not amount to a deliberately indifferent policy because there is no evidence that not ordering the MRI was medically unacceptable in the circumstances.

Finally, Plaintiff received continual care for his kidney issues, hypertension, leukopenia, and thrombocytopenia through chronic care visits and lab tests. As noted, in February 2020, a hematologist/oncologist determined that Plaintiff's chronic leukopenia and thrombocytopenia were due to benign leukopenia (normal variant) and pseudo thrombocytopenia (platelet dumping) and recommended *annual* labs for monitoring. There is no evidence that the hematologist/oncologist recommended any other testing, treatment, or follow-up that any NaphCare provider refused to follow. In addition, Plaintiff's medical records demonstrate that his white blood cell and platelet levels were monitored much more frequently than annually. And despite the hematologist/oncologist's conclusion in 2020 that Plaintiff had benign leukopenia and pseudo thrombocytopenia, NaphCare nevertheless sent Plaintiff back to a hematologist/oncologist, Dr. Rakkar, in March 2024. Like the specialist in 2020, Dr. Rakkar assessed Plaintiff with "artifactual thrombocytopenia," noted that his variable platelet counts were "not clinically significant" because of clumping, and concluded that Plaintiff did not need any further hematology evaluation. NaphCare did not fail to provide Plaintiff with specialist consultations or fail to follow specialist recommendations with respect to his *non-life-threatening* benign leukopenia and pseudo thrombocytopenia.

The available evidence also demonstrates that Plaintiff had two visits with a nephrologist, and his prison providers implemented the nephrologist's recommendations. Although Plaintiff contends he should have been sent to a urologist, NP Johnson determined a urology consultation was not medically indicated, and a provider's determination based on her professional medical judgment that a specialist consultation is not medically necessary cannot support a policy claim against NaphCare.

On this record, Plaintiff has not demonstrated that he suffered any constitutional injury due to a NaphCare policy or custom. The Court will therefore grant Defendants' Motion for Summary Judgment as to Defendant NaphCare.

For the foregoing reasons, the Court will grant Defendants' Motion for Summary Judgment.

IT IS ORDERED:

(1) The reference to the Magistrate Judge is **withdrawn** as to Defendants' Motion for Summary Judgment (Doc. 98).

(2) Defendants' Motion for Summary Judgment (Doc. 98) is **granted**, and the action is terminated with prejudice. The Clerk of Court must enter judgment accordingly.

Dated this 24th day of February, 2025.

Honorable Diane J. Humetewa
United States District Judge

FILED

AUG 24 2026

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY DONNELL DUNLAP,

Plaintiff - Appellant,

v.

SIJI THOMAS, Nurse Practitioner; et al.,

Defendants - Appellees.

No. 25-2946

D.C. No.
2:23-cv-00666-DJH
District of Arizona,
Phoenix

ORDER

Before: MURGUIA, Chief Judge, and WARDLAW and JOHNSTONE, Circuit Judges.

The petition for panel rehearing is DENIED (Doc. 27).

Additional material from this filing is available in the Clerk's Office.