

Judge Eaton

STATE OF VERMONT  
WINDSOR COUNTY, SS

<p>James E. Ashley Plaintiff</p> <p>v.</p> <p>Prison Health Services, Inc. Dr. John Leppman Dr. Mitch Miller Defendant</p>	<p>SUPERIOR COURT Docket No. 396-6-08 Wrcv</p>
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**DECISION ON MOTION FOR SUMMARY JUDGMENT**

Uncontested Facts

Plaintiff filed his complaint for damages in this court on June 10, 2008. In his complaint, Plaintiff alleges several medical conditions which he claims have been improperly addressed. He also claims the inappropriate administration of medication for a non-existent thyroid condition.

Defendants answered the complaint on September 4, 2008. At the time the answer was filed Defendants also served requests for admission under V.R.C.P. 36 and expert interrogatories and requests for production under V.R.C.P. 33 and 34 upon Plaintiff.

The expert interrogatories sought the disclosure from Plaintiff of the names of experts Plaintiff intended to call, the subject matter of their testimony, the facts and opinions each was expected to testify about and a summary of the grounds for each opinion. These discovery requests are typical requests for expert information under V.R.C.P. 26.

The requests for production sought reports of experts, copies of records reviewed by the experts and other documents provided to the experts.

**FILED**

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The requests for admission sought admissions upon whether any physician had been retained or otherwise agreed to provide testimony for Plaintiff concerning Plaintiff's medical complaints.

In December 2008, Defendants' counsel wrote to Plaintiff, reminding him of his obligation to respond to the outstanding discovery. On December 19, 2008, Plaintiff responded that he did have experts, including two physicians, two or three RNs and/or LPNs and an expert on pharmacology. Plaintiff did not identify any of these experts or provide any other information as was sought by the Defendants' discovery request.

On February 9, 2009 Defendants' counsel again wrote to Plaintiff requesting additional information on the experts as sought in the discovery requests. Defendants' counsel informed Plaintiff that failure to provide the requested information would result in a summary judgment motion being filed.

The plaintiff has not responded to the requests for admission, expert interrogatories or the requests for production.

On March 4, 2009, Defendants filed a motion for summary judgment. Plaintiff has filed no response. A motion to suspend the action on account of Plaintiff's alleged illness, filed March 6, 2009, was denied.

#### Discussion

Summary judgment is appropriate where, taking the allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to summary judgment as a matter of law. This standard presupposes that the nonmoving party has had the opportunity to develop his factual case. *Zukatis v. Perry*, 165 Vt. 298 (1996). In order to prevail on a motion for summary judgment, the moving party must satisfy the stringent two-part test; that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Wesco, Inc.* **FILED**

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*Hay-Now, Inc.*, 159 Vt. 23 (1992).

It has long been recognized that summary judgment is mandated where a party fails to make a showing sufficient to establish the existence of an element essential to his case and on which he has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251 (1989). The nonmoving party is not entitled to rest upon mere allegations or denials in his pleadings but rather is required to, "set forth specific facts showing there is a genuine issue for trial." V.R.C.P 56(e). Accordingly, a nonmoving party cannot rely on speculation and conclusory statements to oppose a motion for summary judgment. *Richards v. Nowicki*, 172 Vt. 142 (2001).

Plaintiff's complaint and addendum alleges failure to provide adequate medical care and/or malpractice against the prison healthcare system. Plaintiff also alleges violations of the Eighth Amendment of the United States Constitution.

Medical malpractice, even if established, does not create an Eighth Amendment violation. To establish an Eighth Amendment violation, the Plaintiff must show the Defendants' acts or omissions were sufficiently harmful to evidence deliberate indifference to serious medical needs. *Estelle v. Gamble*, 29 U.S. 97 (1976). Plaintiff has made absolutely no showing sufficient to meet this standard and his Eighth Amendment complaints are unsupported.

With respect to Plaintiff's allegations of medical malpractice, the burden is on the Plaintiff to establish that malpractice has been committed. *Senesac v. Associates in Obstetrics and Gynecology*, 141 Vt. 310 (1982). It is the Plaintiff's burden to establish the proper standard of medical skill and care, a departure from that standard by the Defendant, and that such departure was the proximate cause of harm to the Plaintiff. *Utzler v. Medical Center Hospital of Vermont*, 149 Vt. 126 (1987).

Here, Plaintiff has made no showing of the proper standard of medical skill and

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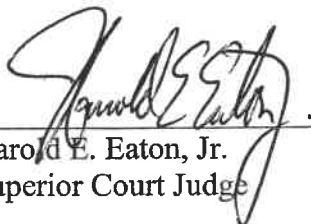
care, a departure from that standard or any resulting harm. Plaintiff has had adequate time to develop this evidence, having had nearly one year post filing to provide this information. There has been an adequate time for discovery in this matter; and despite the discovery requests from Defendants and repeated reminders, and despite the filing of a motion for summary judgment by Defendants, Plaintiff has failed to produce evidence upon which he bears the burden of proof at trial.

V.R.C.P. 56 permits the moving party to point to an absence of evidence to support an essential element of the nonmoving party's claim. *Bay v. Times Mirror Magazines, Inc.*, 936 F.2nd 112 (2d Cir. 1991). Since the Plaintiff has failed to make a showing sufficient to establish the existence of several elements essential to his case, including the standard of care, breach of that standard and resulting harm, summary judgment is appropriate in this instance.

This court is mindful that Plaintiff is proceeding pro se. However, Plaintiff's status as a pro se litigant does not excuse him from the obligation to support his claims. Plaintiff has had adequate time to do so here and has failed to produce evidence essential to his claims.

Defendants' Motion for Summary Judgment is **GRANTED**. There being no further issues between the parties remaining to be litigated, Plaintiff is to take nothing by his complaint, and final judgment is hereby entered for Defendants pursuant to V.R.C.P. 54.

Dated at Woodstock this 4th day of May, 2009.

  
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Harold E. Eaton, Jr.  
Superior Court Judge

**FILED**

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