

restitution or compensation for Holocaust survivors and other victims of the Nazi era is the Foundation.⁶

[2] Finally, as for Rozenkier's remaining request for information, specifically, "the full disclosure of the chemical substance used to sterilize him," the Court's understanding is that the Foundation Law does not mandate answers to such requests. Although the Foundation Law permits Foundation applicants to "request information from enterprises in Germany for which or for whose legal predecessors they performed forced labor, insofar as this is [a] requisite for determining their eligibility for awards[.]" Rozenkier's request does not fall within its parameters. *See* Valen Decl., Ex. 3, § 18(3). Notwithstanding the outstanding nature of Rozenkier's information request, the Court cannot order discovery here.⁷ The gravamen of the Complaint is nonjusticiable on political question grounds.

6. As for Rozenkier's allegation in the Complaint that the Foundation unilaterally altered the compensation calculation formula for victims of medical experiments, *see* Compl. ¶¶ 38-39, the Court notes that the allegation is not directed at Defendants. Further, Rozenkier's most recent argument that he cannot avail himself to an appeals process is also irrelevant to Defendants' alleged acts during World War II. Therefore, a detailed discussion of those points is not required here. Nevertheless, the Court's view is that the Foundation's Board of Trustees adoption of the *pro rata* distribution of the earmarked DM 50 million to victims of medical experimentation was not "unilaterally" decided. Instead, pursuant to the terms of the Foundation Law, specifically §§ 9(3) and 9(6), *see* Valen Decl., Ex. 3, twenty-two members of the Foundation's Board of Trustees unanimously approved the guidelines that led to the *pro rata* dispensation after the same guidelines were first passed by the "partner organizations" and the Foundation's Board of Directors. *See* Pl.'s Memo. in Opp., Ex. 9 at 5. Also the minutes of the Board of Trustee's meeting states that the guidelines were also "agreed with the American side and with the German

Conclusion

For the foregoing reasons, Defendants' motion to dismiss on the ground of nonjusticiability is GRANTED.



JACKSON, et al., Plaintiff,

v.

FAUVER, et al., Defendant(s).

No. CIV.98-2890 WGB.

United States District Court,
D. New Jersey.

Sept. 27, 2004.

Background: Former and current prisoners brought separate actions against offi-

Government." *Id.* As this Court stated in *In re Nazi Era Cases Against German Defendants Litigation*, 213 F.Supp.2d 439, 447 n. 11 (D.N.J.2002), "the Court is absolutely certain that matters pertaining to the operation of the Foundation are beyond the purview of American courts, and must be resolved via existing mechanisms in Germany." Therefore, the Court will not upset the Foundation's internal operation which decided how the funds are to be distributed in accordance with the Foundation Law.

7. However, Defense Counsel provided informal discovery. *See* letter from Roger M. Witten to Carey R. D'Avino and Stephen A. Whinston of 10/21/03 advising that clients searched company's archives and public information without discovering "any information relating to Mr. Rozenkier or the substance to which he may have been exposed . . . or any connection between [Defendants] and sterilization experiments . . ." and advising that transcripts of the Nuremberg Military Tribunals mention that Nazi doctors in chemical sterilization experiments used a substance called *caladium seguinum*.

cials and employees of the New Jersey Department of Corrections (DOC) and contractor hired to operate prison, alleging that defendants were deliberately indifferent to their serious medical needs and medical malpractice.

Holdings: Upon defendants' motions for summary judgment, the District Court, Bassler, J., held that:

- (1) prisoner raised genuine issues of material fact existed as to whether prison defendants were deliberately indifferent to his prostate cancer;
- (2) prisoner failed to establish Eighth Amendment claim with regard to the treatment of his cardiac problems;
- (3) prisoner failed to establish that prison defendants were deliberately indifferent to his serious need for medical care with regard to providing HIV medications, treatment and testing where prisoner failed to show how he was injured by alleged lapses in treatment;
- (4) genuine issue of material fact existed as to whether prison defendants were deliberately indifferent to prisoner's HIV/AIDS condition and Hodgkin's disease;
- (5) genuine issues of material fact existed as to whether contractor hired to operate prison were aware of the grave deficiencies in the medical care provided to plaintiff inmates, as well as the acute risks created by those deficiencies, and whether failure of contractor to take affirmative action to address those risks was sufficiently obvious as to constitute deliberate indifference to inmates' medical needs;
- (6) summary judgment was precluded in favor of prison defendants on some medical malpractice claims;
- (7) medical malpractice claims fell within the "common knowledge exception" to New Jersey's affidavit of merit statute; and

(8) DOC and contractor could be held vicariously liable for independent contractors' medical negligence.

Motions granted in part and denied in part.

1. Federal Civil Procedure ⇨2470.2

Summary judgment is inappropriate if the parties dispute the inferences that could be reasonably drawn from the underlying facts.

2. Civil Rights ⇨1304

To establish a claim under § 1983, a plaintiff must show a violation of constitutional right or federal law, committed by an individual acting under the color of state law. 42 U.S.C.A. § 1983.

3. Sentencing and Punishment ⇨1546

To establish a violation of his Eighth Amendment right to adequate medical care, an inmate must show (1) a serious medical need, and (2) acts or omissions by prison officials that indicated deliberate indifference to that need. U.S.C.A. Const. Amend. 8.

4. Sentencing and Punishment ⇨1546

For purposes of Eighth Amendment deliberate indifference claim, a "serious medical need" is a need diagnosed by a physician, that the physician believes to require medical treatment, or a need that is so obvious that a lay person would easily recognize the necessity for a doctor's attention. U.S.C.A. Const. Amend. 8.

See publication Words and Phrases for other judicial constructions and definitions.

5. Sentencing and Punishment ⇨1546

To demonstrate deliberate indifference, an inmate must show that the officials he is suing knew of and disregarded an excessive risk to the inmate's health. U.S.C.A. Const. Amend. 8.

6. Sentencing and Punishment ¶1546

Only unnecessary and wanton infliction of pain or deliberate indifference to the serious medical needs of prisoners are sufficiently egregious to rise to the level of an Eighth Amendment violation; allegations of medical malpractice are not sufficient and mere disagreement as to the proper medical treatment is also insufficient. U.S.C.A. Const.Amend. 8.

7. Federal Civil Procedure ¶2491.5

Sentencing and Punishment ¶1546

Prisoner raised genuine issues of material fact as to whether prison defendants were deliberately indifferent to his prostate cancer, precluding summary judgment in favor of prison defendants on Eighth Amendment claim; however, prisoner failed to establish Eighth Amendment claim with regard to the treatment he received for his other illnesses. U.S.C.A. Const.Amend. 8.

8. Federal Civil Procedure ¶2491.5

Prisons ¶17(2)

Sentencing and Punishment ¶1546

In light of expert's opinion and findings that prison defendants failed to properly monitor and control the level of sugar in prisoner's blood, and that such failure resulted in irreversible damage to prisoner's heart and kidneys, prisoner raised genuine issues of material fact as to whether prison defendants were deliberately indifferent to his serious need for medical care for diabetes, precluding summary judgment in favor of prison defendants on Eighth Amendment claim; however, prisoner failed to establish Eighth Amendment claim with regard to the treatment of his cardiac problems since he failed to show that defendants ignored or refused to treat his cardiac problems or that he was exposed to treatment under unsanitary conditions. U.S.C.A. Const. Amend. 8.

9. Prisons ¶17(2)

Sentencing and Punishment ¶1546

Prisoner failed to establish that prison defendants were deliberately indifferent to his multiple medical problems in violation of his Eighth Amendment rights; prisoner failed to show how he was injured from his alleged lapses of medication, failed to show that he was injured due to the allegedly poor treatment he received while in administrative segregation, and provided no medical authority to support his claim regarding the allegedly improper medication that allegedly damaged his liver. U.S.C.A. Const.Amend. 8.

10. Sentencing and Punishment ¶1546

In evaluating a claim for deliberate indifference to an inmate's medical needs, a court should consider the severity of the inmate's medical problems, and the potential for harm if the medical care is denied or delayed; court may also consider the actual harm that resulted from the defendant's alleged indifference to the inmate's serious medical needs. U.S.C.A. Const. Amend. 8.

11. Prisons ¶17(2)

Sentencing and Punishment ¶1546

Prisoner failed to establish that prison defendants were deliberately indifferent to his hand condition in violation of his Eighth Amendment rights; while prisoner pointed out that he suffered a delay in treatment, he provided no proof that the alleged delay caused him any significant damage. U.S.C.A. Const.Amend. 8.

12. Prisons ¶17(2)

Sentencing and Punishment ¶1546

Although failure to monitor prisoner's hypertension for almost three years constituted a deviation from the standard of care in correctional medicine, prisoner failed to establish that prison defendants were deliberately indifferent to his hypertension

condition in violation of his Eighth Amendment rights; prisoner was never refused medical treatment by defendants and testified that it was his own choice to discontinue medication for hypertension and to refuse testing for three year period. U.S.C.A. Const.Amend. 8.

13. Prisons ⇨17(2)

Sentencing and Punishment ⇨1546

Prisoner failed to establish that prison defendants were deliberately indifferent to his serious need for medical care with regard to providing HIV medications, treatment and testing where prisoner failed to show how he was injured by alleged lapses in treatment. U.S.C.A. Const.Amend. 8.

14. Prisons ⇨17(2)

Sentencing and Punishment ⇨1546

Prisoner failed to establish that prison defendants were deliberately indifferent to his serious need for medical care for stomach and back problems due to delays in the receipt of treatment and medication; evidence suggested only that defendants had been negligent in treating prisoner's stomach pain, and prisoner failed to provide proof of any serious back injury. U.S.C.A. Const.Amend. 8.

15. Federal Civil Procedure ⇨2491.5

A genuine issue of material fact existed as to whether prison defendants were deliberately indifferent to prisoner's HIV/AIDS condition and Hodgkin's disease, precluding summary judgment in favor of prison defendants on Eighth Amendment claim; there were strong indications that, at least during part of the period pertinent to the action, defendants failed to properly monitor the progression of prisoner's HIV/AIDS, and often failed to timely provide him with necessary medications. U.S.C.A. Const.Amend. 8.

16. Prisons ⇨17(2)

Sentencing and Punishment ⇨1546

Prisoner failed to establish that prison defendants were deliberately indifferent to his serious need for medical care for several of his medical problems, including hypertension; prisoner complained about defendants' failure to monitor his hypertension, but did not document how he was injured in any way. U.S.C.A. Const.Amend. 8.

17. Prisons ⇨17(2)

Sentencing and Punishment ⇨1546

Prisoner failed to establish that prison defendants were deliberately indifferent to his serious need for medical care for a series of ear infections; although the alleged delays in treatment could have put prisoner at risk of deafness and meningitis, prisoner did not provide any evidence about the seriousness of the infections from which he suffered. U.S.C.A. Const. Amend. 8.

18. Federal Civil Procedure ⇨2491.5

Genuine issues of material facts existed with regard to the treatment that prisoner received for his back pain, neck-nerve damage, numbness in his hand, high blood pressure and cardiac problems, precluding summary judgment in favor of prison defendants on prisoner's Eighth Amendment deliberate indifference claim. U.S.C.A. Const.Amend. 8.

19. Federal Civil Procedure ⇨2491.5

Prisoner failed to support his Eighth Amendment claim about the treatment of his asthma with sufficient evidence to survive a motion for summary judgment; prisoner, who leveled general complaints about delays in receiving his asthma medication and complained about alleged failure to monitor the progression of his asthma, failed to specify how those alleged delays

have injured his health. U.S.C.A. Const. Amend. 8.

20. Federal Civil Procedure ⇨2491.5

Prisons ⇨17(2)

Sentencing and Punishment ⇨1546

Prisoner raised genuine issues of material fact as to whether prison defendants were deliberately indifferent to his serious medical need for treatment for his hernia and vascular disease, precluding summary judgment in favor of prison defendants on Eighth Amendment claim; however, prisoner failed to establish Eighth Amendment claim with regard to the treatment he received for his rectal bleeding since prisoner was unable to show how he was injured by the alleged improper monitoring of that problem. U.S.C.A. Const. Amend. 8.

21. Federal Civil Procedure ⇨2491.5

Prisons ⇨17(2)

Sentencing and Punishment ⇨1546

Genuine issue of material fact existed with regard to an alleged delay in providing prisoner with a prescribed knee brace to alleviate his suffering due to rheumatoid arthritis, precluding summary judgment in favor of prison defendants on Eighth Amendment claim; however, prisoner's dissatisfaction with the treatment he received for complications arising from surgery on his Achilles tendon did not provide basis for Eighth Amendment claim. U.S.C.A. Const. Amend. 8.

22. Prisons ⇨17(2)

Sentencing and Punishment ⇨1546

Prisoner failed to establish that prison defendants were deliberately indifferent to his serious need for medical care for his nasal tumor and headaches; prisoner did not demonstrate that he suffered from a serious medical condition that defendants ignored since his medical records showed that he was promptly seen by prison physicians, an outside specialist, and a neurologist, and that a CT scan revealed only the

presence of a non-threatening cyst or polyp. U.S.C.A. Const. Amend. 8.

23. Civil Rights ⇨1336

Corporation that operated under color of New Jersey law could not be held liable under § 1983 for the acts of its employees and agents under the theories of respondeat superior or vicarious liability. 42 U.S.C.A. § 1983.

24. Civil Rights ⇨1351(1)

For purposes of government liability under § 1983, a "policy" is made when a decisionmaker possessing final authority to establish municipal policy with respect to the action issues a final proclamation, policy or edict. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

25. Civil Rights ⇨1351(1)

For purposes of government liability under § 1983, "custom" is defined as an act that has not been formally approved by an appropriate decisionmaker, but that is so widespread as to have the force of law. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

26. Civil Rights ⇨1351(1), 1352(1)

Three situations leading to direct government liability under § 1983 are: (1) appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy; (2) no rule has been announced as policy but federal law has been violated by an act of the policymaker itself; and (3) policymaker has failed to act affirmatively at all, though the need to take some action to control the agents of the government is so obvious, and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the policymaker

er can reasonably be said to have been deliberately indifferent to the need. 42 U.S.C.A. § 1983.

27. Federal Civil Procedure ⇨2491.5

Genuine issues of material fact existed as to whether contractor hired to operate prison was aware of the grave deficiencies in the medical care provided to plaintiff inmates, as well as the acute risks created by those deficiencies, and whether failure of contractor to take affirmative action to address those risks was sufficiently obvious as to constitute deliberate indifference to inmates' medical needs, precluding summary judgment in favor of contractor on prisoner's Eighth Amendment claims. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

28. Health ⇨821(1)

To establish a prima facie case of negligence in a medical malpractice action governed by New Jersey law, a plaintiff must present expert testimony establishing: (1) an applicable standard of care, (2) a deviation from this standard of care, (3) injury, and (4) proximate causation between the breach and the injury.

29. Federal Civil Procedure ⇨2515

Genuine issue of material fact existed as to whether prison's failure to provide radiation oncologist with critical test results constituted negligence by prison personnel, precluding summary judgment in favor of prison doctors on prisoner's medical malpractice claims based on delay in the diagnosis of prisoner's metastasized prostate cancer.

30. Health ⇨634

Medical malpractice claim could not be established under New Jersey law without a demonstration of injury.

31. Federal Civil Procedure ⇨2515

Genuine issues of material fact existed as to whether prison personnel were negligent in the treatment of various prisoners'

medical conditions, precluding summary judgment in favor of prison defendants on medical malpractice claims based on allegations that defendants were negligent when they failed both to provide prisoners with medical care prescribed for them by their treating specialists and to follow the medical instructions of those specialists.

32. Health ⇨804

Prisoners' medical malpractice claims fell within the "common knowledge exception" to New Jersey's affidavit of merit statute; a reasonable jury would not need the assistance of an expert to conclude that prison personnel were negligent when they allegedly failed both to provide these prisoners with medical care prescribed for them by their treating specialists and to follow the medical instructions of those specialists. N.J.S.A. 2A:53A-27.

33. Negligence ⇨1506

Common knowledge exception to New Jersey's affidavit of merit statute applies in cases where the threshold of merit should be readily apparent from a reading of the plaintiff's complaint, and where an expert is no more qualified to attest to the merits of a plaintiff's claim than a non-expert. N.J.S.A. 2A:53A-27.

34. Prisons ⇨9, 10

Use of independent contractors did not relieve New Jersey Department of Corrections (DOC) or contractor hired to operate prison of their duty to provide adequate medical care to prison inmates, and therefore DOC and contractor could be held vicariously liable for independent contractors' medical negligence.

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ren M. Gelber, Esq., John Hogan, Esq., Ellen Torregrossa-O'Connor, Blair Zwillman, Wilentz, Goldman & Spitzer, A Professional Corporation, Woodbridge, NJ, for Plaintiff.

Stephen D. Holtzman, Esq., Jeffrey S. McClain, Esq., Holtzman & McClain, P.C., A Professional Corporation, Linwood, Robert C. Doherty, Office of the New Jersey Attorney General, R.J. Hughes Justice Complex, Trenton, NJ, for Defendants.

OPINION

BASSLER, District Judge.

Plaintiffs, 15 former and current inmates at East Jersey State Prison ("EJSP"), brought separate actions against Correctional Medical Services and four of its officials, and against officials and employees of the New Jersey Department of Corrections (collectively "Defendants"). Plaintiffs argue that Defendants were deliberately indifferent to Plaintiffs' serious medical needs, in violation of Plaintiffs' constitutional rights under the Eighth Amendment. All Plaintiffs also brought medical malpractice claims against Defendants under New Jersey law.

Plaintiffs seek a judgment against Correctional Medical Services and its named employees, and an award of compensatory damages, punitive damages, litigation costs, and attorneys' fees. Plaintiffs also seek to enjoin the Defendants from continuing the practices that allegedly violate EJSP inmates' constitutional rights. This Court has jurisdiction over Plaintiffs' constitutional and federal claims pursuant to 28 U.S.C. § 1331, and over Plaintiffs' state claims pursuant to 28 U.S.C. § 1367.

Presently before this Court are Defendants' motions for summary judgment on Plaintiffs' federal and state law claims.

The parties have taken depositions and their experts have submitted reports. Defendants' motions for summary judgment are granted with regard to Plaintiffs Eugene Drinkard, Walter Griggs, Dennis Hanna, John Howard, Geraldo Izquierdo, Abdul Kahliq, Derrick Lewis, Thomas Musto and Isa Saalahudin. The pendent state law claims of these plaintiffs are dismissed without prejudice.

Defendants' motions for summary judgment with regard to Plaintiffs Gustavo Cancio, Stephen Castellano, Randolph Jackson, Mufeed Muhammad, Jerome Perkins and Paul Ratti are granted in part and denied in part.

I. BACKGROUND

A. *The Parties*

a. *Plaintiffs*

Plaintiffs are 15 current and former inmates who at times material hereto were confined at EJSP, located in Rahway, New Jersey. Plaintiffs filed separate and individual 42 U.S.C. § 1983 and related state law actions against Defendants with regard to the medical treatment they received at EJSP. For the sake of the efficient resolution of these cases, this Court entertains the 15 separate complaints together. This case, however, is not a class action lawsuit. Thus, each individual action is treated independently.

b. *Defendants*

Seven of the defendants in this action were, at times material hereto, officials and employees of the Department of Corrections of the State of New Jersey ("DOC", collectively the "DOC Defendants"). The DOC Defendants are being sued in their individual and official capacities.¹

1. Prior to the summary judgment hearing, the DOC Defendants submitted to the Court that they fully join the brief that was filed in behalf

of CMS and the CMS Defendants, and did not file a separate brief. At the hearing, the DOC Defendants again consented that they fully

Defendant William H. Fauver ("Fauver") was the Commissioner of the DOC. Defendant Howard L. Beyer ("Beyer") was the Assistant Commissioner of the DOC. Defendant Steven Pinchak ("Pinchak") was the Administrator of EJSP. Defendant Terry Moore ("Moore") was the associate Administrator of EJSP. Defendant Ronald Cathel ("Cathel") was an Assistant Superintendent of EJSP. Defendant Richard Switaj ("Switaj") was an Assistant Superintendent at EJSP.

Defendant Correctional Medical Services Inc. ("CMS") is a Missouri-based corporation. At all times relevant to this action, CMS provided medical services to inmates in DOC facilities, including EJSP, pursuant to a contract with the DOC (the "CMS-DOC contract"). The CMS-DOC contract became operative on April 27, 1996.

Four individuals who, at all times relevant to this action, were officials and employees of CMS are also defendants in this action (collectively the "CMS Defendants"). The CMS Defendants are being sued in their individual and official capacities.

Defendant Carol Holt ("Holt") was a manager of CMS. Defendant Bertha Robinson ("Robinson") was the Regional Administrator of CMS. Defendant James Neal ("Dr. Neal") was the Regional State Medical Director of CMS. Defendant Trevor Parks ("Dr. Parks") was CMS's Medical Director at EJSP.

Finally, Defendants John and Jane Does 1-10 are fictitious names of individuals who were agents of the DOC or CMS at all

times relevant to this action. They are all being sued in their individual and official capacities.

B. General Material Facts

Even though Plaintiffs do not bring a class action lawsuit, they all claim to be the victims of the same alleged general policies, adopted by CMS to increase profits while sacrificing the care and health of EJSP's inmates. Thus, the Court will summarize the general context from which these actions arise, and then outline the material facts of each individual action.

Plaintiffs allege that they were victims of profit enhancing policies practiced by CMS from the time it assumed responsibility for EJSP inmates' medical care, on April 27, 1996. Plaintiffs have provided this Court with several memoranda and reports written by Defendants Pinchak, Moore and Switaj throughout 1997 and the beginning of 1998. These documents, which were addressed to various DOC and CMS officials, detail failures and problems in the medical care that CMS provided to EJSP's inmates.

Generally, these documents suggest that from April 1996 to the beginning of 1998, Pinchak, Moore and Switaj accused CMS of: (1) failing to timely provide EJSP inmates with prescribed medication, (2) failing to provide EJSP inmates with prompt medical treatment and doctor visits (mostly due to lack of staffing), and (3) losing or misplacing inmates' medical records on numerous occasions. Also, an investigative report, authored by Defendant Moore on January 27, 1997, notes EJSP inmates'

join CMS and the CMS Defendants. They also suggested, however, that *Durner v. O'Carroll*, 991 F.2d 64 (1993), instructs that the DOC Defendants should be granted summary judgment, regardless of this Court's Holding on CMS and the CMS Defendants' motion. The Court rejects this untimely claim. While *O'Carroll* may or may not apply

to the actions at bar, the DOC Defendants' repeatedly submitted that they fully join CMS and the CMS Defendants, and failed to file a brief describing how *O'Carroll* is applicable here. In denying this argument, the Court take notice of the fact that Plaintiffs seek no damages from the State or the DOC Defendants.

frustration with CMS's medical services and the general feeling among these inmates that CMS does not care about the medical treatment it provides them.

While Defendants correctly point out that none of the Plaintiffs are mentioned by name in these general reports, this Court finds that these general memoranda and reports are relevant for this Court's understanding of the general medical treatment that was provided to EJSP inmates during at least part of the time period that Plaintiffs' actions address. The Court will now address the material facts in each of the individual claims.

II. PLAINTIFFS' EIGHTH AMENDMENT CLAIMS

At the core of this litigation are Plaintiffs' § 1983 actions, alleging that Defendants' have violated Plaintiffs' rights under the Eighth Amendment. These federal law claims also set the basis for this Court's jurisdiction. Thus, the Court will initially determine whether Plaintiffs' Eighth Amendment claims survive Defendants' summary judgment challenge.

a. *Genuine Issues of Material Fact*

Summary judgment is appropriate only if there is no genuine issue as to any material fact. Fed.R.Civ.P. 56(c). The applicable substantive law determines whether or not a fact is material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue of fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248, 106 S.Ct. 2505 (citation omitted). In determining whether a genuine issue of material fact exists, all inferences must be drawn, and all doubts must

2. Dr. Robert Greifinger is a pediatrician and the former Chief Medical Officer for the New York State Department of Corrections. He is a nationally recognized expert and consultant

be resolved, in favor of the non-moving party. *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 264 F.3d 302, 305-306 (3d Cir. 2001) (citing *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505). The moving party has the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party satisfies this requirement, the burden shifts to the non-moving party to present evidence that there is a genuine issue for trial. *Id.* at 324., 106 S.Ct. 2548

Defendants contend that summary judgment is proper because no genuine dispute of material fact exists in any of the actions before the Court. Defendants are wrong. Both parties rely on Plaintiffs' medical records and depositions to support their claims, and generally agree on the events that are documented in these sources. Looking at the same documents, however, the parties' experts reach opposite conclusions with regard to the quality of medical care provided to Plaintiffs.

[1] Summary judgment is inappropriate if the parties dispute the inferences that could be reasonably drawn from the underlying facts. *Hunt v. Cromartie*, 526 U.S. 541, 552, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999). Because the parties and their medical experts draw opposite inferences from many of the material facts in the cases at bar, the Court is satisfied that a genuine dispute over material facts does exist.

Defendants argue that the opinions of Plaintiffs' expert, Dr. Robert Greifinger ("Dr. Greifinger"),² on several matters are based on mistaken or wrong information, and thus cannot be viewed as reasonable inferences. Further, Defendants contend

in field of health services in correctional facilities. His credentials are discussed in further detail below.

that Dr. Greifinger is not qualified to provide an expert opinion on many of the medical issues in question. As discussed in further detail below, this Court rejects Defendants argument with regard to Dr. Greifinger's qualifications. As to Defendants' argument with regard to mistaken information, courts are instructed not to determine the truthfulness or the credibility of factual issues at the summary judgment stage. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

b. *Deliberate Indifference under the Eighth Amendment*

[2] To establish a claim under § 1983, a plaintiff must show a violation of constitutional right or federal law, committed by an individual acting under the color of state law. *Natale v. Camden County Corr. Facility*, 318 F.3d 575, 580-581 (3d Cir.2003). It is uncontested that CMS was acting under color of state law when it provided medical care to Plaintiffs. Because no federal laws are implicated by the actions of CMS's employees and agent, this Court must determine whether CMS employees and agents violated Plaintiffs' constitutional rights. *Id.*

A. *Standard*

[3] To establish a violation of his Eighth Amendment right to adequate medical care, an inmate "must show (i) a serious medical need, and (ii) acts or omissions by prison officials that indicated deliberate indifference to that need." *Natale*, 318 F.3d at 582.

[4] A serious medical need is a need diagnosed by a physician, that the physician believes to require medical treatment, or a need that is "so obvious that a lay person would easily recognize the necessity for a doctor's attention." *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir.1987) (citation

omitted); *see also Atkinson v. Taylor*, 316 F.3d 257, 273 (3d Cir.2003).

[5] To demonstrate deliberate indifference, an inmate must show that the officials he is suing "knew of and disregarded an excessive risk to [the] inmate[s] health." *Natale*, 318 F.3d at 582 (citing *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). The Third Circuit has found deliberate indifference "in situations where 'necessary medical treatment is delayed for non-medical reasons.'" *Natale*, 318 F.3d at 582 (quoting *Monmouth County*, 834 F.2d at 347). Deliberate indifference has also been found "in situations where there was objective evidence that a plaintiff had serious need for medical care, and prison officials ignored that evidence." *Id.*

[6] Finally, "only 'unnecessary and wanton infliction of pain' or 'deliberate indifference to the serious medical needs' of prisoners are sufficiently egregious to rise to the level of a constitutional violation." *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir.2004) (quoting *White v. Napoleon*, 897 F.2d 103, 108-109 (3d Cir.1990)) (other citation omitted). "Allegations of medical malpractice are not sufficient to establish a Constitutional violation." *Id.* Also, "mere disagreement as to the proper medical treatment is also insufficient." *Id.* (citing *Monmouth County*, 834 F.2d at 346).

B. *Analysis*

The fact that Defendants were aware of the medical problems about which Plaintiffs complained is uncontested. Thus, to determine that Plaintiffs' Eighth Amendment claims survive a motion for summary judgment, this Court must find that a reasonable jury could hold that: (1) Plaintiffs' medical problems were serious, and (2) Defendants were deliberately indifferent to these medical problems. This Court must determine these issues while looking

at the facts in the light most favorable to the Plaintiffs. *Hunt*, 526 U.S. at 552, 119 S.Ct. 1545.

The Court takes notice of the reports, written by Defendants' medical experts, that contradict or dispute many of Dr. Greifinger's findings, and that suggest that the medical treatment provided to Plaintiffs was proper. These reports constitute relevant evidence that supports Defendants' claims. It is also important to note, however, that a dispute between medical experts is an issue of fact that courts are generally encouraged not to decide on a motion for summary judgment. *Anderson*, 477 U.S. at 249, 255, 106 S.Ct. 2505.

Defendants have presented documents to this Court which detail numerous doctor's appointments attended by Plaintiffs, and which contain a long list of treatments and medications provided to Plaintiffs at the times relevant to the actions at bar. These documents provide important support for Defendants' motion. Nevertheless, the fact that Plaintiffs were provided with treatment is not, by itself, enough to preclude Plaintiffs' Eighth Amendment claims. *Durmer v. O'Carroll*, 991 F.2d 64 (1993). In *Durmer*, the Third Circuit held that a reasonable jury could find that the physician-in-charge at a state correctional facility was deliberately indifferent to an inmate's serious medical need when he failed to provide the inmate with the physical therapy prescribed for the inmate prior to his incarceration. The Third Court accepted Durmer's argument that a reasonable jury could find that the physician was more interested in saving the prison mon-

ey than in Durmer's well-being, and that is why he referred Durmer to a specialist instead of providing him with physical therapy.

1. *Gustavo Cancio*³

[7] Plaintiff Gustavo Cancio ("Cancio") filed a motion to intervene on or about October 26, 1999, which was granted by this Court on March 14, 2000. He died on May 22, 2002. According to the Deputy Medical Examiner of Mercer County, the immediate cause of Cancio's death was "carcinoma of prostate with metastasis." Pls.' Ex. No. 62.

Prior to his death, Cancio suffered from multiple medical problems, including chronic obstructive pulmonary disease; partial kidney failure, prostate cancer, diabetes mellitus and gout. He was incarcerated in EJSP during all times relevant to this action. According to DOC's quality assurance coordinator, Kenneth R. Wolski, Cancio regularly complained about the level of medical care he was getting at EJSP. Specifically, Cancio often complained about difficulties in seeing medical specialists.

Lung Problems

Cancio suffered from left chronic obstructive pulmonary disease since 1994. In January 1996, Cancio was transferred to EJSP and was placed in the facility's infirmary. On February 2, 1996, Cancio wrote to Thomas Farrell, supervisor of the health services unit at the DOC, and advised Farrell about his serious medical condition. Cancio complained about his inability to see a doctor and obtain previ-

3. Plaintiff Cancio suffered from multiple medical problems. Defendants submitted to the court numerous documents containing extensive descriptions of Cancio's medical history. This opinion only addresses the material facts that are in dispute.

4. Metastasis is the transfer of disease from one organ or part to another not directly connected with it. Cancio died from the spread of his prostate cancer to other parts of his body. All the medical definitions included in this opinion are taken from MOSBY'S MEDICAL, NURSING, & ALLIED HEALTH DICTIONARY (6th ed.2002).

