IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

CHRISTOPHER STEWART,	:	
	:	
Plaintiff,	:	
VS.	:	
	:	**NO. 5:15-CV-360-MTT-MSH**
SHARON LEWIS *et al.*,	:	
	:	
Defendants.	:	
_____	:	

REPORT AND RECOMMENDATION

Presently pending before the Court is Defendant's motion for summary judgment (ECF No. 31). For the reasons stated below, the Court recommends that Defendant's motion be granted.

BACKGROUND

Plaintiff filed claims for relief pursuant to 42 U.S.C. § 1983 against two employees of the Utilization Management Department of the Georgia Department of Corrections arising from an alleged denial of medical treatment to Plaintiff. At this stage of the proceedings, only Plaintiff's claim for deliberate indifference to medical needs against Dr. Wells remains.

Plaintiff suffers from a condition called "hammer toes," which is an abnormality of the joints in Plaintiff's toes. Compl. ¶¶ 10-11, ECF No. 1. Plaintiff contends that hammer toes constitutes a "serious medical need." *Id.* ¶ 12. Plaintiff also has an 18-inch steel rod implanted his right leg due to a previous incident which caused the development of his hammer toes. *Id.* ¶ 10; Stewart Dep. 9:14-10:06, ECF No. 31-3. On August 5,

2013, while Plaintiff was incarcerated at Macon State Prison ("MSP"), Dr. Chiquifa Fye, the MSP Medical Director, recommended that Plaintiff see a specialist concerning his hammer toes. Compl. ¶¶ 8-9. On December 10, 2013, Plaintiff was seen by podiatrist Dr. Mark Wiggins at Georgia State Prison ("GSP"), and Dr. Wiggins recommended that Plaintiff undergo surgery to treat his hammer toes. *Id.* ¶ 13; Stewart Dep. 17:16-22.

Plaintiff alleges that on February 10, 2014, Defendant denied Plaintiff's surgery for his hammer toes for nonmedical reasons. Compl. ¶¶ 15-16. He contends that Defendant denied his surgery because "hammertoes . . . are not an eligible covered illness according to the Summary of Healthcare Benefits." *Id.* ¶ 16. On November 24, 2014, Plaintiff received surgery on his hammer toes. *Id.* ¶ 17. Plaintiff avers that he suffered "grievous pain" as a result of Defendant denying his surgery and that Defendant's denial of Plaintiff's surgery constituted deliberate indifference to Plaintiff's serious medical needs. *Id.* ¶ 19. Plaintiff seeks damages and attorney's fees. *Id.* ¶¶ 20-22. Defendant now moves for summary judgment on Plaintiff's deliberate indifference claim. This motion is ripe for review.

DISCUSSION

I. Summary Judgment Standard

Summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether a *genuine* dispute of *material* fact exists to defeat a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing summary judgment, drawing all justifiable inferences in

the opposing party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A fact is *material* if it is relevant or necessary to the outcome of the suit. *Id.* at 248. A factual dispute is *genuine* if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. *Id.*

II. Undisputed Material Facts[1]

Defendant is a medical director for the Utilization Management ("UM") Department of the Georgia Department of Corrections ("GDOC"). Wells Decl. ¶ 4, ECF No. 31-5. UM reviews and advises an inmate's treatment when the proposed treatment cannot be directly handled by the institution where the inmate is housed. *Id.* ¶ 6. Primary care medical staff at correctional institutions can electronically submit consult requests to UM for an inmate to be provided medical treatment at a location outside the institution. Lewis Dep. 9:24-10:06, 10:25-11:22, ECF No. 34-2; *see, e.g.*, Wells Dep. Ex. 2 at 38-39, ECF No. 31-4. In deciding which treatment to provide an inmate, UM considers "whether the treatment is medically necessary, whether the treatment is likely to provide relief, and whether the treatment provides an efficient and safe means to serve the medical needs of the inmate." Wells Decl. ¶ 6. Once UM decides upon a particular course of treatment, that treatment is administered and handled by the medical staff at the inmate's institution and other consulted medical professionals, and UM ceases to monitor the inmate's treatment. *Id.* ¶¶ 5, 7.

[1] As part of his response (ECF No. 34) to Defendant's motion for summary judgment, Plaintiff contests the statement of material facts included in Defendant's motion (ECF No. 31-2). *See* Reply to Statement of Material Facts, ECF No. 34-1. The Court finds that Plaintiff's objections are generally not supported by the record. Thus, many facts which Plaintiff "contests" have been included among the undisputed material facts in this case.

In 1984, a steel rod was surgically placed in Plaintiff's right leg to treat a compound fracture. Stewart Dep. 9:14-10:01. The rod "created [Plaintiff's] hammer toe problem" in his right foot. *Id.* at 10:07-14. Other than physical therapy following the surgery to repair the compound fracture in his right leg, Plaintiff did not receive any treatment of his hammer toes before his incarceration in December 2012. *Id.* at 10:21-11:10, 13:02-05. In December 2013, Plaintiff had a consult with podiatrist Dr. Mark Wiggins at Georgia State Prison regarding Plaintiff's hammer toes. *Id.* at 17:08-15. Dr. Wiggins recommended that Plaintiff undergo surgery on his hammer toes, and a consult request for the surgery was submitted to UM and Defendant by Dr. Chiquita Fye at MSP. *Id.* at 17:11-17; Wells Dep. Ex. 2 at 40-41.

Defendant reviewed and denied the consult request for surgery and instead recommended that Plaintiff receive conservative treatment for his hammer toes. Wells Dep. 49:04-14 & Ex. 2 at 40. Conservative treatment for hammer toes consists of prescriptions for pain medications, prosthetic shoes, and anti-inflammatory medications. Wells Decl. ¶ 10; Wells Dep. 48:04-10. Defendant advised conservative treatment instead of surgery because in his medical opinion, Plaintiff's prior surgery on his leg would make the success of hammer toe surgery less likely, "hammer toes often respond positively to such treatment, and . . . surgery is an invasive treatment that should only be used when more conservative treatment fails." Wells Decl. ¶ 9; Wells Dep. 16:04-06, 28:23-25. In June 2014, Defendant received and denied another request for Plaintiff to undergo surgery on his hammer toes submitted by Dr. Chiquita Fye because in Defendant's medical opinion, conservative treatment had not been sufficiently tried at

that point. Wells Decl. ¶ 11; Wells Dep. 37:13-38:22 & Ex. 4 at 42-43. After this request, different UM employees reviewed all subsequent consult requests regarding Plaintiff's treatment, and Defendant had no further involvement with Plaintiff's medical treatment. Wells Decl. ¶ 12.

On July 25, 2014, UM reviewed and approved a consult request for Plaintiff to be fitted with prosthetic footwear. Wells Dep. Ex. 3 at 40-41. The prosthetic shoes Plaintiff received included "inserts [which] were custom made for hammer toe, thick padding," and extra room. Stewart Dep. 16:18-25. Plaintiff's first pair of prosthetic shoes did not properly fit him. *Id.* at 17:01-05. On October 3, 2014, UM approved a consult request for Plaintiff to be refitted for different prosthetic footwear. Medical Consult Forms 4-5, ECF No. 31-6. Plaintiff received the adjusted shoes. Stewart Dep. 17:01-07. The prosthetic shoes provided Plaintiff with some relief compared to the footwear he had previously been wearing while incarcerated. *Id.* at 14:25-16:08. On June 2, 2015, Dr. Wiggins performed surgery on Plaintiff's hammer toes. *Id*. at 18:18-20, 21:06-10. Plaintiff considers the surgery to have been successful. *Id.* at 21:20-22:25.

III. Defendant's Motion for Summary Judgment

Defendant moves for summary judgment, arguing that Plaintiff's claim fails as a matter of law. Specifically, Defendant argues that Plaintiff has not provided evidence to show that Defendant acted with deliberate indifference regarding Plaintiff's medical needs. Plaintiff responded to Defendant's motion on April 19, 2017, and Defendant replied on May 3, 2017. The Court recommends that Defendant's motion be granted

because the uncontested evidence shows that Defendant was not deliberately indifferent to Plaintiff's medical needs.

"The Eighth Amendment's prohibition against cruel and unusual punishments protects a prisoner from deliberate indifference to serious medical needs." *Kuhne v. Fla. Dep't of Corr.*, 745 F.3d 1091, 1094 (11th Cir. 2014) (internal quotation marks and citations omitted). "[T]o prevail on a deliberate indifference to serious medical need claim, [a plaintiff] must show: (1) a serious medical need; (2) the defendants' deliberate indifference to that need; and (3) causation between that indifference and the plaintiff's injury." *Mann v. Taser Int'l*, 588 F.3d 1291, 1306-07 (11th Cir. 2009). "Mere incidents of negligence or malpractice do not rise to the level of constitutional violations." *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (internal quotation marks and citations omitted).

"A serious medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Bingham v. Thomas*, 654 F.3d 1171, 1176 (11th Cir. 2011) (internal quotation marks and citation omitted). Here, Plaintiff suffered from hammer toes which caused him pain and affected his life "traumatically." Stewart Dep. 12:11-23, 14:14-24. Plaintiff also required medical treatment for his condition while in prison. Wells Dep. Exs. 2-4. The Court assumes that this condition is objectively serious for the purposes of a deliberate indifference claim.

The prisoner must then show deliberate indifference—that a prison official had "subjective knowledge of a risk of serious harm" and "disregard of that risk . . . by

conduct that is more than mere negligence." *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004) (citation omitted). Here, Defendant received and denied one consult request for Plaintiff to undergo surgery and instead advised Plaintiff's doctor to utilize conservative treatment. Wells Dep. Ex. 2 at 40. The conservative treatment Defendant advised included prescribing prosthetic shoes, pain medications, and anti-inflammatory medications. Wells Decl. ¶ 10; Wells Dep. 48:04-10. Plaintiff received prosthetic shoes which provided some relief for his condition. Stewart Dep. 14:25-16:08, 16:18-25. Defendant denied a second consult request for surgery because he believed that not enough time had elapsed to determine whether conservative treatment was effective. Wells Dep. 37:13-38:22.

Defendant's conduct fails to exhibit any disregard for Plaintiff's medical needs. Defendant reviewed Plaintiff's condition and advised Plaintiff's doctor to utilize a type of conservative treatment that Defendant believed, based on his medical opinion, would provide relief to Plaintiff. In fact, Defendant made this decision based in part upon Plaintiff's particular medical situation by taking into account the steel rod implanted in Plaintiff's leg from a prior invasive surgery and deciding that this situation made successful hammer toe surgery less likely. Wells Decl. ¶ 9; Wells Dep. 16:04-06, 28:23-25. Defendant was thus directly responsive to Plaintiff's needs. Furthermore, Plaintiff admits that he received at least some relief from the prosthetic shoes prescribed to him as part of the conservative treatment advised by Defendant. Stewart Dep. 16:06-25.

Plaintiff primarily argues that Defendant displayed deliberate indifference by allegedly ignoring the advice of Dr. Wiggins and Dr. Fye to conduct surgery on

Plaintiff's hammer toes and instead deciding upon conservative treatment. Resp. to Mot. for Summ. J. 6-9. However, a doctor's decision to utilize a different form of treatment than that recommended by another doctor does not constitute deliberate indifference. *Adams v. Poag*, 61 F.3d 1537, 1545 (11th Cir. 1995) (quoting *Estelle v. Gamble*, 429 U.S. 97, 107 (1976)) ("Whether governmental actors should have employed additional diagnostic techniques or forms of treatment 'is a classic example of a matter for medical judgment' and therefore not an appropriate basis for grounding liability under the Eighth Amendment."); *Bismark v. Fisher*, 213 F. App'x. 892, 896-97 (11th Cir. 2007) ("Nothing in our case law would derive a constitutional deprivation from a prison physician's failure to subordinate his own professional judgment to that of another doctor."). Furthermore, courts in the Eleventh Circuit have held that a doctor's decision "to treat the plaintiff in a more conservative manner than the plaintiff believe[s] appropriate" does not constitute deliberate indifference. *French v. Pavlakovic*, No. 4:14-cv-01864, 2015 WL 7770224, at *4 (N.D. Ala. Nov. 6, 2015) (granting summary judgment to defendant prison doctor where plaintiff inmate was treated conservatively after being stabbed).

Plaintiff also argues that some Eleventh Circuit cases suggest that a doctor's decision to deny a form of treatment which was recommended by another doctor who examined the patient constitutes deliberate indifference. Resp. to Mot. for Summ. J. 7-9 (citing *Steele v. Shah*, 87 F.3d 1266 (11th Cir. 1996); *Grearson v. Kemp*, 891 F.2d 829 (11th Cir. 1990); *Waldrop v. Evans*, 871 F.2d 1030 (11th Cir. 1989)). However, those cases are clearly distinguishable from this case. The defendant doctors in the cases cited by Plaintiff completely discontinued all existing treatment of the patient inmates.

Defendant in this case advised that doctors administer Plaintiff conservative treatment. *Steele*, 87 F.3d at 1267-68; *Grearson*, 891 F.2d at 831-33; *Waldrop*, 871 F.2d at 1032. Here, Plaintiff also admitted that the prosthetic shoes prescribed to him as part of Defendant's recommended conservative treatment provided him some relief, unlike the total deprivation of treatment for inmates in the cases cited by Plaintiff. Stewart Dep. 16:06-25. Plaintiff has thus failed to show that Defendant disregarded any risk of harm to Plaintiff during his medical treatment, and Defendant was not deliberately indifferent to Plaintiff's medical needs. It is recommended that Defendant's motion for summary judgment be granted.[2]

CONCLUSION

For the foregoing reasons, the Court recommends that Defendant's motion for summary judgment (ECF No. 31) be granted. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, within fourteen (14) days after being served with a copy hereof. The District Judge shall make a de novo determination of those portions of

[2] The Court takes note of and condemns the actions of Plaintiff's counsel in this case. Plaintiff's counsel incessantly badgered Defendant during his deposition even after numerous objections to such behavior by Defendant's counsel, and during the objections themselves, Plaintiff's counsel was similarly disrespectful to Defendant's counsel. Wells. Dep. 11:11-16:02, 19:17-21:04, 29:18-32:23, 34:12-36:12, 51:02-52:08. Plaintiff's counsel used profane and vulgar language, displaying a serious lack of professionalism in doing so. *Id.* at 50:07-18. Plaintiff's counsel did not "communicate respectfully with other lawyers" or "avoid creating unnecessary animosity or contentiousness" as required by the local rules and the General Rules of Professional Conduct. M.D. Ga. L.R., Standards of Conduct § A at vi. Plaintiff's counsel is admonished not to repeat such behavior.

the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, this 28th day of June, 2017.

S/Stephen Hyles
UNITED STATES MAGISTRATE JUDGE