IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANGELO JOE,

Plaintiff,

v.

DR. GARY BRIDGEWATER, M.D., WILLIAM McCREEDY, DR. HORN, M.D., SHARON ZUNKER, and PATRICIA SIEDSCHLAG,

Defendants.

OPINION AND ORDER

01-C-704-C

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This is a civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff Angelo Joe, a prisoner confined at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin, injured his elbow in a prison basketball game. He seeks declaratory and monetary relief from defendants, who allegedly violated his Eighth Amendment rights by denying him therapy prescribed by a specialist, resulting in permanent damage to his elbow. Presently before the court is defendants' motion for summary judgment. Because the undisputed facts show that defendants Siedschlag and McCreedy were not personally involved in deciding how to treat plaintiff's elbow and that the treatment plaintiff received from defendants Bridgewater, Horn

and Zunker was adequate under the Eighth Amendment, defendants' motion for summary judgment will be granted.

From the facts proposed by the parties, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Angelo Joe is a Wisconsin inmate currently incarcerated at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin, where he has been confined since November 30, 2000. Plaintiff was incarcerated at Columbia Correctional Institution from April 6, 2000, until his transfer to Kettle Moraine.

Defendant Gary Bridgewater, M.D., has been employed by the Department of Corrections as a physician at Columbia Correctional Institution since November, 1998. Defendant Bridgewater has been a licensed physician in Wisconsin since 1977 and has been board certified in internal medicine since 1978. Defendant Elsa Horn, M.D., is employed on a part-time basis by the Department of Corrections as a physician at Kettle Moraine Correctional Institution, has been a licensed physician in Wisconsin since 1971 and is board certified in internal medicine and gastroenterology. As physicians at Columbia and Kettle Moraine, defendant Bridgewater and Horn have responsibilities that include the examination, evaluation and treatment of inmates' medical conditions. They prescribe

treatments and medications as necessary. Defendant Patricia Siedschlag has been employed as the manager of the health services unit at Columbia since March 1986. Defendant William McCreedy has been employed as the manager of the health services unit at Kettle Moraine since March 1999. Defendants Siedschlag's and McCreedy's responsibilities include overseeing the delivery of all medical services at their respective prisons and providing administrative support to physicians and other health services unit staff. Defendant Zunker is director of the Department of Correction's health services bureau.

Plaintiff injured his left elbow while playing basketball at Columbia on June 20, 2000. Defendant Bridgewater examined his elbow at the health services unit, ordered an injection of an anti-inflammatory medication and sent him by ambulance to Divine Savior Hospital in Portage, Wisconsin, for evaluation and treatment of a dislocated or fractured left elbow. At the hospital, plaintiff's elbow was x-rayed and he was diagnosed with a left elbow dislocation and multiple associated fractures. The attending physician at the hospital recommended that plaintiff be transported to the University of Wisconsin hospital in Madison for treatment. He was taken there on June 20, 2000, and treated with closed reduction of his elbow and application of a splint, holding the elbow in a 90-degree flexion. Orthopedic Surgery Service physicians then elected to obtain a CT scan of plaintiff's elbow to evaluate the fracture and brought his arm to a 30-degree flexion and re-splinted the elbow. During the re-splinting process, plaintiff's elbow became dislocated a second time and the

CT scan was obtained while the elbow was dislocated. A second reduction procedure was performed with the elbow in 90-degree flexion and the elbow was re-splinted in that position. Plaintiff was admitted to the hospital for an overnight stay, with his pain managed with oral narcotics. He was transported back to Columbia Correctional Institution on June 21, 2000.

Defendant Bridgewater saw plaintiff at Columbia on June 21, 2000. He recommended that plaintiff keep his elbow elevated above his heart as much as possible and told him to inform prison medical staff if he could not wiggle his fingers. Defendant Bridgewater told plaintiff not to use his left arm for lifting or other daily activities, to keep his splint clean and dry, not to remove his ace wraps and to use a sling whenever he was out of bed. Defendant Bridgewater prescribed plaintiff Percocet for pain management. Plaintiff was scheduled to visit the University of Wisconsin orthopedic clinic on June 28, 2000. On June 22, 2000, defendant Bridgewater saw plaintiff at Columbia because plaintiff believed his elbow had become dislocated again. Defendant Bridgewater contacted a physician at the University of Wisconsin hospital, who recommended that plaintiff be transported to a local hospital for x-rays. When the x-rays revealed that the elbow was dislocated, plaintiff was transferred to the UW hospital emergency room for an orthopedic evaluation. His elbow was casted and he was transported back to Columbia. On June 27, 2000, plaintiff was seen at the UW emergency room again because he was experiencing pain and skin irritation

around his cast. Plaintiff was given Percocet and returned to Columbia. On June 28, 2000, plaintiff was transported to the UW hospital for a follow-up visit. X-rays revealed that plaintiff's elbow was properly located and a follow-up visit was scheduled for July 5, 2000.

On June 29, 2000, plaintiff's elbow became dislocated again while in the cast. Plaintiff was transported to the UW hospital where staff attempted unsuccessfully to perform a reduction. Later, a second attempt was made to reduce the elbow. This attempt succeeded and plaintiff's elbow was placed in a padded splint. Plaintiff remained scheduled for a July 5 follow-up evaluation. Plaintiff and corrections officers were told to contact the UW hospital immediately if plaintiff experienced increased pain, numbness or tingling in his left arm. Defendant Bridgewater saw plaintiff on June 29, 2000, and on the advice of UW hospital physicians, prescribed Tylenol and Codeine for plaintiff in an effort to reduce pain and inflammation. On July 5, 2000, plaintiff returned to the UW hospital for his follow-up visit. He told the UW staff that his elbow became sore a couple of days earlier but that he neglected to mention it to anyone. X-rays revealed that his elbow was again dislocated. Plaintiff's splint was removed, his elbow was reduced, but it was very unstable after reduction. The UW hospital physicians determined that surgery was required. On July 6, 2000, plaintiff was admitted to the UW hospital and orthopedic surgeons placed a pin in his elbow.

On July 8, 2000, plaintiff was discharged back to Columbia, where he was seen by

defendant Bridgewater, who ordered extra pillows for plaintiff so he could keep his elbow elevated, prescribed him Percocet and restricted his work and recreation activities. That night, plaintiff began to experience pain in his left elbow which radiated to his thumb. He was transported to the UW hospital emergency room where an x-ray revealed heterotopic ossification above the radius, which is an overgrowth of bone that can occur after a fracture. Plaintiff was also diagnosed with muscle spasms in his elbow and as a result was given Valium. He was released from the hospital early on July 9, 2000, and was scheduled for a follow-up visit on July 18, 2000. Upon his return to the prison, plaintiff was seen by defendant Bridgewater, who prescribed plaintiff Valium for his muscle spasms and reminded him to keep his arm elevated. On July 10, 2000, defendant Bridgewater prescribed plaintiff Percocet for his pain and advised him that he should abstain from the gym and his prison job for two weeks.

On July 26, 2000, plaintiff returned to the UW hospital where staff removed the pin from his elbow. Following the procedure, his elbow was to remain in a cast until August 18, 2000, when a hinged elbow brace would be applied and he would begin gentle range of motion exercises. On August 18, 2000, plaintiff was taken to the UW hospital where his cast was removed. Although X-rays revealed that his elbow was properly located, there was evidence of heterotopic ossification at the elbow joint. Plaintiff had almost no pronation or supination, which is rotation of the forearm. He was given a hinged elbow brace and a

physical therapy consultation was recommended for improving his elbow's range of motion. On August 21, 2000, defendant Bridgewater prescribed plaintiff Ibuprofen to help manage his pain and decrease inflamation in the elbow.

On August 29, 2000, Mary Ellen Drumm, an occupational therapist at the UW hospital hand and upper extremity clinic, examined plaintiff's elbow. Drumm noted that plaintiff experienced significant pain in his elbow when he moved it and that any motion was "extremely tight." In addition, Drumm indicated that plaintiff's prognosis was questionable secondary to heterotopic ossification. Drumm gave plaintiff a home exercise program, which included range of motion exercises and information regarding scar massage and recommended aggressive therapy twice each week for four to six weeks. Defendant Bridgewater noted these recommendations in plaintiff's chart.

On September 1, 2000, defendant Bridgewater saw plaintiff at Columbia. Plaintiff complained of pain associated with his range of motion exercises. His range of motion was five to ten degrees. Defendant Bridgewater believed that aggressive occupational therapy would not be useful and, given the joint's tendency to dislocate, he feared that either aggressive therapy or the restraint methods used in transporting plaintiff to a therapy clinic might result in another dislocation of plaintiff's elbow. To insure stability, defendant Bridgewater believed that the proper course of treatment involved enabling plaintiff to advance at his own pace using the hinged elbow brace and to practice the exercises he had

learned from the UW therapist. Defendant Bridgewater believed that a self-exercise program would be beneficial in light of plaintiff's persistent pain, swelling in his elbow and long period of immobility. Defendant Bridgewater cancelled plaintiff's occupational therapy referral and watched plaintiff closely for signs of improvement. Self-therapy was continued at Columbia for increased range of motion and Percocet was continued for pain relief. On September 7, 2000, defendant Bridgewater ordered that plaintiff be seen at the prison health services unit in one to two weeks so his elbow could be reexamined.

On September 15, 2000, UW hospital orthopedics staff again recommended that plaintiff undergo physical therapy to achieve aggressive and active range of motion. On September 18, 2000, defendant Bridgewater saw plaintiff and noted that he had elbow pain and contracture with an elbow flexion range of motion of 30 degrees. On September 27, 2000, defendant Bridgewater prescribed more Percocet for plaintiff's elbow pain. On October 10, 2000, defendant Bridgewater examined plaintiff's elbow, noted elbow flexion of 20 degrees, and planned an orthopedics follow-up at the UW hospital. On October 19, 2000, defendant Bridgewater ordered plaintiff's Percocet prescription discontinued and started him on Vicodan for pain. On November 8, 2000, defendant Bridgewater prescribed plaintiff Oxycodone in an effort to help manage his persistent pain. On November 9, 2000, defendant Bridgewater examined plaintiff's elbow, noting that he had significant contracture of the elbow joint but that his function had improved. Defendant Bridgewater

recommended that plaintiff visit the UW orthopedics clinic during the next week and planned to follow up with plaintiff after that visit. On November 22, 2000, defendant Bridgewater examined plaintiff and noted his complaint of symptoms consistent with ulnar neuropathy, which is a compressed nerve at the elbow. Defendant Bridgewater diagnosed plaintiff with ulnar neuropathy, recommended that he inform the UW hospital orthopedic surgeon about this at his next visit and asked prison nursing staff to check the date of plaintiff's next orthopedics appointment, which they confirmed was in one week. Defendant Bridgewater anticipated that the UW hospital physicians would evaluate the elbow nerve compression that had developed. He still did not think that off-site therapy was necessary or that it was the best course of treatment at that time. On November 30, 2002, plaintiff was transferred to Kettle Moraine Correctional Institution. Plaintiff received off-site therapy for his elbow while incarcerated at Kettle Moraine.

On December 1, 2000, plaintiff was transported to the UW hospital orthopedic clinic for an evaluation of his elbow. The treating physician indicated that plaintiff had a possible impingement of his ulnar nerve, secondary to heterotopic ossification. The physician recommended plaintiff undergo a nerve conduction study and if the study was positive, that he see a physician at the UW hand clinic for possible heterotopic ossification removal and ulnar nerve transposition. On December 5, 2000, pursuant to the recommendation of the UW hospital staff, defendant Horn ordered staff at the Kettle Moraine prison to schedule

an appointment for plaintiff to have the nerve study performed. The study was performed on December 28, 2000, and the results were within normal limits. On January 19, 2001, plaintiff visited the UW hospital again, where he was referred to a physician at the UW hand clinic for consultation because of the continued evidence of heterotopic ossification on the elbow joint, secondary to multiple dislocations. On January 23, 2001, defendant Horn ordered prison staff to schedule an appointment for plaintiff at the UW hand clinic. On March 8, 2001, plaintiff was transported to the UW orthopedic clinic, where he was seen under the direction of the specialist from the hand clinic. Plaintiff's primary diagnosis was heterotopic ossification with loss of motion secondary to left elbow dislocation. The physician recommended therapy to increase range of motion in plaintiff's elbow. He did not recommend surgery because of the risk of destabilizing the elbow, but suggested plaintiff attempt to maximize his range of motion through exercise.

The Department of Corrections uses a "Class III" referral system, which is the procedure that must be followed for an inmate to receive non-urgent medical care outside of the prison system. The treating institution physician evaluates the inmate patient and if she believes further evaluation and treatment is required, she fills out a form seeking the authorization of the requested service and forwards it to the department's medical director in Madison. The request is reviewed by the medical director who decides whether to approve the request. On March 13, 2001, defendant Horn submitted a request for approval

of the therapy recommended by the UW physician on March 8, 2001. On March 23, 2001, the request was approved and defendant Horn ordered prison staff to schedule plaintiff for an appointment at the UW sports medicine clinic. On March 28, 2001, the appointment was canceled when defendant Horn learned that the sports medicine clinic does not see prison inmates. Defendant Horn ordered prison staff to make an appointment for plaintiff at Valley View Medical Center in Plymouth, Wisconsin, and plaintiff attended his first therapy session on April 17, 2001. Plaintiff attended a second therapy session on May 14, 2001, a third on May 17, 2001, and a fourth on May 24, 2001. Plaintiff attended a fifth therapy session on May 29, 2001, and on that date his therapist recommended that his therapy be discontinued because his left elbow appeared contracted and he was unable to increase his range of motion. On May 31, 2001, defendant Horn ordered that plaintiff's physical therapy be discontinued on the basis of the Valley View therapist's recommendation, but relying on the therapist's notes, Horn indicated that plaintiff could continue to perform his home exercise program and stretches on his own.

On August 10, 2001, plaintiff told defendant Horn that he was having difficulty moving his elbow. Defendant Horn ordered plaintiff to return to the UW hospital orthopedic clinic for a follow-up visit. On October 11, 2001, defendant Horn wrote an off-site service request to the orthopedic physician to inquire whether he had any other recommendations regarding plaintiff's elbow and to ask whether surgery would be

appropriate. Also on that day, plaintiff was transported to the UW orthopedic clinic, where he was seen by a specialist from the hand clinic. The specialist discussed surgical options with plaintiff, who indicated he was not interested in further surgery because he did not want to risk further instability in his elbow. The specialist recommended an aggressive therapy program at the UW hospital to improve plaintiff's range of motion and suggested that he be given a left elbow extender brace to decrease his flexion contracture. On October 12, 2001, defendant Horn ordered that plaintiff be seen by a therapist at the UW hospital and that he should return to the orthopedic clinic in two months for follow-up. On November 14, 2001, plaintiff was seen at the UW hospital by a therapist, who recommended a special brace for his elbow. Plaintiff saw the therapist several times subsequently for therapy.

On November 27, 2001, defendant Horn submitted a request to the Department of Correction's medical director seeking authorization for an arm brace to help correct plaintiff's left elbow. The request was approved on November 30, 2001 and plaintiff received the brace subsequently. On December 13, 2001, plaintiff had a follow-up visit at the UW orthopedic clinic. The attending physician told plaintiff that he should continue to work on his home exercise program, that his therapist would follow him on a monthly basis to check his progress and that he was to return to the clinic on April 11, 2002 for another follow-up examination. On December 14, 2001, defendant Horn ordered that

plaintiff have continued therapy once each month for four months. On January 15, 2002, plaintiff saw his therapist at the UW hospital. She recommended he return to see her in one month for reevaluation and treatment as needed. On January 23, 2002, defendant Horn examined plaintiff at the prison. Plaintiff requested a weight to lift with his left hand for extension purposes. After discussing plaintiff's request with a nurse, defendant Horn ordered that plaintiff be given a one gallon jug containing distilled water weighing five pounds to use as a form of therapy for his left arm.

On February 13, 2002, plaintiff saw his therapist at the UW hospital. She indicated that he was showing improvement of active and passive range of motion, revised his home exercise program and recommended an increase in the adjustment of his night extension splint. The adjustment to plaintiff's splint was made. Plaintiff returned to the UW hospital on April 11, 2002. His therapist recommended that he return the dynamic splint he was using because it was not contributing to his progress. She indicated that plaintiff had made some progress with active elbow extension and that she had told him to continue using the extension splint at night. Plaintiff was discharged from therapy on this date. Also on April 11, 2002, plaintiff was seen at the UW orthopedic clinic. He showed fairly functional flexion and extension, but lacked rotation. His treating physician mentioned surgery as a consideration, but noted that it still carried the risk of destabilizing plaintiff's elbow. Plaintiff was told that he could continue working on his range of motion on his own and that

he could contact the clinic if he had any future concerns.

Defendants Bridgewater's and Horn's decisions concerning plaintiff's health were made as a matter of their professional judgment in light of information available to them at the time.

Defendants Siedschlag and McCreedy were never personally involved in making treatment decisions with respect to plaintiff's elbow or his referral for off-site therapy. They defer treatment decisions to the physicians at their respective prisons.

Plaintiff never filed an inmate complaint appeal concerning defendant Zunker regarding the allegations involved in this lawsuit.

OPINION

Plaintiff is proceeding in this case on a single claim that defendants Bridgewater, Horn, McCreedy, Zunker and Siedschlag violated his Eighth Amendment right to be free from cruel and unusual punishment by virtue of their deliberate indifference to his need for therapy for his surgically repaired elbow. However, in response to defendants' summary judgment motion, plaintiff appears to have thrown in the towel with respect to defendants Horn, McCreedy, Zunker, and Siedschlag. He has not disputed any of defendants' proposed facts regarding these defendants. Therefore, it is undisputed that defendants Siedschlag and McCreedy were not personally involved in or responsible for treating plaintiff's elbow or in

deciding whether to refer him for physical or occupational therapy. To establish individual liability under § 1983, plaintiff must allege that the individual defendants were involved personally in the alleged constitutional deprivation or discrimination. Although it is not necessary that the respondent participate directly in the deprivation, the official is sufficiently involved only "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). Because plaintiff has conceded that defendants Siedschlag and McCreedy were not personally involved in deciding how to treat his elbow, summary judgment will be granted in their favor.

Summary judgement will also be granted in defendant Horn's favor. Plaintiff has not disputed any of defendants' proposed facts regarding defendant Horn. Those facts indicate that defendant Horn was attentive to plaintiff's medical needs. In addition, plaintiff has not proposed any of his own facts regarding Horn's treatment of his elbow or her decisions regarding his access to therapy. There are simply no facts in the record from which I could conclude that defendant Horn was deliberately indifferent to plaintiff's serious medical needs in violation of the Eighth Amendment. Summary judgment "is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." Schacht v. Wisconsin Department of

Corrections, 175 F.3d 497, 504 (7th Cir. 1999). Plaintiff has presented no evidence sufficient to create a triable dispute regarding the adequacy under the Eighth Amendment of defendant Horn's treatment of his elbow.

As for defendant Bridgewater, plaintiff has singled him out as primarily responsible for denying him the aggressive therapy that he believes would have averted permanent damage to his elbow. Plaintiff's beef with defendant Bridgewater is nicely summed up in his response to defendants' proposed findings of fact and is thus worth quoting at length. Referring to Mary Ellen Drumm, an occupational therapist he saw at the UW hospital, plaintiff maintains that

> Ms. Drumm being fully aware of all of the[] problems with plaintiff Joe's elbow went on to make a recommendation for aggressive therapy which she felt was the best plan and course of treatment for the plaintiff. Aggressive therapy was never given a chance by defendant Bridgewater and he deliberately ignored the recommendations of two leading specialists in the field of physical therapy whom recommended aggressive therapy as being the best course of treatment for the plaintiff . . . . Defendant Bridgewater sought a cheaper method to treat plaintiff Joe's injury without first trying the recommended aggressive therapy of . . . Mary Ellen Drumm. The question is, [w]ho is better qualified to order the proper course of treatment to be followed, Dr. Bridgewater or (OTR) Occupational Therapist Mary Ellen Drumm whom the plaintiff was referred to by order of Associate Professor Ben K. Graf, M.D. of the Division of Orthopedic Surgery UWH. . . . [T]he proper course of treatment was aggressive therapy and it can be inferred that [because of] the lack of aggressive therapy . . . Joe's elbow became contracted and unable to gain any progress in his [later] therapy sessions.

Plt.'s Resp. to Dfts.' Proposed Findings of Fact and Conclusions of Law, dkt. #27, at 2-5. Even if I assume that aggressive therapy was the best course of treatment for plaintiff's

elbow, that as an occupational therapist Mary Ellen Drumm was better qualified than defendant Bridgewater to decide on a course of treatment, that defendant Bridgewater considered cost in determining a course of treatment and that Bridgewater's decision to prescribe less aggressive home therapy resulted in permanent injury to plaintiff's elbow, plaintiff has still failed to make out an Eighth Amendment claim that defendant Bridgewater was deliberately indifferent to his serious medical needs.

"Mere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference." Estate of Cole v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996); Snipes v. DeTella, 95 F.3d 586, 591 (7th Cir. 1996) (decision "whether one course of treatment is preferable to another" is "beyond the [Eighth] Amendment's purview"). The essence of plaintiff's argument is that he believes the course of treatment defendant Bridgewater prescribed for him was inferior to that suggested by his occupational therapist, but "deliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole, 94 F.3d at 261-62. Defendant Bridgewater avers that he believed that aggressive occupational therapy would not be helpful to plaintiff's recovery and, given plaintiff's elbow's tendency to dislocate, he feared that aggressive therapy and the restraint

methods used in transporting plaintiff to a therapy clinic might result in yet another dislocation. Defendant Bridgewater believed that the proper course of treatment involved enabling plaintiff to advance at his own pace by using a hinged elbow brace and the exercises he learned from the UW therapist. Plaintiff has submitted no evidence, expert or otherwise, from which a jury could infer that defendant's choices regarding the treatment of plaintiff's elbow were based upon anything other than his medical judgment.

Moreover, even assuming that defendant Bridgewater's treatment of plaintiff's elbow amounts to professional malpractice, plaintiff's Eighth Amendment claim still falls flat because "the courts have labored mightily to prevent the transformation of the Eighth Amendment's cruel and unusual punishment clause into a medical malpractice statute for prisoners." Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996); Gutierrez v. Peters, 111 F.3d 1364, 1374 (7th Cir. 1997) ("[M]edical malpractice in the form of an incorrect diagnosis or improper treatment does not state an Eighth Amendment claim."). Finally, courts "examine the totality of an inmate's medical care when considering whether that care evidences deliberate indifference to his serious medical needs." Gutierrez, 111 F.3d at 1375. It is undisputed that plaintiff received extensive treatment for his injured elbow from defendant Bridgewater as well as from multiple outside surgeons, specialists and therapists at several different hospitals. Thus, the record belies plaintiff's claim that he was the victim of deliberate indifference. Accordingly, summary judgment will be granted in defendant

Bridgewater's favor.

That leaves only defendant Zunker. Defendants allege that plaintiff "has not filed an inmate complaint appeal concerning defendant, Sharon Zunker, regarding the allegations stated in plaintiff's complaint." Dfts.' Proposed Findings of Fact, dkt. #17, at ¶89. I must address this exhaustion argument before considering the merits of plaintiff's claim against defendant Zunker because the Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections., 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999).

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." Moreover, the court of appeals has held that

"if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733.

Wis. Admin. Code § DOC 310.04 details the exhaustion requirement for claims involving prison conditions: "[B]efore an inmate may commence a civil action . . . the inmate shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC 310.14." The Court of Appeals for the Seventh Circuit has held that "[t]o exhaust administrative remedies, a person must follow the rules governing filing and prosecution of a claim." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). Defendants argue that plaintiff did not properly prosecute his inmate grievance against defendant Zunker. However, defendants' exhaustion argument is too nebulous to support a grant of summary judgment in defendant Zunker's favor. Defendants do not suggest that plaintiff failed to exhaust his administrative remedies regarding the treatment of his elbow. If that were the case, defendants would have presumably moved for summary judgment as to all defendants on exhaustion grounds. Rather, they seem to suggest that plaintiff never specifically named defendant Zunker in a complaint that he pursued to

a final judgment within the prison grievance system.

Although some courts "demand[] that [an inmate's] administrative grievance name each person who ultimately becomes a defendant" in a subsequent civil action, the Seventh Circuit has generally not required such specificity in inmate administrative complaints. Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002). Rather, in the Seventh Circuit, "grievances must contain the sort of information that the [particular] administrative system requires." Id. The specificity requirements imposed by an administrative system can run the gamut from a general notice pleading standard (in which individuals need not be named in a grievance in order to be named subsequently as defendants in a § 1983 action), to the heightened specificity required under a fact pleading regime. But ultimately, it "is up to the administrators to determine what is necessary to handle grievances effectively." Id. In Strong, which involved an Illinois inmate, the court of appeals noted that "Illinois has not established any rule or regulation prescribing the contents of a grievance or the necessary degree of factual particularity." Id. at 650. Under those circumstances, the court concluded that "a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." Id. Defendants have not identified any administrative rule dealing with the degree of factual particularity required of inmates utilizing Wisconsin's prison grievance system. In the absence of such evidence, I am unwilling to conclude that Wisconsin inmates filing § 1983 actions may never name as defendants persons not specifically named in an

inmate complaint. Accordingly, because defendants' exhaustion argument is based not on plaintiff's failure to exhaust his remedies, but rather on the absence of defendant Zunker's name from his fully-exhausted inmate complaint, defendants have not shown that plaintiff failed to exhaust his remedies as to defendant Zunker.

Nevertheless, summary judgment will be granted in defendant Zunker's favor for the same reasons it was granted in favor of defendants Horn and Bridgewater. As discussed earlier, there is simply no evidence from which a jury could conclude that the extensive treatment plaintiff received for his elbow reflected deliberate indifference on the part of defendant Zunker or other prison medical staff.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Dr. Gary Bridgewater, M.D., William McCReedy, Dr. Elsa Horn, M.D., Sharon Zunker and Patricia Siedschlag is GRANTED. The clerk of court is directed to enter judgment for defendants

and close this case.

Entered this 13th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge