

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LOREN L. LEISER, SR.,

Plaintiff,

v.

WILLIAM BRAUNSTEIN and
JOHN SPENCER ARCHINIHU,

Defendants.

OPINION and ORDER

11-cv-328-bbc

Pro se plaintiff Loren L. Leiser sued various officials at the Stanley Correctional Institution for failing to provide adequate medical treatment for his knees between 2005 and 2010. In an order dated October 18, 2012, I granted summary judgment to most of the defendants on the ground that plaintiff failed to adduce evidence that a reasonable jury could find that defendants violated his rights under the Eighth Amendment. Dkt. #119. Now before the court are the motions for summary judgment of the remaining two defendants, William Braunstein and John Spencer Archinihu. Dkt. ##127 and 172.

Defendants Braunstein and Archinihu were both doctors who treated plaintiff at the prison after he received a left knee replacement but before he received a right knee replacement. Archinihu treated plaintiff between January 2007 and April 2007; Braunstein treated plaintiff between October 2007 and January 2008. In February 2008 another

doctor at the prison ordered surgery for plaintiff's right knee, which plaintiff received two months later.

In the order screening the complaint, I allowed plaintiff to proceed on claims that defendants Archinihu and Braunstein violated the Eighth Amendment by refusing to recommend surgery on his right knee. Dkt. #6. As in the last round of summary judgment, plaintiff raises many issues outside those in the screening order, but I have not considered those because they are not part of this lawsuit.

With respect to plaintiff's claims that defendants Archinihu and Braunstein refused to recommend surgery for him, I am denying defendants' motions for summary judgment with respect to the following claims under the Eighth Amendment: (1) defendant Archinihu failed to take any action to seek approval for surgery on plaintiff's right knee after he reviewed the orthopedist's February 6, 2007 report; (2) defendant Braunstein failed to take any action to provide treatment for plaintiff in December 2007 after learning that the physical therapist had discontinued therapy; and (3) defendant Braunstein failed to take any action to seek approval for surgery on plaintiff's right knee after Braunstein concluded that plaintiff was a candidate for surgery. A reasonable jury could find that defendants consciously disregarded plaintiff's serious medical need at these times. I am granting defendants' motions in all other respects.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

At all relevant times, plaintiff Loren L. Leiser was a prisoner at the Stanley Correctional Institution. In October 2005, he asked for an appointment with Bruce Gerlinger, a doctor at the Stanley prison. He wrote that he needed to meet with Gerlinger about the "ever increasing pain and deteriorating condition of my left knee." Gerlinger examined plaintiff on October 13 and requested an off-site orthopedic evaluation for "bilateral knee pain."

On January 3, 2006, orthopedic specialist Steven Pals recommended a total replacement for plaintiff's left knee. On January 4, Gerlinger requested approval for the surgery from the "prior authorization committee," which approved surgery on January 6. On February 28, 2006, Dr. Pals performed a total knee arthroplasty, or a knee replacement, on plaintiff's left knee.

On January 3, 2007, Kenneth Adler, another doctor who sometimes worked at the Stanley prison, saw plaintiff for right knee pain. After the January 3 exam, Adler requested approval for physical therapy.

In 2006 and 2007 defendant John Spencer Archinihu served as a medical doctor at the Stanley prison on an "as needed" basis. He was not a permanent physician at the prison and he was never on a committee that approved surgical procedures.

On January 30, 2007 defendant Archinihu saw plaintiff for the first and last time. During that visit, plaintiff complained about pain in his right knee, as well as his shoulders, ankles and feet. Archinihu's assessment was that plaintiff's right knee pain was caused by

arthritis. He ordered an orthopedic consultation and lab work. (Plaintiff says that Archinihu told him that he was a “full time doctor” at the prison.)

On February 6, 2007, plaintiff had an orthopedic consultation with Dr. Pals. In his report Pals wrote that plaintiff’s right knee “has remained very symptomatic” and he concluded that plaintiff suffered from degenerative joint disease in that knee. In the section of the report discussing his plan for plaintiff, Pals wrote that plaintiff “is quite interested in discussing the possibility of a right total knee arthroplasty, which I agree is reasonable. We are going to look at getting that set up for him.” In addition, Pals wrote that he informed plaintiff what a total knee arthroplasty entailed, along with the potential risks and complications. Plaintiff told Pals that he understood and wanted to proceed. Pals also completed what appears to be a form from the Wisconsin Department of Corrections called “off site service request and report.” Pals wrote “schedule total knee” in the “plan/recommendations” section of the document.

On March 6, 2007 defendant Archinihu received and reviewed Pals’s report. (Archinihu says that he did not see the other document called “off site service request and report.” Neither side explains why a month elapsed before Archinihu reviewed Pals’s report.)

While defendant Archinihu was working at the Stanley prison, he did not see any health service requests from plaintiff and no one asked him to see plaintiff. Archinihu’s only other involvement in plaintiff’s care was to approve medication refills and to sign orders for physical therapy. After April 12, 2007, Archinihu had no involvement in plaintiff’s care.

On October 19, 2007, Adler saw plaintiff again for pain in his right knee and plaintiff

requested surgical replacement. After the exam, Adler sent a request to the prior authorization committee to approve a total replacement for plaintiff's right knee. He wrote that plaintiff "meets all the McKesson criteria for [replacement] except that he hasn't had formal PT [physical therapy]" for 12 weeks. He also wrote that the orthopedist had recommended a right knee replacement and that "surgery is inevitable." The committee declined to approve surgery, recommending instead that plaintiff start a physical therapy program. The committee directed Adler to submit another request if physical therapy was not successful.

From October 2007 to February 2008, defendant William Braunstein worked at the Stanley prison as a contract physician through Maxim Healthcare Services. On October 30, 2007, Braunstein saw plaintiff for the first time about knee pain. After reviewing Adler's notes and those of the committee, Braunstein concluded that it was reasonable for plaintiff to undergo physical therapy for his right knee.

In December 2007 the physical therapist discontinued therapy, concluding in his progress notes that it had "failed." Braunstein reviewed these notes around the same time. (Plaintiff included these facts in his brief with a citation to the record, dkt. #182-1, but he did not include them in his proposed findings of fact. However, Braunstein admitted in his reply brief that he "was aware that physical therapy 'failed' in December 2007 and that it was discontinued on December 13, 2007," dkt. #185 at 4, so I consider these facts to be undisputed for the purpose of summary judgment.)

On January 31, 2008, Braunstein had a second and final appointment with plaintiff.

After the visit, Braunstein wrote the following:

Follow up after Physical Therapy (“failed”). See Physical Therapy note dated December 12, 2007. When gets up, sometimes falls. Asked regarding prednisone like he had before Left knee surgery. O: Uses cane. Difficulty walking. A: Degenerative Joint Disease P: Class III for knee replacement. Note: Complains of stomach problem secondary to spicy food here. Tums helps, but complaint bad by suppertime. Asked for Tagamet, Prilosec.

Class III for Right knee replacement. Prednisone 12.5 mg by mouth every day (po qd) for five months. Three extra pillows, extra blanket, extra mattress, cane, for six months. Ranitidine 150 mg every day (qd) for one year. Ice packs four times per day as needed (qid prn) for one year. Hot packs four times per day as needed (qid prn) for one year. Tub for foot soaks for one year. Plastic chair for cell for six months.

According to defendant Braunstein, the first clause of the second paragraph means that he believed plaintiff was “a candidate for a Class III right knee replacement.” Dft. Braunstein’s PFOF ¶ 29, dkt. #174. (Braunstein does not explain the significance of the “Class III” modifier.) Defendant Braunstein’s last day at the Stanley prison was February 8, 2008.

In February 2008, defendant Joan Hannula became plaintiff’s treating physician. On February 27, 2008, Hannula recommended that plaintiff receive replacement surgery on his right knee. On March 4, the prior authorization committee approved the surgery. On April 29 plaintiff received replacement surgery for his right knee.

OPINION

A prison official may violate the Eighth Amendment if the official is “deliberately indifferent” to a “serious medical need.” Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

A “serious medical need” may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it “significantly affects an individual's daily activities,” Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). “Deliberate indifference” means that the officials are aware that the prisoner needs medical treatment, but are consciously disregarding the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff’s claim has three elements: (1) did plaintiff need medical treatment? (2) did defendants know that plaintiff needed treatment? and (3) despite their awareness of the need, did defendants consciously fail to take reasonable measures to provide the necessary treatment? On a motion for summary judgment, it is plaintiff’s burden to show that a reasonable jury could find in his favor on each of these elements. Henderson v. Sheahan, 196 F.3d 839, 848 (7th Cir. 1999).

A. John Spencer Archinihu

Plaintiff contends that defendant Archinihu violated his Eighth Amendment rights on two occasions by refusing to recommend surgery for plaintiff’s right knee: (1) after January 30, 2007, when plaintiff first complained to Archinihu about his right knee; and (2)

after February 6, 2007, when plaintiff saw the orthopedist. For the purpose of summary judgment, Archinihu does not deny that plaintiff had a serious medical need or that Archinihu knew about that need. The question is whether Archinihu consciously failed to take reasonable measures to provide treatment.

Plaintiff cannot make that showing with respect to defendant Archinihu's actions when plaintiff first complained to him on January 30, 2007. After Archinihu determined that plaintiff was suffering from arthritis in his right knee, he referred plaintiff to an orthopedist. At that point, plaintiff was not entitled to more. Although plaintiff seems to believe that it was already obvious in January 2007 that he needed surgery on his right knee, he cites no admissible evidence to support that view, as I noted in the October 2012 summary judgment opinion. Dkt. #119 at 15-16. Thus, no reasonable jury could find that Archinihu's decision to seek the opinion of a specialist was "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that [Archinihu] did not base the decision on such a judgment," King v. Kramer, 680 F.3d 1013, 1018 (7th Cir. 2012), which is what a prisoner must prove when a doctor makes a determination about the appropriate medical treatment.

I cannot reach the same conclusion with respect to defendant Archinihu's actions after the orthopedist issued his report on February 6, 2007, agreeing with plaintiff that surgery on plaintiff's right knee was appropriate. Archinihu admits that he reviewed the report and he does not suggest that he had any medical reason to disagree with the orthopedist's assessment, but he took no action on the report. In his declaration, Archinihu

provides the following explanation for his inaction:

19. It was my understanding after reviewing the orthopedic report that Dr. Pals was making a recommendation, not an order, and that Dr. Pals was going to follow up with looking into getting that scheduled for Leiser.

20. It was also my understanding that any necessary steps to seek approval for any recommendation of Dr. Pals would be done between Dr. Pals and the HSU staff.

Dkt. #130.

Defendant Archinihu seems to be making two points in these paragraphs: (1) the orthopedist's report was a recommendation, not an order; and (2) Archinihu believed that the orthopedist would perform any needed followup. With respect to the first point, Archinihu does not explain why he believes it matters whether the orthopedist's report was an "order" or a "recommendation." Either way, the report represents a conclusion that surgery is the proper course of treatment. The orthopedist did not identify any other treatment options and neither did Archinihu, either in response to the report or in his summary judgment filings. Because Archinihu does not suggest that he disagreed with the orthopedist's conclusion, the extent to which the orthopedist was "ordering" treatment seems to have little relevance to plaintiff's claim.

With respect to the second point, if defendant Archinihu honestly believed that the orthopedist was going to seek approval on his own to obtain surgery for plaintiff, then Archinihu is entitled to judgment in his favor. Archinihu does not cite any evidence that the orthopedist ever contacted the prison again on behalf of plaintiff but, as noted above, a prison official may not be held liable under the Eighth Amendment unless he *consciously*

refused to take reasonable measures. A mistake is not enough. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996) (“[A] defendant's inadvertent error, negligence or even ordinary malpractice is insufficient to rise to the level of an Eighth Amendment constitutional violation.”). However, this does not mean a defendant is entitled to summary judgment in every case in which he testifies that he acted in good faith. Rather, a plaintiff may use circumstantial evidence to prove the defendant’s knowledge and state of mind. Farmer, 511 U.S. at 842.

In this case a reasonable jury could find that defendant Archinihu knew that the orthopedist would not and could not seek approval for the surgery on his own. As discussed in the October 2012 summary judgment opinion, the process followed to obtain surgery on plaintiff’s left knee (and later his right knee) involved a request by a doctor at the prison to the “prior authorization committee” using a form created by the Wisconsin Department of Corrections. E.g., dkt. #64 at ¶¶ 18-19; dkt. #58-2 at HSU 191-92. The role of the off-site specialist was limited to making recommendations to the treating physician at the prison.

Archinihu does not deny that it was generally the responsibility of the treating physician at the prison to follow through with any recommendations made by the specialist. Common sense would suggest that it would be impractical if not almost impossible for an off-site physician to lobby prison officials directly to obtain care for a prisoner. Archinihu identifies no prison procedure that would be available to the off-site physician to accomplish that result and he does not point to any examples in which it occurred. Further, one month had passed by the time Archinihu reviewed the orthopedist’s report, but the orthopedist had

taken no action, which would have given Archinihu additional reason to believe that *he* needed to take action. Although Archinihu is free to testify that he was not aware of the prison's own general practice for requesting surgery, this is unlikely enough that a reasonable jury would be entitled to disbelieve it.

Defendant Archinihu raises several alternative arguments, but these are not persuasive. First, he says that he did not have authority to approve surgery. This is true, as it was true for every other doctor who worked at the prison because all surgeries had to be approved by a committee. However, the language of 42 U.S.C. § 1983 (the statute that authorizes civil lawsuits for constitutional violations) does not limit individual liability to "final decision makers." Rather, it imposes liability on anyone acting under color of law who "subjects or causes to be subjected" a person to a constitutional violation. The court of appeals has interpreted this language as requiring that a defendant be "personally involved" in the constitutional deprivation at issue. Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003).

Although the committee had the final say, plaintiff could not get his request in front of the committee without a recommendation from his treating physician. That is enough to show personal involvement. Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004) (rejecting view that defendants could not be held liable because they only made recommendations to a higher authority); Hennings v. Ditter, 2007 WL 5445543, *5 (W.D. Wis. 2007) (same). A defendant may not escape liability for unconstitutional conduct that he caused by professing that he is only one cog in the machine.

It is true that the committee might have denied Archinihu's request for surgery, as it did several months later when it required plaintiff to try physical therapy first. However, even if the committee had denied the request, it is reasonable to infer that plaintiff could have started physical therapy and gotten final approval for his surgery much faster than he did.

Defendant Archinihu argues next that plaintiff has not adduced any evidence that he suffered any harm as a result of his delay in treatment. That is incorrect. Although it may be true that plaintiff has not shown that he has suffered long term consequences, he has sworn in his declarations that he suffered great pain as a result of the delay in receiving surgery.

Defendant Archinihu refers to statements by the court of appeals that a prisoner must provide "verifying medical evidence" that a delay in treatment harmed him, e.g., Williams v. Liefer, 491 F.3d 710, 714-16 (7th Cir. 2007); Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir.1996), but the court has warned against construing this requirement broadly. As the court explained recently in Ortiz v. City of Chicago, 656 F.3d 523, 534-35 (7th Cir. 2011), "non-expert evidence is sufficient as long as it permits the fact-finder to determine whether the delay caused additional harm." Plaintiff's testimony about his pain is sufficient for that purpose. Smith v. Knox County Jail, 666 F.3d 1037, 1039-40 (7th Cir. 2012) ("[D]eliberate indifference to prolonged, unnecessary pain can itself be the basis for an Eighth Amendment claim."). See also Rodriguez v. Plymouth Ambulance Service, 577 F.3d 816, 832 (7th Cir. 2009) (state employees could be liable for four-day delay in treating

prisoner who complained that his IV was causing him serious pain); Grieverson v. Anderson, 538 F.3d 763, 779-80 (7th Cir. 2008) (delay in treating pain for day and a half could be Eighth Amendment violation); Walker v. Benjamin, 293 F.3d 1030, 1040 (7th Cir. 2002) (delay in providing pain medication stated claim under Eighth Amendment).

Finally, defendant Archinihu points out in his brief and his proposed findings of fact that he was not a “permanent” physician at the prison and that he filled in at the prison on an “as needed” basis. To the extent Archinihu means to argue that he cannot be held liable for failing to provide care under those circumstances, I disagree. To begin with, Archinihu does not explain with any specificity how often he was at the prison or the extent to which he was responsible for any particular prisoner’s care. According to plaintiff, Archinihu told him that he was “a full-time doctor” at the prison. Dkt. #163 at ¶ 16. Further, Archinihu does not point to any other doctor at the prison that was providing care to plaintiff at the relevant time.

In any event, even if Archinihu’s employment was limited, I am not aware of any authority that would immunize him from liability. The same standard applies to any health care professional at the prison, which is whether he consciously disregarded plaintiff’s serious medical need. Because a reasonable jury could find that Archinihu consciously disregarded plaintiff’s serious medical need related to his right knee by doing nothing after reviewing the specialist’s recommendation for surgery, summary judgment is not appropriate. Although Archinihu’s limited role at the prison could provide some explanation for his ignorance of prison policies, that is an issue the jury will have to resolve.

B. William Braunstein

Defendant Braunstein had contact with plaintiff on two occasions: (1) on October 30, 2007, when Braunstein concluded that physical therapy was a reasonable treatment; and (2) on January 31, 2008, when Braunstein concluded that physical therapy had “failed” and plaintiff was a candidate for a right knee replacement. Plaintiff argues that Braunstein violated his Eighth Amendment rights on both occasions by failing to recommend surgery. In addition, he argues that Braunstein may be held liable for failing to take action after he learned in December 2007 that the physical therapist had discontinued therapy because it had not been successful.

Braunstein concedes for the purpose of summary judgment that plaintiff had a serious medical need and Braunstein does not deny that he was aware of that need. Again, the question is whether defendant consciously refused to take reasonable measures to provide treatment for plaintiff’s right knee.

I agree with defendant Braunstein that plaintiff cannot prevail on his claim that Braunstein violated his rights by failing to recommend surgery after the October 30, 2007 appointment. As of October 30, the authorization committee had just rejected another doctor’s request for surgery and ordered physical therapy instead. Plaintiff points to no new facts that had developed in the meantime that would have persuaded the committee to order surgery before the physical therapy was completed. Thus, even if Braunstein had recommended surgery, plaintiff has not shown any reason to believe that the result would have been different.

At plaintiff's next appointment with defendant Braunstein on January 31, 2008, the situation changed. Braunstein concluded that physical therapy had "failed" and that plaintiff was a candidate for a right knee replacement. However, Braunstein did not take any steps to get the surgery approved.

Defendant Braunstein does not identify any medical reason for his inaction. Instead, he included the following explanation in his declaration:

My last assigned day at Stanley Correctional was February 8, 2008. My note from January 31, 2008 assessed Mr. Leiser as a candidate for a Class III Right knee replacement, and had I been assigned to Stanley Correctional for a longer period of time following Mr. Leiser's January 31, 2008 appointment, I would have prepared and submitted a "Prior Authorization for Therapeutic Level of Care" form on behalf of Mr. Leiser.

Dkt. #175 at ¶ 22. By stating that he would have sought approval for surgery if he had been employed at the prison longer, Braunstein is acknowledging that he believed surgery was an appropriate treatment. However, he does not explain why nine days was not a sufficient period of time to fill out a one-page form requesting approval for surgery, or, if that was not enough time, why he did not make any effort to communicate his conclusion about the need for surgery to the doctor who replaced him at the prison or anyone in the health services unit. In the absence of such evidence, a reasonable jury could find that Braunstein consciously disregarded plaintiff's serious medical need.

Defendant Braunstein raises a number of arguments in support of a contrary conclusion. First, he points out that he took *some* action after the January 31 appointment by prescribing a pain medication and various accommodations such as extra pillows and a cane. However, it is well established that a prisoner may maintain a claim under the Eighth

Amendment even if he receives some care. Gonzalez v. Feinerman, 663 F.3d 311, 314 (7th Cir. 2011). Braunstein does not say in his summary judgment materials that he believed pain medication and some comfort measures were sufficient to address plaintiff's knee problem. Rather, his own notes acknowledge that plaintiff was a candidate for surgery. When a physician prescribes treatment that he knows is ineffective, he may be held liable under the Eighth Amendment. Johnson v. Doughty, 433 F.3d 1001,1013 (7th Cir. 2006) ("[M]edical personnel cannot simply resort to an easier course of treatment that they know is ineffective.").

Defendant Braunstein raises a similar argument that "plaintiff's claim is at most a dispute about plaintiff's disagreement with the timing of certain care. A difference of opinion on how a condition should be treated does not give rise to a constitutional violation. Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996)." Dft. Braunstein's Br., dkt. #173, at 12. However, Fromm is not on point because plaintiff and Braunstein did *not* have a difference of opinion about plaintiff's treatment as of January 31, 2008. Rather, they agreed that surgery was appropriate.

Finally, defendant Braunstein repeats defendant Archinihu's argument that plaintiff has no "verifying medical evidence" to show that he was harmed by the delay, but, as discussed above, plaintiff's testimony that he was in great pain while he was waiting for surgery is sufficient evidence of harm. Braunstein argues for the first time in his reply brief that "plaintiff has offered no evidence that if Dr. Braunstein had submitted a request for the right knee surgery . . . immediately after the January 31, 2008 appointment, the surgery

would have taken place any sooner,” dkt. #185 at 3, but that argument is forfeited as untimely. Casna v. City of Loves Park, 574 F.3d 420, 427 (7th Cir. 2009). In any event, it is undisputed that plaintiff had to wait an additional month before the new doctor sought approval for surgery from the committee, so it is reasonable to infer that he would have received surgery sooner if Braunstein had acted on January 31. Although plaintiff has not identified a particular date the surgery could have been performed, that is an issue of damages, not liability. Ortiz, 656 F.3d at 534-35 (plaintiff “is not required to show ‘specific causation’ for a particular result; she needs only to establish that the failure to take [action] was unreasonable under the circumstances and that it caused her some harm”).

It is a somewhat closer question whether plaintiff may proceed to trial on his claim regarding defendant Braunstein’s inaction in December 2007 because he did not have a request pending from plaintiff or anyone else to take action at that time. However, a pending request is not necessarily one of the elements of an Eighth Amendment claim; rather, the plaintiff must show that the defendant knew about the plaintiff’s need for treatment through some means and that Braunstein knew that his response to that need was unreasonable.

In this case it is undisputed that Braunstein knew in December 2007 that both the orthopedist and Dr. Adler had recommended surgery for plaintiff’s right knee, that Adler had concluded that surgery was inevitable, that the physical therapist had stopped therapy because it was not helping and that the committee provided instructions to submit a new request if physical therapy failed. Despite all this knowledge, Braunstein did nothing.

Although the committee's instructions were directed at Dr. Adler, defendant Braunstein does not argue that he failed to act because he believed that Adler was addressing the situation. Rather, Braunstein's only explanation is that it was the responsibility of the health services unit to schedule followup appointments. Dft. Braunstein's Reply Br., dkt. #185, at 4. However, regardless whether it was Braunstein's responsibility to schedule appointments, a reasonable jury could find that Braunstein consciously disregarded plaintiff's serious medical need by taking *no* action after learning of the physical therapist's conclusion.

ORDER

IT IS ORDERED that

1. Defendant John Spencer Archinihu's motion for summary judgment, dkt. #127, is DENIED with respect to plaintiff Loren L. Leiser's claim that defendant Archinihu failed to take any action to seek approval for surgery on plaintiff's right knee after he reviewed the orthopedist's February 6, 2007 report, in violation of the Eighth Amendment. The motion is GRANTED in all other respects.

2. Defendant William Braunstein's motion for summary judgment, dkt. #172, is DENIED with respect to plaintiff's claims that (a) defendant Braunstein failed to take any action in December 2007 after learning that plaintiff had stopped physical therapy; and (b) defendant Braunstein failed to seek approval for surgery on plaintiff's right knee after January 31, 2008, when Braunstein concluded that plaintiff was a candidate for surgery, in

violation of the Eighth Amendment. The motion is GRANTED in all other respects.

Entered this 29th day of April, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge