IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LOREN L. LEISER, SR.,

OPINION AND ORDER

Plaintiff,

11-cv-328-bbc

v.

JEANNIE ANN VOEKS, R.N., DR. BRIAN J. BOHLMANN,
DR. KENNETH ADLER, DR. BRUCE GERLINGER,
DR. BRAUNSTEIN, DR. JOAN M. HANNULA,
REED RICHARDSON, BRADLEY HOMPE,
JAMES GREER, R.N., HOLLY GUNDERSON,
TIMOTHY HAINES, JODI DOUGERTY,
CHERYL WEBSTER, KENNETH MILBECK,
MATTHEW GERBER, JEROME SWEENEY,
PATRICK J. LYNCH, JUDY BENTLEY,
PATRICIA SCHERREIKS, RENE ANDERSON,
DAVID BURNETT, JOHN SPENCER ARCHINIHU
and JAMES LaBELLE,

Defendants.

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Pro se plaintiff Loren Leiser is proceeding on claims that various prison officials refused to provide adequate medical treatment for his knees from 2005 to 2010. Plaintiff received knee replacements in 2006 (for his left knee) and 2008 (for his right knee), but he believes that defendants subjected him to cruel and unusual punishment in violation of the Eighth Amendment by refusing to approve the surgeries earlier, prescribe stronger pain medications and help him recover more quickly from the surgeries. Defendants' motions for summary judgment are ready for review, dkt. ##53 and 55, as is plaintiff's "motion for

finding of contempt." Dkt. #91. Having reviewed each motion, I am granting defendants' motions and denying plaintiff's.

Plaintiff emphasizes repeatedly in his summary judgment submissions that he was in great pain while he was waiting for his surgeries to be approved. He argues that defendants had no reason but malice to delay his surgeries and that they were in no position to question his demands for stronger pain medication during the wait.

Plaintiff's situation is similar to many prisoners and nonprisoners alike who understandably become frustrated when they suffer from a chronic, painful condition. When health care providers make decisions with which we disagree or prescribe more conservative treatments than we would prefer, it is easy to assume that they are not acting in our best interests. However, plaintiff cannot prove his claim simply by alleging that defendants failed to take away all of his pain or even by showing that they committed malpractice. Rather, under the Eighth Amendment, plaintiff must show that defendant's decisions were "blatantly inappropriate or not even based on medical judgment." King v. Kramer, 680 F.3d 1013, 1019 (7th Cir. 2012).

In this case, a strong argument can be made that some of the defendants did not move as fast as they could have in approving plaintiff's surgeries, particularly with respect to his right knee. The facts also suggest there may have been instances in which plaintiff did not receive all the treatment that was ordered and other instances in which requests for treatment were lost in the prison bureaucracy. These delays and missteps are unfortunate, particularly if plaintiff was in as much pain as he says, and they suggest that defendants

should make changes to insure better and swifter communication among different medical decision makers. However, whatever defendants' failures were, plaintiff has not shown that they amount to an Eighth Amendment violation. Even if defendants could have done a better job, plaintiff has not made any showing that defendants were not exercising medical judgment in making decisions about treatment for his knee problems or that defendants knowingly failed to provide followup care.

Plaintiff raises numerous other issues in his summary judgment submissions regarding other health care concerns, but I have not considered these because they are outside the scope of this case. If plaintiff believes that defendants are violating his rights in other ways, he must file another lawsuit.

With respect to plaintiff's contempt motion, I am denying it because he has not made any showing that defendants have engaged in sanctionable conduct.

The undisputed facts are set forth below. They are taken primarily from defendants' proposed findings of fact because plaintiff did not submit any of his own proposed findings of fact as he was permitted to do under this court's Procedure to be Followed on Motions for Summary Judgment. Although plaintiff did submit responses to defendants' proposed findings of fact, he failed to follow the requirement to cite evidence in the record to support his version of the fact. Procedure II.D.2 ("If you dispute a proposed fact, state your version of the fact and refer to evidence that supports that version."). See also Memorandum to Pro Se Litigants Regarding Summary Judgment Motions ("Plaintiff must pay attention to Procedure II.D.2., which tells him how to dispute a fact proposed by the defendant."). In

many instances, he simply wrote "disputed" in response to a proposed fact or supported the dispute by referring generally to a brief. Although plaintiff includes many facts in his brief, under this court's procedures, "[t]he court will not consider facts contained only in a brief." Procedure I.B.4.

The purpose of the court's procedures is to resolve motions for summary judgment in a way that is fair to both sides and helps the court identify relevant facts and disputes in an efficient manner. Delapaz v. Richardson, 634 F.3d 895, 899-900 (7th Cir. 2011) (district court summary judgment rules are "designed, in part, to aid the district court, which does not have the advantage of the parties' familiarity with the record and often cannot afford to spend the time combing the record to locate the relevant information, in determining whether a trial is necessary") (internal quotations omitted). That purpose is undermined when parties do not submit proposed findings of fact, but instead pepper their briefs with facts. Plaintiff filed nine separate briefs and seven declarations with documents attached as part of his summary judgment submissions, dkt. ## 96, 99, 101-13, 115, and neither defendants nor this court is required to dig through plaintiff's submissions to determine whether evidence supporting his claims might be buried somewhere. Ciomber v. Cooperative Plus, Inc., 527 F.3d 635, 643 -644 (7th Cir. 2008) ("District courts are entitled to expect strict compliance [with their rules], and a court does not abuse its discretion when it opts to disregard facts presented in a manner that does follow the Rule's instructions.") (internal quotations omitted); Corley v. Rosewood Care Center, Inc. of Peoria, 388 F.3d 990, 1001 (7th Cir. 2004) ("[W]e will not root through the hundreds of documents and

thousands of pages that make up the record here to make his case for [plaintiff].").

Plaintiff received a copy of the court's procedures and the tips for pro se litigants with the magistrate judge's preliminary pretrial conference order, dkt. #20, and again when defendants filed their motions for summary judgment. The magistrate judge's order instructed plaintiff to read those procedures because they explain how to respond to a motion for summary judgment. Id. at 7. Although plaintiff is pro se, that does not excuse him from following procedural rules. Cady v. Sheahan, 467 F.3d 1057, 1061 (7th Cir. 2006) ("even pro se litigants must follow rules of civil procedure"). Plaintiff's summary judgment submissions make it clear that he is relatively sophisticated and understands the law, so he easily could have followed the court's rules if he had chosen to do so.

Accordingly, I have treated defendants' properly supported proposed findings of fact as undisputed when plaintiff did not cite evidence showing a dispute. However, as discussed in the opinion, even if I considered plaintiff's declarations and the evidence he cites in his briefs, the result would be the same.

UNDISPUTED FACTS

Plaintiff Loren Leiser is a prisoner at the Stanley Correctional Institution and was housed there at all times relevant to this case. In a "health service request" dated October 7, 2005, plaintiff asked for an appointment with defendant 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, ordered a one-week supply of Flexeril and Prednisone for pain management and requested an orthopedic evaluation for "bilateral knee pain." Defendant James Labelle, the nursing coordinator, approved the request the same day. On October 20 and November 4, Gerlinger renewed plaintiff's prescription for Flexeril. On November 18, Gerlinger prescribed a "Medrol dose pack" to control plaintiff's "breakthrough pain." On December 5, Gerlinger prescribed Prednisone to control pain and swelling. On December 22, he increased the dosage for Prednisone, prescribed Piroxicam for six months and ordered knee braces because plaintiff was having difficulty walking.

On January 3, 2006, the orthopedic specialist, Steven Pals, recommended a total replacement for plaintiff's left knee. On January 4, Gerlinger requested approval from the "prior authorization committee" for a left knee replacement. The committee approved the surgery on January 5.

On January 17, 2006, Gerlinger stopped plaintiff's prescription for Prednisone and Piroxicam on the ground that non-steroidal anti-inflammatory drugs could increase the risk of excessive bleeding related to his surgery. However, on January 24, Gerlinger renewed plaintiff's prescription Prednisone through February 14.

On February 8, 2006, Gerlinger requested approval for physical therapy, two to three times a week for four to six weeks. The request was approved the same day.

On February 28, 2006, Dr. Pals performed a total knee arthroplasty, or a knee replacement, on plaintiff's left knee. On March 3, he was discharged from the hospital.

The same day plaintiff was placed on a low bunk and first floor restriction and he

received a commode to place over his toilet. In addition, Gerlinger ordered (1) a wheelchair for use in plaintiff's cell for two weeks and for long distances for four weeks; (2) a walker for three months; (3) 5 mg Vicodin and 800 mg ibruprofen. Plaintiff's pain medication prescription was renewed on March 3, March 13, March 24, March 31 and April 5. His order for a wheelchair on his unit was extended to April 24 and then into May. On April 14, his physical therapy was extended four weeks. In June 2006, Gerlinger stopped working at the Stanley prison.

On January 3, 2007, defendant Kenneth Adler saw plaintiff for knee pain. Adler works primarily at the Jackson Correctional Institution, but he also "fills in" at other prisons if there is a temporary gap in physician coverage. After the January 3 exam, Adler ordered knee braces, extra pillows, a blanket and a cane. He requested approval for physical therapy. (Neither side explains what happened to the request for physical therapy.)

On April 23, 2007, defendant Brian Bohlmann saw plaintiff for knee pain. Bohlmann was a doctor at the Stanley prison from April 2007 to September 2007. Plaintiff told Bohlmann he was taking ibuprofen, but it was not helping. Bohlmann determined that plaintiff had chronic joint pain from arthritis and prescribed 20mg of Feldene, a pain reliever for joint pain, for four months.

On May 14, 2007, Bohlmann submitted a request for replacement surgery on plaintiff's right knee or for "further care." The same day defendant Labelle referred the request to defendant David Burnett, the medical director for the Bureau of Health Services, an agency that is responsible for overseeing medical care at the Wisconsin prisons. Burnett

referred the request to the committee. "The request was neither denied or approved." Dfts.' PFOF ¶ 168, dkt. #57. (Neither side explains what that means or what happened to the request.)

On August 6, 2007, Bohlmann saw plaintiff again. He continued plaintiff's Feldene prescription for one year and added Tylenol four times a day as needed.

On September 10, 2007, Bohlmann submitted a request for total knee replacement after plaintiff continued to complain of pain. On October 16, the prior authorization committee, including defendant Burnett, rejected the request, writing these comments: "Dr. Bohlmann to see and evaluate joint replacement needs and apply McKesson criteria. May resubmit here at a later date if group review will be of benefit." "McKesson criteria" is a reference to a program that medical staff use to evaluate the appropriateness of specialty referral and procedures.

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. The committee, including defendant Burnett, 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.

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. In reaching this decision, she "evaluated his response to physical therapy prior to the surgery, her objective findings concerning his gait, range of motion, Leiser's subjective complaints of pain and the evaluation of the orthopedic consultants who examined him." Dfts.' PFOF ¶ 119, dkt. #57. On March 4, the prior authorization committee, including defendant Burnett, approved the surgery. On April 29 plaintiff received replacement surgery for his right knee.

The "discharge summary" prepared by the hospital listed a number of "discharge medications," including Oxycontin for the first five days and Vicodin. In addition, the "discharge instructions" stated that plaintiff "is to use an electric heat pad as needed over the right thigh due to tourniquet pain."

Defendant Hannula prescribed Vicodin, but not Oxycontin. Because Oxycontin is highly addictive and is susceptible to trafficking, she refrains from prescribing the drug "except in situations of a need for management of extreme or very long term plain." Dfts.' PFOF ¶ 125, dkt. #57. Hannula believed that Vicodin was sufficient because it had been used to manage plaintiff's pain after his left knee replacement surgery.

After consulting with security staff about the electric heating pad, Hannula decided not to allow it because it would be a safety risk. In particular, electric heating pads are not permitted because they can be "altered" and because they are a fire hazard. Instead of an electric heating pad, Hannula ordered that plaintiff be provided with hot packs and plastic bags. In a letter dated May 20, plaintiff complained to defendant Reed Richardson, the

security director, about Hannula's decision to deny the heating pad. In a response dated May 21, Richardson wrote: "The off site report is a RECOMMENDATION to the institution and is not a requirement to have an electric heat pad. HSU has informed you of an alternate method to apply heat to the affected area that is not a risk to security."

Hannula ordered that plaintiff be allowed to use a wheelchair (two weeks on the unit and four weeks for long distances), a walker, ace wrap, ice packs, "TED" stockings for circulation and a commode unit to place over his toilet. In addition, she ordered physical therapy and placed him on work and recreational restrictions. She did not order a double mattress for plaintiff because she did not believe it was necessary. Plaintiff "responded well" to physical therapy and participated in 16 sessions between May and September 2008, when the physical therapist discharged plaintiff because he had achieved the maximum benefit.

In a health service request dated October 7, 2008, plaintiff asked for a second mattress to be "re-ordered." (Although the proposed findings of fact do not address this issue, it seems to be undisputed that plaintiff had a second mattress in the past, though it is not clear why, and that plaintiff lost his second mattress in April 2008 after defendant Bradley Hompe, the warden, decided that prisoners could not have extra mattresses without a medical need for one.) In response, defendant Jeannie Ann Voeks, the health services manager, stated that extra mattresses were no longer being authorized because mattresses at the Stanley prison are "thick." Plaintiff filed a grievance, but defendant Jodi Dougherty dismissed it on the same grounds given by Voeks. Defendant Holly Gunderson affirmed the decision.

In a health service requested dated November 28, 2010 and directed to the "special needs committee," plaintiff again requested an extra mattress. On December 14, 2010, the committee, including defendant Voeks, denied plaintiff's request because he did not have a medical order for one and did not otherwise demonstrate a need.

OPINION

I. PLAINTIFF'S MOTION FOR SANCTIONS

Plaintiff has filed what he calls a "motion for finding of contempt of court" because of what he views as several instances of misconduct by defendants: (1) defendants submitted two copies of the same medical record, but one of them has additional language handwritten on it; (2) pages are missing from defendants' Exhibit A; (3) he has been denied access to parts of his medical file; and (4) he has not received a "Signature Verification Sheet." Plaintiff has not shown that he is entitled to relief on any of these issues.

The first issue relates to a medical record from March 2006 that lists plaintiff's "medical restrictions/special needs." Defendants submitted two versions of this document, but only one of them includes the handwritten notes "May use coffee bags for hot or cold packs" and "May use garbage bags for showers." Dkt. #91-1 at 1-2. Defendants suggest that the difference is the result of notes being added to the document after it was created, but plaintiff argues that the difference is proof that one of the documents has been "tampered with."

Plaintiff's view makes little sense. If prison officials were attempting to alter

plaintiff's medical records, why would they keep evidence of that by leaving both versions in his file? In any event, the document has no apparent relevance to plaintiff's claims. Although plaintiff says that "[t]he usage of coffee bags as hot/ice packs was real and one of my demonstration[s] of deliberate indifference by Bruce Gerlinger," dkt. #91 at 1, he does not explain how either version of the document shows that Gerlinger violated his Eighth Amendment rights. Plaintiff's claims against defendant Gerlinger have nothing to do with using coffee bags as hot or cold packs.

Plaintiff's remaining objections are without merit as well. Defendants supplemented Exhibit A to include the missing pages, dkt. #85-1, and plaintiff has made no showing that the failure to include them sooner was anything but an oversight. With respect to plaintiff's access to his medical file, he fails to explain what he needs that he did not receive. With respect to the signature verification sheet, plaintiff seems to believe that he needs it to identify the signatures of particular defendants, but he does not point to a single document that has a disputed author. Accordingly, I am denying this motion in full.

II. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

In his complaint, plaintiff raises different claims against different defendants, but all of them relate to alleged deficiencies in the health care he received, in violation of the Eighth Amendment. They can be grouped into several categories: (1) defendant Gerlinger's treatment decisions before plaintiff received his left knee replacement; (2) defendant Richardson's decision to limit plaintiff's physical therapy after surgery on his left knee; (3)

treatment decisions of various health care providers before plaintiff received his right knee replacement; (4) treatment decisions regarding plaintiff's recovery after surgery on his right knee; and (5) the refusal to allow plaintiff have an extra mattress and pillows.

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).

For the most part, defendants do not dispute that plaintiff's knee problems were a serious medical need, so I will be focusing on the questions whether defendants knew that plaintiff needed treatment and consciously failed to respond reasonably to that need. It is not enough for plaintiff to show that he disagrees with defendants' conclusions about the appropriate treatment, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), or even that defendants could be providing better treatment. Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). Rather, plaintiff must show that defendants' medical judgment was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted).

A. Defendant Gerlinger

1. Delay in recommending surgery

In the order screening the complaint, I understood plaintiff to be raising a claim that defendant Gerlinger violated his Eighth Amendment rights by refusing to recommend him for knee replacement surgery earlier. Plaintiff began complaining to Gerlinger about serious knee pain in October 2005. (In his declaration, plaintiff says that Gerlinger saw him in August 2005, but that his knee pain was "stable" and "responsive" to pain medication at the time. Plt.'s Decl. ¶ 6, dkt. #102.) Plaintiff received a replacement for his left knee in February 2006 and for his right knee in April 2008.

It is not clear from plaintiff's summary judgment materials whether he continues to

blame Gerlinger for any delay in obtaining the left knee replacement. To the extent he does, that claim is frivolous. Gerlinger immediately requested an orthopedic consultation after examining plaintiff in October 2005; only four months elapsed between Gerlinger's examination and his first surgery. Even many nonprisoners do not obtain treatment on a faster pace. Although plaintiff emphasizes that he was in pain during this time, he has adduced no evidence that the amount of time he had to wait was unusual or, more important, that there was anything Gerlinger could have done to speed up the process. McGowan v. Hulick, 612 F.3d 636, 640 (7th Cir. 2010) ("[T]he length of delay that is tolerable depends on the seriousness of the condition and the ease of providing treatment.").

With respect to his right knee replacement, plaintiff seems to believe that it should have followed shortly after the first because it was clear from the beginning that he had the same condition in both knees. The problem with this argument is that plaintiff points to no admissible evidence to support it. In fact, plaintiff said in his October 7, 2005 health service request that he wanted to meet with Gerlinger about the "ever increasing pain and deteriorating condition of my *left* knee." Dkt. #58-3 at 60, Bates #HSU 528 (emphasis added).

Even if I assume that plaintiff was complaining about both knees at the time, it does not follow that any failure to provide immediate surgery on his right knee was a violation of the Eighth Amendment. He says in his brief that Dr. Pals (the orthopedic specialist) told him that he would receive a right knee replacement six months after the first, but plaintiff cannot testify on behalf of Pals under the rules against hearsay. Fed. R. Evid. 801 and 802.

Plaintiff has not submitted an affidavit from Pals or even any medical records to support his view of the facts.

Even if I assume that plaintiff's account is accurate, that is a long way from showing that Gerlinger violated his Eighth Amendment rights. For one thing, plaintiff points to no evidence that Gerlinger was even aware of Pals' alleged opinion. Further, neither side discusses Gerlinger's involvement in the decision to do surgery on plaintiff's right knee; all of plaintiff's allegations against Gerlinger about events after the left knee surgery focus on pain medication. He says nothing about any decisions by Gerlinger to recommend or reject another surgery request. Accordingly, I am granting defendants' summary judgment motion as to this claim.

2. Pain medication

Defendant Gerlinger prescribed a number of pain medications for plaintiff, including Flexeril, Prednisone, Medrol and Piroxicam before the first surgery, and Vicodin and ibuprofen after surgery. Plaintiff says Gerlinger violated his Eighth Amendment rights by refusing to prescribe stronger medication. In particular, plaintiff says that once Dr. Pals determined that surgery was needed "there should not [have been] any hesitation" in "making [plaintiff] as comfortable as humanly possible" by prescribing narcotic drugs. Plt.'s Br., dkt. #101, at 3.

Plaintiff cites no authority for this bold proposition. Instead, he states that he is "the sole proprietor of [his] pain," suggesting that he should be the one to determine the

appropriate pain medication for his condition. Id. at 4. Of course, that is not how it works; the Eighth Amendment does not give prisoners the right to dictate the terms of their medical care. Again, even nonprisoners do not have that kind of control. Rather, courts must give deference to the judgment of medical professionals in determining the appropriate treatment for a prisoner, including pain medication. Arnett v. Webster, 658 F.3d 742, 759 (7th Cir. 2011) (plaintiff must show that no "minimally competent" doctor would have prescribed medication chosen by defendant); Snipes, 95 F.3d at 591 ("The administration of pain killers requires medical expertise and judgment. Using them entails risks that doctors must consider in light of the benefits."); Banks v. Cox, No. 09-cv-9-bbc, 2010 WL 693517, *7 (W.D. Wis. 2010) ("Although plaintiff may believe that he needed narcotic pain medication, the Constitution does not require prison officials to provide prisoners the medical care they believe to be appropriate; it requires officials to rely on their medical judgment to provide prisoners with care that is reasonable in light of their knowledge of each prisoner's problems."). Particularly when narcotics are involved, prison officials have a legitimate interest in insuring that prisoners do not become addicted or otherwise abuse the medication. DeBoer v. Luy, No. 01-C-382-C, 2002 WL 32345414, *4 (W.D. Wis. 2002) ("[The] delicate balancing between the benefits of pain relief and the risk of addiction can be characterized fairly as 'a classic example of a matter for medical judgment' that falls outside the purview of the Eighth Amendment.") (quoting Estelle, 429 U.S. at 107). See also Block v. Rutherford, 468 U.S. 576, 588-89 (1984) ("[T]he unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the

country.").

With respect to the four months before surgery, the facts show that defendant Gerlinger tried a variety of different medications to keep plaintiff's pain under control. Although plaintiff says that Gerlinger's treatment was not effective, that is not the test. Plaintiff has adduced no evidence suggesting that Gerlinger knew that the pain medication would be insufficient or that Gerlinger's choices were blantantly inappropriate.

Plaintiff focuses on the period between January 17 and January 24 when Gerlinger stopped plaintiff's pain medication, but plaintiff does not dispute Gerlinger's averment that he did so out of concern that the medication could cause excessive bleeding during surgery. As it turns out, plaintiff did not have surgery until February 28. Unfortunately, neither side points to any evidence about what Gerlinger knew about the timing of plaintiff's surgery as of January 17. However, plaintiff has the burden of proof, not Gerlinger. Marion v. Radtke, 641 F.3d 874, 876-77 (7th Cir. 2011). Further, Gerlinger renewed plaintiff's prescription for pain medication on January 24 (until February 14), which supports a view that Gerlinger stopped plaintiff's medication because of a mistaken view that surgery was imminent. In the absence of contrary evidence from plaintiff, no reasonable jury could find that Gerlinger acted gratuitously and without medical judgment.

After plaintiff had surgery, it is undisputed that Gerlinger prescribed the narcotic Vicodin to plaintiff for three months. Plaintiff says that he did not receive any Vicodin at night and that he still needed it after the prescription expired. An initial problem with plaintiff's position is that he says nothing specific about postsurgery pain management either

in his responses to defendants' proposed findings of fact or his declaration. All of his specific objections come from his brief, but, as I stated previously, this court's rules prohibit parties from relying on facts included in their brief only. However, even if I considered the allegations in plaintiff's brief, they do not support a claim that Gerlinger violated plaintiff's Eighth Amendment rights because plaintiff does not cite any evidence or even allege specific facts showing that Gerlinger knew plaintiff was in pain at night. Although plaintiff does cite health service requests in which he says he continues to need Vicodin, dkt. #58-2, at 95-98 and 102, Bates #HSU 353-58 and 361, all of these are from March and April 2006. Because it is undisputed that Gerlinger continued to renew plaintiff's Vicodin until May, these complaints do not show any disregard by Gerlinger for plaintiff's health.

3. Delays in approving accommodations

In the order screening plaintiff's complaint, I allowed him to proceed on a claim that defendant Gerlinger violated his rights under the Eighth Amendment by refusing to order the following: (1) a "lower tier restriction" for plaintiff so that he would not have to walk up and down stairs; (2) an ambulatory aid, such as a wheel chair, crutch, cane or knee braces; or (3) a portable commode or placement in a handicapped cell, because the toilet in plaintiff's cell was too low for him to use without handrails. (Plaintiff says in his brief that he "never said anything about an 'ambulatory aid,'" Plt.'s Br., dkt. #101, at 2, but this seems to be a quibble over word choice because plaintiff continues to complain about not having a wheel chair, crutch, cane or knee braces.)

It is undisputed that defendant Gerlinger approved all of these accommodations after plaintiff had surgery on his left knee. Plaintiff's claim is that Gerlinger should have approved them even before his surgery. Again, however, plaintiff does not discuss this issue with any specificity in his responses to plaintiff's proposed findings of fact, declaration or even his brief. He says nothing about the lower tier restriction, so that issue is waived. With respect to the wheel chair, cane crutch or brace, it is undisputed that Gerlinger ordered knee braces for plaintiff on December 22, 2005. To the extent plaintiff means to argue that Gerlinger should have ordered them sooner, he cites no evidence that he raised this issue with Gerlinger. To the extent plaintiff means to argue that Gerlinger should have prescribed *additional* aids, that is a question of medical judgment that does not implicate the Eighth Amendment. Plaintiff says in his brief (though not his declaration) that he did not receive the braces until many months later. Dkt. #101 at 10. However, he does not cite any evidence that Gerlinger was responsible for the delay or even knew about it, so he cannot be held liable for that.

With respect to the commode, the only evidence plaintiff cites about his need for one is an allegation in a health service request that he was having "trouble getting on & off the toilet." Dkt. #102-3, at 14, exh. 2M. This statement provides support for a view that plaintiff was experiencing some inconvenience and perhaps some discomfort, but that is not enough to prove an Eighth Amendment violation. Hudson v. McMillian, 503 U.S. 1, 9 (1992). ("Because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure

of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation.") (internal quotations and citations omitted). Plaintiff says that he injured his left shoulder because he did not have a commode, Plt.'s Decl. ¶ 13, dkt. #102, but he does not cite any evidence showing the cause of that injury, its extent or that Gerlinger knew a serious injury was likely.

B. Defendant Richardson: Refusal to Allow Physical Therapy

In the order screening plaintiff's complaint, I allowed him to proceed on a claim that defendant Reed Richardson refused to allow plaintiff to participate in physical therapy at the Stanley Hospital after he had surgery on his left knee. Because plaintiff does not develop an argument in support of this claim or cite any evidence, I conclude that he has abandoned it.

C. Decisions Leading Up to Right Knee Surgery

1. Defendant Bohlmann

I allowed plaintiff to proceed on a claim that defendant Bohlmann refused to recommend him for a right knee replacement. The problem with this claim is that plaintiff does not deny that Bohlmann *did* recommend him for surgery. Bohlmann saw plaintiff on two occasions, once in April 2007 and again in August 2007; after *both* appointments, the records show that Bohlmann sought approval for a right knee replacement. (Oddly, Bohlmann does not discuss the first recommendation in his affidavit. However, the other defendants submitted the record showing that Bohlmann made the request and plaintiff does

not dispute their proposed finding of fact on this issue. Plt.'s Resp. to Dfts.' PFOF ¶ 168, dkt. #100.) Although the prior authorization committee did not approve these requests, plaintiff does not explain how any failure by Bohlmann to persuade the committee can amount to a conscious disregard of plaintiff's health.

Plaintiff raises other issues about Bohlmann, including an alleged sexual assault. Although these are serious issues, they are outside the scope of this case. If plaintiff believes that Bohlmann violated his rights in other ways, he must file a separate lawsuit.

2. Defendant Adler

Plaintiff is proceeding on two claims against defendant Adler: (a) refusing to recommend surgery for plaintiff's right knee; and (b) refusing to prescribe stronger pain medication.

a. Refusal to recommend surgery

Adler saw plaintiff on January 3, 2007 and again on October 19, 2007. After the first meeting, Adler ordered knee braces, extra pillows, a blanket and a cane and he requested approval for physical therapy. After the second meeting, he requested approval for knee replacement surgery, but the committee denied the request and recommended physical therapy instead. Adler did not see plaintiff again after that because defendant Hannula took over plaintiff's care.

Plaintiff is challenging Adler's decision not to recommend surgery after the January

3 appointment, his failure to take additional action between January and October and his failure to obtain approval for surgery in October. All of these arguments fail.

Plaintiff seems to assume that it was already established in the medical records as of January 2007 that he needed a right knee replacement. However, as I discussed in the context of plaintiff's claims against defendant Gerlinger, plaintiff has pointed to no admissible evidence to support that view. He also seems to assume that his subjective complaints of pain are sufficient on their own to show that surgery was required. However, it is obvious that not all painful conditions require surgery. In the absence of evidence showing that surgery was the only viable option, no reasonable jury could find that Adler violated plaintiff's Eighth Amendment rights by recommending physical therapy instead. Jackson v. Kotter, 541 F.3d 688, 697-98 (7th Cir. 2008) ("There is not one 'proper' way to practice medicine in a prison, but rather a range of acceptable courses based on prevailing standards in the field.") Although it is not clear whether plaintiff actually received any physical therapy after Adler recommended it, plaintiff points to no evidence that any failure to follow up was Adler's fault.

With respect to the nine months between appointments, it is undisputed that defendant Adler was not a full time doctor at the Stanley prison. He is ordinarily employed at the Jackson Correctional Institution, but fills in at other prisons as needed. It is also undisputed that plaintiff was seen by other medical staff, including defendant Bohlmann, between January and October 2007. Plaintiff has not adduced any evidence that Adler even knew that plaintiff was in need of followup care during that time period. Under those

circumstances, Adler cannot be held liable under the Eighth Amendment for failing to provide care in between appointments.

Finally, with respect to the failure to obtain approval for surgery in October 2007, plaintiff says in his affidavit that Adler ordered physical therapy again instead of surgery. Dkt. # 104, ¶ 14. However, plaintiff does not dispute defendants' proposed finding of fact that Adler recommended right knee replacement at that time, a fact that is supported by the medical records. Plt.'s Resp. to Dfts.' PFOF ¶ 103, dkt. #100; Dkt. #58-2 at 19, Bates #HSU 191. It is the *committee* that rejected the request and recommended physical therapy instead. Because plaintiff does not identify anything else that Adler could have done to obtain authorization for plaintiff's surgery at that point, I am granting defendants' motion for summary judgment as to this claim.

b. Refusal to provide stronger pain medication

Plaintiff says that Adler should have prescribed stronger pain medication at the January 2007 appointment. As I discussed above, courts must give deference to doctors' choices about the appropriate pain medication. That choice can violate the Eighth Amendment only when it is obvious that no minimally competent doctor would make the same choice. Arnett, 658 F.3d at 759.

Plaintiff has not met that standard. A problem with this claim as with many of plaintiff's claims is that he fails to support it with specific evidence. Neither Adler's affidavit nor the medical records reflect any discussion at the January 2007 exam regarding a request

for a different pain medication. Plaintiff's declaration includes only one paragraph about this issue: "[O]n January 3, 2007, defendant Adler refused to order stronger pain medications. I suggested Vicodin as it had helped from the streets and while recovering from the left" knee surgery." Dkt. #104, ¶ 11. From this, it is impossible to infer that Adler was disregarding plaintiff's health by refusing to change his medications. Plaintiff does not say that he told Adler that the medications he was on were completely ineffective or that he gave Adler any reason to believe a change was necessary or appropriate. Further, as discussed above, prison officials have legitimate concerns about prescribing narcotics to prisoners on a long-term basis. Plaintiff cannot prove an Eighth Amendment violation simply by alleging that the doctor refused to do what he wanted. I am granting defendants' motion for summary judgment as to defendant Adler.

3. Defendant Burnett

Defendant Burnett is the medical director for the agency that oversees health care at the Wisconsin prisons and a member of the committee that determines whether to approve certain health care requests. Plaintiff is proceeding on claims that Burnett violated his Eighth Amendment rights by refusing to approve requests for surgery on plaintiff's right knee.

Defendant Burnett considered three requests for surgery on plaintiff's right knee in May 2007, September 2007 and October 2007 before he and the rest of the committee approved the fourth request in March 2008. Plaintiff says nothing about the May 2007

request in his brief or his declaration discussing his claims against Burnett, so I will limit my consideration to the September 2007 and October 2007 requests.

The committee denied the September 2007 request for what seems to be procedural reasons. In particular, in making the request, defendant Bohlmann did not apply the "McKesson" criteria, which is a program the committee uses to evaluate whether a particular medical procedure is needed. In October 2007, when defendant Adler resubmitted the request, he applied the McKesson criteria and explained that plaintiff met all of them except he had not yet been through 12 weeks of physical therapy. Accordingly, the committee denied the request so that plaintiff could attempt physical therapy and it directed Adler to resubmit the request if physical therapy was not successful.

With respect to the September 2007 request, plaintiff does not challenge the validity of the McKesson criteria or argue that defendants' reliance on it is a sham excuse to deny health care to prisoners. Instead, plaintiff argues defendant Burnett should be held liable for failing to train medical staff on how to apply the criteria effectively. However, that is an argument that Burnett was negligent, which is not sufficient to prove an Eighth Amendment violation. Snipes, 95 F.3d at 590. Plaintiff has not adduced any evidence that Burnett knew before the September 2007 request that many doctors were not filling out forms correctly and that prisoners were being denied necessary medical treatment as a result.

With respect to the October 2007 request, I understand plaintiff to be arguing that Burnett knew that physical therapy was an ineffective treatment and that Burnett recommended it only to save costs. If this were true, plaintiff would have a strong claim,

but, again, he cites no evidence to support a view that Burnett knew that physical therapy would be unsuccessful.

Plaintiff says that the orthopedic specialist had already ordered a right knee replacement, Plt.'s Decl. ¶ 13, dkt. #108, suggesting that plaintiff believes that any other treatment was blatantly inappropriate. In support, he cites a medical record dated February 2007 that appears to be signed by the specialist in which the words "Schedule R Total Knee" appear under the heading "Plan/Recommendations." Dkt. #97-2 at 29, Bates #HSU 203. In the notes accompanying that form, the specialist wrote that plaintiff "is quite interested in discussing the possibility of right total knee arthroplasty, which I agree is reasonable. We are going to look at getting that set up for him." Dkt. #97-2 at 8. (I did not include these documents in the undisputed facts because they are not discussed in the parties' proposed findings of fact.)

The documents plaintiff cites may support a view that the specialist believed in February 2007 that a right knee replacement was appropriate, but they do not support a view that replacement surgery was the only reasonable option at the time. The possibility of physical therapy is not even discussed in the specialist's notes. Thus, plaintiff cannot rely on those documents to show that Burnett violated the Eighth Amendment. At most, the documents suggest a difference of opinion, which is not enough to sustain a claim under the Eighth Amendment, even if hindsight shows that the orthopedist's opinion was the better one. Norfleet, 439 F.3d at 396 ("[A] difference of opinion among physicians on how an inmate should be treated cannot support a finding of deliberate indifference."); Walker v.

Peters, 233 F.3d 494, 499 (7th Cir. 2000) ("We do not consider what a reasonable doctor would have done.").

Plaintiff's argument that Burnett rejected the October 2007 request for the sole purpose of saving money is refuted by Burnett's later decision to approve the surgery when physical therapy failed. Prison officials cannot prescribe a treatment they know is ineffective simply because it is cheaper, but cost is one factor that officials may consider. Johnson v. Doughty, 433 F.3d 1001, 1013 (7th Cir. 2006). Because plaintiff has adduced no evidence that defendants knew that physical therapy would be unsuccessful, no reasonable jury could find that defendant Burnett violated the Eighth Amendment by choosing a less expensive (and less dangerous) treatment before approving surgery.

Perhaps what is most unfortunate about the October 2007 decision requiring physical therapy is that plaintiff should have already received it earlier in the year when defendant Adler ordered it. If there were evidence that any of the defendants prevented plaintiff from receiving physical therapy out of an attempt to deny or delay care, this would be a much different case. However, neither side has submitted any evidence showing why Adler's order was not carried out. Again, it is plaintiff's burden at summary judgment to adduce evidence supporting his claims. Without evidence demonstrating that a particular defendant knew plaintiff was not receiving physical therapy even though Adler ordered it, no reasonable jury could find that any defendant violated the Eighth Amendment by failing to take action sooner.

4. Defendant Greer

Defendant James Greer is a nurse and the director (not the medical director) of the agency that oversees health care for Wisconsin prisoners. Greer's involvement in this case is not addressed in the proposed findings of fact, but plaintiff attaches to his brief a letter dated October 9, 2007 that is addressed to Greer, in which plaintiff complains about his knee pain and asks Greer to "intervene . . . to schedule" surgery. Dkt. #109-1 at 1. A nursing coordinator responded on behalf of Greer, writing that Greer could not order the surgery and that plaintiff must wait for a physician to determine the effectiveness of physical therapy. Id. at 2.

Plaintiff cannot prevail on his claim against Greer. The Court of Appeals for the Seventh Circuit has held that prisoners cannot expect every prison official who receives a letter from a prisoner to intervene on his behalf; prisoners must respect the division of labor in the prison. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009). In this case, there was a particular procedure in place for seeking approval for surgery, on which Greer was entitled to rely. Particularly because Greer is not a doctor, he did not violate the Eighth Amendment by refusing to second guess the medical judgment of those who are, at least in the absence of facts demonstrating an obvious problem. Berry v. Peterman, 604 F.3d 435, 443 (7th Cir. 2010). In any event, because I have concluded that defendant Burnett did not violate the Eighth Amendment by recommending physical therapy before surgery, it follows necessarily that Greer did not violate plaintiff's rights by deferring to Burnett's decision.

5. Defendant LaBelle

It is not clear what plaintiff believes that defendant LaBelle did to violate his rights. In his brief, plaintiff seems to blame LaBelle for failing to insure that he received surgery on his knees sooner, but the facts show that LaBelle's involvement in plaintiff's health care was limited to two points. First, in October 2005, he *approved* the request for an orthopedic evaluation. Second, in May 2007, he referred a request to approve surgery to defendant Burnett. Presumably, plaintiff believes that LaBelle simply should have ordered surgery in May 2007 rather than referring the matter. However, even if I assume that LaBelle *could* have approved plaintiff's request, it is difficult to see how it violates the Eighth Amendment for a nurse (defendant LaBelle) to defer to the judgment of a doctor (defendant Burnett) about major surgery. LaBelle did not give false information to Burnett or otherwise try to prevent plaintiff from receiving care. Because no reasonable jury could find that LaBelle disregarded plaintiff's health, I am granting defendants' summary judgment motion as to this claim.

D. Postsurgery Care

I allowed plaintiff to proceed on the following claims about the medical care he received after surgery on his right knee: (1) defendant Joan Hannula refused to comply with the hospital's discharge orders regarding his pain medication; (2) defendants Hannula and Reed refused to comply with discharge orders to give plaintiff a heating pad to help with healing; and (3) Hannula failed to provide plaintiff adequate physical therapy. I am granting

defendants' motion for summary judgment as to each of these claims.

1. Medications

With respect to the first claim, plaintiff takes issue with two of defendant Hannula's decisions. First, although plaintiff's discharge instructions listed both Oxycontin and Vicodin as medications for the first five days, Hannula prescribed Vicodin to plaintiff, but not Oxycontin. Second, in a more confusing part of his brief, plaintiff says that Hannula changed the Vicodin prescription from "every six hours" to "every six hours PRN."

a. Oxycontin

With respect to the decision to eliminate Oxycontin, defendant Hannula says she refrains from prescribing the drug "except in situations of a need for management of extreme or very long term pain," Dfts.' PFOF ¶ 125, dkt. #57, out of concerns that the prisoner will become addicted or engage in trafficking. Further, because Vicodin had been sufficient to manage plaintiff's pain after his left knee replacement surgery, she concluded that Oxycontin was not necessary. Plaintiff does not deny that Oxycontin raises special concerns or that Vicodin was sufficient to manage his pain after his first surgery. Instead, he cites Gil v. Reed, 381 F.3d 649, 663 (7th Cir. 2004), and Jones v. Simek, 193 F.3d 485, 490 (7th Cir. 1999), for the proposition that Hannula was required to follow the orthopedist's instructions because he is a specialist.

Plaintiff is overstating the holdings of Gil and Jones because the problem in both cases

was more than just a disagreement between a specialist and a generalist. In Gil, 381 F.3d at 663-64, the defendant prescribed a particular medication even though the specialist explicitly warned the defendant not to prescribe it and even though the defendant knew the medication was likely to have harmful side effects. In Jones, 193 F.3d at 490, the defendant refused to prescribe *any* pain medication or follow through with any of the recommendations of the specialist for many months, even though the defendant "knew that something might be seriously wrong with" the prisoner. In contrast, this case involved a choice between two different narcotics and Hannula had valid reasons for the choice she made. Further, the choice Hannula made was a question of pain management, not orthopedics. Plaintiff identifies no reason why the orthopedist's opinion on that issue would carry any greater authority that Hannula's. At best, plaintiff has identified another difference of opinion between two doctors.

b. Vicodin

It is harder to follow plaintiff's second argument about defendant Hannula's alleged interference with the discharge instructions. He seems to believe that Hannula somehow changed the prescription so that plaintiff would not receive his medication every six hours, but instead "when the RN is available/scheduled to have the medication window open." Plt.'s Br., dkt. #105, at 9. "PRN" stands for "pro re nata," which means "when necessary," Stedman's Medical Dictionary 1562 (28th ed. 2006), so on its face the designation would not prevent plaintiff from receiving needed medication.

To the extent plaintiff means to say that the disbursement of his medication was contingent on staff availability, that would be true regardless what was written on the prescription. Plaintiff cites generally to notes he made on a calendar in support of the proposition that there were instances in which he missed doses of medication, but he does not suggest that these instances were frequent and he cites no evidence to support a view that they were intentional. More important for the purpose of this claim, he cites no evidence to show that defendant Hannula had any reason to believe that he was not receiving his medication at the appropriate time.

2. Heating pad

Plaintiff's discharge instructions stated that plaintiff "is to use an electric heating pad as needed over the right thigh due to tourniquet pain." Out of concern that an electric heating pad presented a security and safety risk, Hannula authorized plaintiff to use hot packs instead. When plaintiff complained to defendant Reed, Reed deferred to Hannula.

In his brief, plaintiff challenges Hannula's determination that heating pads pose safety and security risks, dkt. #105 at 8, but he cites no evidence in support of a contrary view. In any event, he makes no showing that the alternative Hannula authorized was any less effective than an electric heating pad. His only objection to the hot packs is that they were "unclean" because they were "heated up in the communal microwave." Plt.'s Decl. ¶ 21, dkt. #106. Again, however, he cites no evidence to support that view, much less that Hannula was aware of any potential problems with using a hot pack.

3. Physical therapy

I allowed plaintiff to proceed on a claim that defendant Hannula failed to provide adequate physical therapy after his surgery on his right knee. However, plaintiff does not dispute that Hannula approved 16 physical therapy sessions after surgery, that he "responded well" to the sessions and that the sessions ended only because the therapist determined that plaintiff had received the maximum benefit from them. In his declaration he says that Hannula "did not follow the protocols of the physical therapy, 2 or 3 times a week, per the orthopedic specialist," dkt. #106, ¶ 22, but he does not explain what that means, much less how it violates it his rights under the Eighth Amendment. In his response to defendants' proposed findings of fact, plaintiff is slightly more specific when he says that he "received no assistance in bending, or stretching exercises and had to suffer longer period of rehabilitation." Plt.'s Resp. to Dfts.' PFOF ¶ 17, dkt. #100. However, he does not allege that he ever complained to Hannula about problems with his physical therapy. In any event, because it is undisputed that therapy was generally successful, any imperfections in the program do not amount to a constitutional violation.

E. Extra Mattress and Pillows

I allowed plaintiff to proceed on a claim that defendants Hannula, Hompe, Voeks and members of the "special needs committee" refused to allow to plaintiff to keep an extra mattress and pillows, which he used to cope with his knee problems. Plaintiff does not discuss any issues about extra pillows, so that issue is forfeited.

With respect to the extra mattress, defendants argue initially that plaintiff failed to exhaust his administrative remedies with respect to his 2010 request. However, they admit he completed the grievance process on the same issue in 2008. Because I have concluded in previous cases that prisoners are not required to file a new grievance each time a new instance of the same alleged conduct occurs, I decline to dismiss this claim on the ground that plaintiff to exhaust his administrative remedies. E.g., Freeman v. Berge, 2004 WL 1774737, *5 (W.D. Wis. 2004). See also Johnson v. Johnson, 385 F.3d 503, 521 (5th Cir. 2004) ("prisoners need not continue to file grievances about the same issue").

With respect to the merits, the parties debate the circumstances surrounding the decision to limit the use of extra mattresses in the prison and there is significant confusion regarding the identities of those involved in rejecting plaintiff's request for an extra mattress. I need not resolve any of those issues in this order because plaintiff has not made any showing that an extra mattress will help alleviate any serious medical needs he has related to his knees. In his brief, plaintiff says that the prosthetics in his knees "could be the cause of the neuropathy in [his] feet," dkt. #105 at 14, but he does not even discuss neuropathy in his declarations, much less cite any medical evidence that it is caused by his prosthetics or could be improved by an extra mattress.

Plaintiff also discusses various other alleged ailments in his brief. These are outside the scope of this lawsuit, which is limited to plaintiff's knee problems. However, even if I could consider those other conditions, again, plaintiff cites no medical evidence to support a view that an extra mattress would alleviate any of them. Without any showing by plaintiff

that a mattress would likely improve a serious medical need, no reasonable jury could find that defendants disregarded plaintiff's health by refusing to grant his request.

Although I am granting defendants' motion on this claim, it is important to address what could have been a significant problem. Many of the defendants plaintiff sued on his claim regarding the extra mattress are *possible* members of the special needs committee that denied his request. I say "possible" because defendants say they do not know which employees were on that committee. Apparently, the composition of the committee changes from meeting to meeting and the Department of Corrections does not keep records of the members of a particular committee. Dfts.' PFOF ¶ 229, dkt. #57.

The department must change this practice, if it has not already done so. Although the reason for the lack of documentation may be innocent (defendants do not provide a reason in their summary judgment submissions), the effect is to conceal the identities of those responsible for the decision. A prisoner cannot rely on his own recollection of the committee's composition because he does not meet with the committee; it decides each request on paper. Defendants criticize plaintiff for naming officials as defendants when it is unknown whether they were actually involved in the decision, but I find it difficult to blame plaintiff for that strategy when the department has made it impossible for him to be more precise.

I anticipate that the department will make any necessary changes to their policies and practices to insure that this problem does not continue. To help with that process, I am asking counsel to forward the relevant portion of this opinion to the current department

Secretary, Director of the Bureau of Health Services and Warden of the Stanley prison.

F. Defendants Archinihu and Braunstein

This opinion does not resolve plaintiff's claims against defendants Braunstein and Archinihu, two other doctors who allegedly treated plaintiff for his knee problems. Defendant Archinihu was served well after many of the other defendants and his deadline for filing a dispositive motion is not until November 15. Dkt. #92. Although the United States Marshals Service filed a return acknowledging service on Braunstein, dkt. #17, the court has not received an answer from him. Accordingly, I will give plaintiff an opportunity to file a motion for entry of default under Fed. R. Civ. P. 55 with respect to Braunstein. If plaintiff fails to do so, I will dismiss Braunstein from the case.

ORDER

IT IS ORDERED that

1. Plaintiff Loren Leiser's motion for a finding of contempt of court, dkt. #91, is DENIED.

2. Defendant Brian Bohlmann's motion for summary judgment, dkt. #53, is GRANTED.

3. The motion for summary judgment filed by Jeannie Ann Voeks, Kenneth Adler, Bruce Gerlinger, Joan Hannula, James Greer, Reed Richardson, Bradley Hompe, Holly

Gunderson, Timothy Haines, Jodi Dougerty, Cheryl Webster, Kenneth Milbeck, Matthew Gerber, Jerome Sweeney, Patrick Lynch, Judy Bentley, Patricia Scherreiks, Rene Anderson, David Burnett and James LaBelle, dkt. #55, is GRANTED.

3. Plaintiff may have until November 9, 2012, to file a motion for entry of default against defendant Braunstein. If plaintiff fails to respond by that date, I will dismiss Braunstein from the case.

Entered this 18th day of October, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge