IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

KEVIN ANDERSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	**No. 03-2650 P**
SHELBY COUNTY GOVERNMENT,	)	
CORRECTIONAL MEDICAL SERVICES,	)	
INC., et al.,	)	
	)	
Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART
MOTIONS TO DISMISS AND
DENYING MOTIONS FOR SUMMARY JUDGMENT

Before the court is defendant Shelby County Government's ("Shelby County") Motion to Dismiss or, in the Alternative, for Summary Judgment (D.E. 137), and defendant Correctional Medical Services, Inc.'s ("CMS") Motion to Dismiss or, in the Alternative, for Summary Judgment (D.E. 141). The plaintiffs filed a response, first supplemental response, and second supplemental response to both motions. For the reasons below, the motions to dismiss are GRANTED in part and DENIED in part, and the motions for summary judgment are DENIED.

I. BACKGROUND

A. Procedural History of the Case

The original complaint in this case was filed on August 29,

2003, by plaintiff Lynell Marcus Butler *pro se*.[1] In his complaint, Butler alleged that he was incarcerated at the Shelby County Correctional Center ("Correctional Center") during parts of 2002 and 2003, that he was repeatedly subjected to spider bites, and that during the summer of 2002, medical care for these injuries was repeatedly delayed.[2] Butler alleged he "was informed that he had boils, sores, or minor problems, given an Advil, Tylenol (possibly in generic form) and advised that he had only a minor problem or no serious problem." Butler claimed that in or about October of 2003, after several months of delay, he was transported to the Regional Medical Center for surgery to repair a large hole in his leg. He alleged that he was left with a permanent disfigurement of his leg. Butler sued Shelby County and CMS, among others, under 42 U.S.C. § 1983 for violations of his rights under the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as asserting causes of action for negligence, medical malpractice, intentional infliction of emotional distress, and violations of his rights under the Tennessee Constitution.[3] On

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[1]Although Butler was proceeding *pro se*, he apparently had the assistance of attorney Paul Leitch, who signed the complaint with Butler and provided his business address and telephone number.

[2]At the time of the filing of his complaint, Butler had already been released from the Correctional Center and thus was no longer incarcerated. (Complaint p. 2).

[3]Other defendants, including Correctional Center Director George Little, Shelby County Sheriff Mark Lutrell, and other unknown individuals and entities, were dismissed from the complaint by the

September 29, 2003, the court entered an order granting Butler's motion to proceed *in forma pauperis*, dismissing the complaint with respect to all defendants except Shelby County and CMS, and ordering the Clerk of Court to issue process for Shelby County and CMS.[4]

On March 15, 2004, Butler, who by this time was represented by attorney Paul Leitch, filed an Amended Motion for Leave to Amend Complaint. In this motion, Butler sought leave of court to add over fifty new plaintiffs who were currently or had been incarcerated at either the Shelby County Jail ("Jail") or the Correctional Center, and had suffered injuries from spider bites. The amended complaint also sought to add a new defendant, Annie's Pest Control, Inc., who provided pest control services at these facilities. Neither Shelby County nor CMS opposed the motion to amend complaint, and thus the court, applying the liberal standards under Fed. R. Civ. P. 15(a), granted the motion to amend on March 16, 2004 ("First Amended Complaint").

Shortly after the court granted the motion to amend complaint, on March 18, 2004, the undersigned Magistrate Judge held a scheduling conference. At that time, attorney Leitch sought leave

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court on September 29, 2003.

[4]The court also observed that a one-year statute of limitations is applicable to § 1983 actions in Tennessee, and because Butler could not recover for any incidents occurring prior to August 29, 2002, the court dismissed all claims concerning events occurring prior to that date.

of court to withdraw as counsel for all plaintiffs due to health reasons that would require him to shut down his law practice. At subsequent status conferences held on July 29 and August 5, 2004, the Magistrate Judge was informed that Randall Tolley, an attorney with the court's Civil Pro Bono Panel, had agreed to represent the plaintiffs in this matter and to substitute as plaintiffs' counsel in place of attorney Leitch. The court thereafter granted Leitch's motion to withdraw as counsel and substituted Tolley as counsel of record.

Over the course of the next several months, Tolley attempted to obtain the plaintiffs' case files from Leitch and to contact each plaintiff in order to execute the court's Civil *Pro Bono* Panel Contract of Representation form, which would authorize Tolley to represent the individual plaintiffs. Due to the large number of plaintiffs, as well as difficulty in locating certain plaintiffs who had since been released from or transferred out of the Jail or Correctional Center, Tolley requested additional time to locate the plaintiffs to secure signed *pro bono* contracts. With no opposition from the defendants, the court granted Tolley's requests for additional time.

Subsequently, those plaintiffs represented by Tolley and the defendants executed a form consenting to trial and entry of final

judgment by the Magistrate Judge pursuant to 28 U.S.C. § 636(c).[5] With leave of court, on October 4, 2005, plaintiffs filed an amended complaint that narrowed the list of plaintiffs to only those individuals who had signed *pro bono* contracts with Tolley ("Second Amended Complaint").[6] On January 30, 2006, plaintiffs filed another motion to amend the complaint to add Rodrigues McKinney as a plaintiff, who had recently signed a *pro bono* contract with Tolley but who had not been named in any of the prior versions of the complaint. This motion was granted on March 8, 2006 ("Third Amended Complaint").

B. Allegations in the Third Amended Complaint

According to the Third Amended Complaint, the named plaintiffs

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[5]As for those plaintiffs named in the First Amended Complaint who did not respond to Tolley to inform him whether or not they wanted Tolley to represent them or whether they intended to pursue their claims *pro se* (and thus were excluded from the Second Amended Complaint), defendants filed a motion to dismiss the complaint with respect to these plaintiffs. The undersigned submitted a Report and Recommendation to the District Judge on July 17, 2006, recommending that those plaintiffs be dismissed. In addition, with respect to defendant Annie's Pest Control, who had been served with the complaint but had not appeared or answered, the Clerk of Court entered default against this defendant pursuant to Rule 55(a) and default judgment pursuant to Rule 55(b)(1) and 29 U.S.C. § 1132(g) in the amount of $5,000 per plaintiff, for a total of $135,000.

[6]These plaintiffs are Kevin Michon Anderson, Michael Eugene Biggs, Marvell Lashun Bolton, Clifton Bowles, Johnny Yuma Bonds, Julius Cameron Braswell, Judune Lever Brown, Lynell Marcus Butler, Marcus Danner, Carl Frederick Davis, Tyrone L. Dyson, Tim Edwards, Andre Tyron Giden, Nico Antoine Gilkey, Timothy Greer, Marvin Jenkins, Randy G. Johnson, Antonio Lipsey, Johnny Antonio Maxwell, Timothy Wayne Murley, William L. Ohman, Donald Owens, Tony Neal a/k/a Paulo Ross, Elton Sylvester Rubin, Jr., Antonio R. Sanders, and Christopher Winston.

were all inmates at either the Jail or Correctional Center sometime in 2002 and/or 2003. These facilities are under the control of defendant Shelby County, who contracted with defendant CMS to provide medical services for the detainees and inmates housed at both facilities. The plaintiffs allege that between August 29, 2002 and 2003, they were bitten by spiders, that the defendants allowed the Jail and Correctional Center to become "infested and/or reinfested" with spiders and failed to keep these facilities free of dangerous conditions, and that the defendants failed to meet the plaintiffs' "medical and safety needs" causing scarring and loss of flesh and tissue. (Third Amended Complaint IV ¶¶ 1, 3, 6, 7). Plaintiffs further allege that individuals seeking to investigate the problems at these facilities on behalf of the plaintiffs were denied access to the plaintiffs, that the defendants failed to adequately diagnose and treat them, and that the defendants failed to investigate their complaints or take adequate remedial action, which amounted to negligence, gross negligence, and deliberate indifference. (Id. IV ¶¶ 5, 9-11). Plaintiffs also allege that the "[r]epeated spider bites and delays and inadequate prison healthcare have resulted in cruel and unusual punishment" under the Eighth and Fourteenth Amendments (Id. IV ¶ 7, V ¶ 1). Plaintiffs contend that the defendants were deliberately indifferent in the recruitment, oversight, hiring, training, discipline and supervision of Deputy County Jailers, Correctional Center

employees, CMS employees, and Annie's Pest Control employees, and as a result manifested a callous and reckless disregard for the rights of the plaintiffs. (Id. V ¶¶ 13, 35, 36, 37).

Plaintiffs claim that the defendants deprived them of their rights under the First, Fourth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, in violation of 42 U.S.C. § 1983. (Id. V ¶ 1, 2). They also allege a conspiracy to "cover up" these constitutional violations, in violation of §§ 1985 and 1986. The plaintiffs further assert state law claims for medical malpractice, negligence, intentional inflection of emotional distress, and violations of the Tennessee Constitution. (Id. V ¶ 20). Plaintiffs seek compensatory and punitive damages, as well as an award of attorney's fees. (Id. V ¶¶ 2, 3).

C. Defendants' Motions to Dismiss and/or for Summary Judgment

The motions pending before the court filed by Shelby County and CMS raise essentially identical arguments and rely upon the same set of facts and affidavits in support of dismissal.[7] In

[7]Shelby County relies upon and attached to its motion the affidavits of James Coleman, Director of the Jail; James Blanchard, the Jail's Environmental Supervisor who provided "Environmental Health Pest Control Weekly Reports" and related pest control records from August 29, 2002 through August 29, 2003 for pest control at the Jail during this time period; Marcquinne Yancey, Deputy Administrator of Care and Custody Operations at the Shelby County Division of Corrections; Bailey Waits, the Unit Manager for Security at the Shelby County Division of Correction, who provided "Environmental Health Pest Control Weekly Reports" and related pest control records from June 2, 2003 through August 29, 2003 for pest control at the Correctional Center during this time period; and John Lanos, a foreman of the Maintenance Department for the Shelby

their motions, the defendants argue that (1) plaintiffs claims should be dismissed because the plaintiffs have not carried their burden of demonstrating that they have exhausted their administrative remedies as required under the Prison Litigation Reform Act; (2) plaintiffs fail to state a claim under Rule 12(b)(6) for violations of their First, Fourth, and Sixth Amendment rights; (3) summary judgment should be granted on plaintiffs' Eighth and Fourteenth Amendment claims; (4) plaintiffs fail to state a claim under Rule 12(b)(6) for conspiracy in violation of 42 U.S.C. §§ 1985 and 1986; (5) defendant Shelby County is immune from suit based on a claim of intentional infliction of emotional distress pursuant to the Tennessee Government Tort Liability Act ("GTLA"); (6) plaintiffs fail to state a claim under Rule 12(b)(6) for violations of the Tennessee Constitution; (7) summary judgment should be granted on plaintiffs' negligence claim against defendants based on the defendants' affidavits which show that the county maintains a safe environment for inmates at the Jail and Correctional Center; (8) plaintiffs' claims for punitive damages against Shelby County should be dismissed since plaintiffs are prohibited from recovering punitive damages from this defendant

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County Division of Corrections who provided "Environmental Health Pest Control Weekly Reports" and related pest control records from August 29, 2002 through June 18, 2003, for pest control at the Correctional Center during this time period. In addition to relying upon the affidavits attached to Shelby County's motion, CMS also attached to its motion the affidavit of Gary L. Soileau, CMS's Health Services Administrator.

under § 1983 and the GTLA; and (9) plaintiff Rodriques McKinney's § 1983 claims should be dismissed because they are barred by the statute of limitations.

II. ANALYSIS

A. Standard of Review

The motions filed by Shelby County and CMS seek dismissal of certain claims in the Third Amended Complaint under Fed. R. Civ. P. 12(b)(6) and 56(c). Rule 12(b)(6) of the Federal Rules of Civil Procedure permits the court to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). This rule requires the court to "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief." Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998). Rule 12(b)(6) does not "require a claimant to set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957). However, "[t]o avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to all the material elements of the claim." Wittstock v. Mark A. Van Sile, Inc., 330 F.3d 899, 902 (6th Cir. 2003).

The defendants in this case have moved, in the alternative, for summary judgment and have attached affidavits in support of

their motion. "If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . ." Fed. R. Civ. P. 12(b). Rule 56(c) provides that a

> judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Canderm Pharmacal, Ltd. v. Elder Pharms., Inc., 862 F.2d 597, 601 (6th Cir. 1988). In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). When the motion is supported by documentary proof such as depositions and affidavits, the nonmoving party may not rest on his pleadings but, rather, must present some "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586. These facts must be more than a scintilla of evidence and must meet the standard of whether a reasonable juror could find by a preponderance of the evidence that the nonmoving party is entitled to a verdict. Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 252 (1986). Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Finally, the "judge may not make credibility determinations or weigh the evidence." Adams v. Metiva, 31 F.3d 375, 379 (6th Cir. 1994).

B. Exhaustion of Administrative Remedies Under the Prison Litigation Reform Act

As an initial matter, the defendants argue in their motions that the plaintiffs are covered under the Prison Litigation Reform Act ("PLRA"), that section 1997e of the PLRA requires prisoner plaintiffs to exhaust their administrative remedies prior to filing suit under § 1983, and that the entire complaint should be dismissed under Rule 12(b)(6) because none of the plaintiffs have demonstrated that they have exhausted their administrative remedies. In the alternative, and relying upon the affidavits of Jail Director James E. Coleman and Correctional Center Deputy Administrator Marcquinne Yancey, the defendants argue that they are entitled to summary judgment on the § 1983 claims. Defendants contend that, as set forth in these affidavits, inmates upon entering these facilities are informed of their rights and the grievance process, and that based upon a search of defendants' grievance records for each of the plaintiffs, none of them filed any grievances between August 29, 2002 and August 29, 2003 relating

to spider bites or failure by CMS to respond to their sick call requests and/or failure to properly attend to their medical needs, with the exception of plaintiffs Johnny Bonds, Julius Braswell, Carl Davis, and Tony Neal a/k/a Paulo Ross.[8] (See Coleman Aff. ¶¶ 5-7; Yancey Aff. ¶¶ 7-8).

Under the PLRA, an inmate seeking to maintain an action challenging prison conditions must first exhaust all available administrative remedies.[9] 42 U.S.C. § 1997e(a). As the Sixth Circuit has explained:

> A natural reading of the statute suggests that its application requires consideration of three simple questions. First, is plaintiff "a prisoner confined in [a] jail, prison, or other correctional facility?" If not, the statute is inapplicable. If so, a second question must be considered: Is the plaintiff suing under § 1983 respecting "prison conditions?" If not, the statute is inapplicable. If so, a third question must be considered: Did plaintiff exhaust "such administrative

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[8]According to Coleman's affidavit, plaintiffs Marcus Danner, Tim Edwards, Johnny A. Maxwell and William I. Ohman filed grievances with the Jail during this one-year time period. However, none of their grievances related to spider bites or medical treatment in connection with an alleged spider bite. (Coleman Aff. ¶ 6). Moreover, with respect to plaintiff Tony Neal, he did not file a grievance during this one-year time period, but during a disciplinary hearing on December 31, 2002, he defended the charge of disobeying an order by a jailer on the grounds that he had been bitten by a spider and that his leg was numb. (Yancey Aff. ¶ 7.D). As for plaintiffs Bonds, Braswell, and Davis, although each of them filed some type of grievance, Yancey avers that none of them appealed their grievance. (Id. ¶ 7).

[9]42 U.S.C. § 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under § 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."

> remedies as [were] available" before plaintiff "brought" his action? If question three is answered in the negative, plaintiff is in violation of the statute and the court is required to dismiss plaintiff's suit.

Cox v. Mayer, 332 F.3d 422, 424 (6th Cir. 2003). The duty to exhaust administrative remedies before filing suit "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."[10] Porter v. Nussle, 534 U.S. 516, 532 (2003). Moreover, the PLRA requires "proper" exhaustion; accordingly, before initiating a lawsuit the prisoner must comply "with an agency's deadlines and other critical procedural rules." Woodford v. Ngo, 126 S. Ct. 2378, 2386 (2006). Although the PLRA exhaustion requirement is mandatory, see Booth v. Churner, 532 U.S. 731, 739 (2001), it is not jurisdictional. Richardson v. Goord, 347 F.3d 431, 434 (2d Cir. 2003). "A prisoner does not exhaust available administrative remedies when he files a grievance but 'd[oes] not appeal the denial of that complaint to the highest possible administrative level.'" Dale, 2006 WL 3041371, at *3 (quoting Wright v. Morris, 111 F.3d 414, 417 n. 3 (6th Cir. 1997)). A prisoner also may not abandon the grievance process "before completion and then claim that he exhausted his remedies, or that

[10]A denial of medical care claim is a challenge to conditions of a prisoner's confinement and thus is subject to the exhaustion requirements of the PLRA. Dale v. Corrections Corporation of America, No. 3:05-0319, 2006 WL 3041371, at *3 n.7 (M.D. Tenn. Oct. 24, 2006) (citing Freeman v. Francis, 196 F.3d 641, 642-44 (6th Cir. 1999)).

it is now futile for him to do so." Dale, 2006 WL 3041371, at *3 (citing Hartsfield v. Vidor, 199 F.3d 305, 309 (6th Cir. 1999)).

Relying upon Brown v. Toombs, 139 F.3d 1102 (6th Cir. 1998), Wyatt v. Leonard, 193 F.3d 876 (6th Cir. 1999) and Jones Bey v. Johnson, 407 F.3d 801 (6th Cir. 2005), the defendants contend that plaintiffs bear the burden of demonstrating that they have exhausted or attempted to exhaust all available administrative remedies, and that they are required to make that demonstration in the complaint. In Brown and Knuckles El v. Toombs, 215 F.3d 640 (6th Cir. 2000), the Sixth Circuit explained that a plaintiff bears the burden of demonstrating exhaustion, and that to do so he must attach copies of his administrative grievances to his complaint or must plead with specificity how and when he exhausted the grievance procedures. Brown, 139 F.3d at 1103-04; Knuckles El, 215 F.3d at 642. As the court stated in Knuckles El, the reason for this requirement is "so that the district court may intelligently decide if the issues raised can be decided on the merits." Knuckles El, 215 F.3d at 642. Under the Sixth Circuit's approach, a Rule 12(b)(6) motion is generally proper, because it can typically be determined from the face of the complaint whether the plaintiff has adequately alleged and shown exhaustion of administrative remedies.

However, in Jones v. Bock, 127 S. Ct. 910 (2007), the Supreme Court considered, among other things, the issue of whether exhaustion under the PLRA is a pleading requirement the prisoner

must satisfy in his complaint or an affirmative defense the defendant must plead and prove.[11] Id. at 915. The Court rejected the Sixth Circuit's approach and adopted the position of the majority of courts which hold that failure to exhaust administrative remedies under the PLRA is an affirmative defense that must be proved by the defendant, and that inmates are not required to plead or demonstrate exhaustion in their complaints. Id. at 919. "An affirmative defense may only be considered on a motion to dismiss if it clearly appears on the face of the complaint." Beuster v. Equifax Information Servs., 435 F. Supp. 2d 471, 480 (D. Md. 2006) (internal quotation omitted); see also Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 158 (2d Cir. 2003) (dismissal for failure to state a claim based on affirmative defense appropriate only "if the defense appears on the face of the complaint.").

Thus, in light of the Supreme Court's recent decision in Jones, the defendants' argument that the complaint should be dismissed under Rule 12(b)(6) because the plaintiffs have failed to demonstrate that they have satisfied the PLRA's exhaustion requirement now lacks merit. Had the plaintiffs' complaint contained details regarding the filing of grievances, the court

[11]The Supreme Court granted the petition for writ of certiorari in Jones on March 6, 2006, and issued the opinion January 22, 2007.

might have been in a position to consider the affirmative defense if it had clearly appeared on the face of the complaint. Beuster, 435 F. Supp. 2d at 480. However, under Jones, the plaintiffs are not required to allege with specificity the facts relating to their grievances. See Shire v. Greiner, No. 02 Civ 6061, 2007 WL 840472, at *11 (S.D.N.Y. Mar. 15, 2007) (holding that because defendants did not offer any proof that plaintiff failed to exhaust remedies, "they have failed to meet their evidentiary burden and cannot rely on the PLRA exhaustion requirement as a basis for the dismissal of any of [plaintiff's] claims.").

In addition to their motions to dismiss, the defendants also apparently move for summary judgment on exhaustion grounds based on the affidavits of Coleman and Yancey, in which they aver that only three or four plaintiffs filed grievances relating to the issues in this lawsuit, and that none of those plaintiffs pursued an appeal of their grievance.[12] In response, plaintiffs contend that they are still in the process of obtaining discovery from the defendants relating to their grievances, and argue that the motions are

[12]The court notes that the affidavits of Coleman and Yancey provide very little detail regarding the grievance and appeal procedures at the Jail and Correctional Center applicable to these plaintiffs. As the Supreme Court observed in Jones, "[t]he level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim" and that it is the prison's grievance requirements "that define the boundaries of proper exhaustion." Jones, 127 S. Ct. at 922-23.

premature at this time.[13] Based upon the entire record, and in light of Jones, the court agrees with plaintiffs and therefore denies the motions for summary judgment on exhaustion grounds. The defendants, however, may renew their motions after the parties have engaged in discovery on this issue.[14]

Moreover, the PLRA applies only to plaintiffs who were prisoners at the time they filed suit, and the defendants have not shown which of the plaintiffs were prisoners when they were added to this case.[15] Although the Sixth Circuit has not expressly addressed the issue of whether the PLRA applies to actions filed by former prisoners, see Cox v. Mayer, 332 F.3d 442, 430 n.1 (6th Cir. 2003), every court of appeals that has considered the issue has held that the PLRA does not apply to former prisoners. See Nerness v. Johnson, 401 F.3d 874, 876 (8th Cir. 2005); Ahmed v. Dragovich, 297 F.3d 201, 210 n.10 (3d Cir. 2002); Harris v. Garner, 216 F.3d

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[13]The court construes plaintiffs' request as a motion for additional discovery under Fed. R. Civ. P. 56(f). See Vance v. United States, 90 F.3d 1145, 1149 (6th Cir. 1996) ("Before a summary judgment motion is decided, the non-movant must file an affidavit pursuant to Fed. R. Civ. P. 56(f) which details the discovery needed, or file a motion for additional discovery").

[14]Indeed, based on the questionnaires filled out by the plaintiffs and attached as exhibits to their response to defendants' motions to dismiss, it appears likely that many of the plaintiffs fall under the PLRA and did not file grievances as required by the PLRA.

[15]The PLRA defines "prisoners" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h).

970, 979-80 (11th Cir. 2000) (en banc); Page v. Torrey, 201 F.3d 1136, 1139 (9th Cir. 2000); Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999); Doe v. Washington County, 150 F.3d 920, 924 (8th Cir. 1998); Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998); see also McCullough v. Barnes, No. 3-05-0819, 2005 WL 2704878, at *2 (M.D. Tenn. Oct. 17, 2005); Smith v. Franklin County, 227 F. Supp. 2d 667, 676 (E.D. Ky. 2002).

Plaintiff Butler, at the time he filed his original complaint on August 29, 2003, was a former prisoner and thus the PLRA's exhaustion requirement does not apply to him. As for all of the other plaintiffs, however, they were added (with the exception of plaintiff McKinney) to this lawsuit in the First Amended Complaint filed with leave of court on March 16, 2004, and McKinney was added to this lawsuit in the Third Amended Complaint filed with leave of court on March 8, 2006. Although it is undisputed that all of the plaintiffs were prisoners at some point in 2002 and/or 2003, and that their claims pertain to conditions of confinement, the defendants have not demonstrated with respect to each particular plaintiff (with the exception of Butler) whether or not he was a prisoner at the time he became a plaintiff in this litigation by way of the amended complaints.[16]

[16]The original complaint, filed August 29, 2003, named only Butler as a plaintiff. The other plaintiffs, however, did not "bring" their action until the complaints were amended to add them as plaintiffs. See Harris, 216 F.3d at 973-80. Moreover, as the court in Cox held, a plaintiff who files a complaint while a

C. Section 1983 Claims

The defendants move under Rule 12(b)(6) to dismiss for failure to state a claim the plaintiffs' claims brought under 42 U.S.C. § 1983 for violations of their rights under the First, Fourth, and Sixth Amendments to the Constitution, and move for summary judgment on plaintiffs' claims brought under § 1983 for violations of their rights under the Eighth and Fourteenth Amendments.[17]

1. First Amendment Violations

The plaintiffs' First Amendment claim apparently is based on their allegation that the defendants interfered with and obstructed their efforts to investigate their claims, thus denying them access to the courts. (Third Amended Complaint V ¶ 12). Inmates have a constitutionally protected right of access to the courts. See Bounds v. Smith, 430 U.S. 817, 828 (1977). However, the right of access to the courts is not unrestricted and does not mean that an

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prisoner but who is later released must still satisfy the exhaustion requirement under the PLRA. Cox, 332 F.3d at

[17]Section 1983 provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

inmate must be afforded unlimited litigation resources. See Lewis v. Casey, 518 U.S. 343, 352-55 (1996). There is no generalized "right to litigate" which is protected by the First Amendment. Thaddeus-X v. Blatter, 175 F.3d 378, 391 (6th Cir. 1999). In Lewis, the Supreme Court held that an inmate claiming that he was denied access to the courts must show that he suffered an actual litigation related injury or legal prejudice because of the actions of the defendants. Lewis, 518 U.S. at 349- 51; see also Pilgrim v. Littlefield, 92 F.3d 413, 416 (6th Cir. 1996). In other words, in order to state a claim for interference with access to the courts, a plaintiff must allege an "actual injury," such as "having a case dismissed, being unable to file a complaint, and missing a court-imposed deadline." Harbin-Bey v. Rutter, 420 F.3d 571, 578 (6th Cir. 2005). Here, the plaintiffs have not alleged in their complaint any such injury or prejudice caused by the defendants' actions. Indeed, other than the single, conclusory allegation that the defendants interfered with their efforts to investigate, the complaint contains nothing else that would support a claim for a First Amendment violation. Therefore, the motion to dismiss under Rule 12(b)(6) is granted with respect to the plaintiffs' § 1983 claims based on violations of the First Amendment.

2. Fourth Amendment and Sixth Amendment Violations

The plaintiffs' Third Amended Complaint also alleges violations of plaintiffs' Fourth and Sixth Amendment rights.

However, the complaint does not contain any allegations that would remotely support such a claim, nor do the plaintiffs in their response to the motions to dismiss explain how or why their Fourth or Sixth Amendment rights were violated as a result of being bitten by spiders or being provided inadequate medical care for these bites. "Conclusory, unsupported allegations of the deprivation of rights protected by the United States Constitution or federal laws are insufficient to state a claim." Lanier v. Bryant, 332 F.3d 999, 1007 (6th Cir. 2003). Thus, the defendants' motions to dismiss under Rule 12(b)(6) plaintiffs' § 1983 claims based on violations of their Fourth and Sixth Amendments are granted.

3. Eighth Amendment and Fourteenth Amendment Violations

The defendants move for summary judgment on plaintiffs' allegation that the defendants violated their right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments by allowing spiders to infest the jail cells and providing inadequate medical care for plaintiffs' injuries. The Supreme Court has held that the Eighth Amendment imposes upon prison officials the duty to "provide humane conditions of confinement," and that among the obligations attendant to the discharge of that duty is to "ensure that inmates receive adequate food, clothing, shelter, and medical care." Farmer v. Brennan, 511 U.S. 825, 832 (1994). However, "Eighth Amendment scrutiny is appropriate only after the State has complied with the

constitutional guarantees traditionally associated with criminal prosecutions . . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." Ingraham v. Wright, 430 U.S. 651, 671- 72, n. 40 (1977). Thus, for those plaintiffs who were detained prior to trial and who had not received a formal adjudication of guilt at the time of the violation, the Eighth Amendment has no application. City of Revere v. Massachusetts General Hosp., 463 U.S. 239, 244 (1983); Watkins v. City of Battle Creek, 273 F.3d 682, 685 (6th Cir. 2001). Nonetheless, the Fourteenth Amendment Due Process Clause provides pretrial detainees with "a right to adequate medical treatment that is analogous to the Eighth Amendment rights of prisoners." Watkins, 273 F.3d at 685-86; see also Thompson v. County of Medina, 29 F.3d 238, 242 (6th Cir. 1994); Roberts v. City of Troy, 773 F.2d 720, 723 (6th Cir. 1985).

In order for plaintiffs to prevail on this § 1983 claim, they must establish "(1) that there was the deprivation of a right secured by the Constitution and (2) that the deprivation was caused by a person acting under color of state law." Wittstock v. Mark A. Van Sile, Inc., 330 F.3d 899, 902 (6th Cir. 2003). "Section 1983 is not the source of any substantive right, but merely provides a method for vindicating federal rights elsewhere conferred." Humes v. Gilless, 154 F. Supp. 2d 1353, 1357 (W.D. Tenn. 2001).

An Eighth Amendment claim consists of both objective and subjective components. Farmer v. Brennan, 511 U.S. 825, 834 (1994); Hudson v. McMillian, 503 U.S. 1, 8 (1992); Wilson v. Seiter, 501 U.S. 294, 298 (1991); Brooks v. Celeste, 39 F.3d 125, 127-28 (6th Cir. 1994); Hunt v. Reynolds, 974 F.2d 734, 735 (6th Cir. 1992). The objective component requires that the deprivation be "sufficiently serious." Farmer, 511 U.S. at 834; Hudson, 503 U.S. at 8. The subjective component requires that the official act with the requisite intent, that is, that he have a "sufficiently culpable state of mind." Farmer, 511 U.S. at 834. The official's intent must rise at least to the level of deliberate indifference. Id. at 834.

In order to satisfy the objective component of an Eighth Amendment claim, the plaintiff must show that he "is incarcerated under conditions posing a substantial risk of serious harm," Farmer, 511 U.S. at 834; Stewart v. Love, 796 F.2d 43, 44 (6th Cir. 1982), or that he has been deprived of the "minimal civilized measure of life's necessities," Wilson, 501 U.S. at 298 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). The Constitution "'does not mandate comfortable prisons.'" Wilson, 501 U.S. at 298 (quoting Rhodes, 452 U.S. at 349). Rather, "routine discomfort 'is part of the penalty that criminal offenders pay for their offenses against society.'" Hudson, 503 U.S. at 9 (quoting Rhodes, 452 U.S. at 347).

With respect to the subjective component, a plaintiff must show that the prison officials acted with "deliberate indifference" to a substantial risk that the prisoner would suffer serious harm. Farmer, 511 U.S. at 834; Helling v.. McKinney, 509 U.S. 25, 32 (1993); Woods v. Lecureux, 110 F.3d 1215, 1222 (6th Cir. 1997); Street v. Corrections Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996); Taylor v. Michigan Dep't of Corrections, 69 F.3d 76, 79 (6th Cir. 1995). "[D]eliberate indifference describes a state of mind more blameworthy than negligence." Farmer, 511 U.S. at 835. Thus:

> *[a] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.* This approach comports best with the text of the Eighth Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. . . . But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

Id. at 837-38 (emphasis added; citations omitted); see also Lewellen v. Metropolitan Gov't of Nashville & Davidson County, 34 F.3d 345, 348 (6th Cir. 1994); Bell v. Shelby County, No. 06-2456, 2006 WL 3734421, at *3 (W.D. Tenn. Dec. 15, 2006).

Even if a constitutional violation has occurred, however, it does not necessarily follow that Shelby County or CMS is liable under § 1983.[18] Instead, a plaintiff bringing a § 1983 claim against a municipality must also allege that a municipal custom or policy, or policy of inaction, was the moving force behind the constitutional violation. City of Canton v. Harris, 489 U.S. 378, 379 (1989). A municipality cannot be held liable for an injury caused by its agents or employees under § 1983 based on a theory of *respondeat superior*. Monell, 436 U.S. at 691. Rather, the plaintiff must "identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." Board of County Comm'rs of Bryan County, Okla. v. Brown, 520 U.S. 397, 403 (1997). The plaintiff must demonstrate a "direct causal link" between official action and the deprivation of rights, such that the "deliberate conduct" of the governmental body is the "moving force" behind the alleged constitutional violation. Waters v. City of Morristown, 242 F.3d 353, 361-62 (6th Cir. 2001). A municipal policy or custom may be established by proof of the knowledge of policymaking officials and their acquiescence in the established practice. Memphis, Tenn. Area Local, Am. Postal Workers Union, AFL-CIO v. City of Memphis,

[18]Local governments such as Shelby County are considered "persons" for purposes of § 1983. See Willis v. Shelby County, No. 05-2625, 2006 WL 2827059, at *4 (W.D. Tenn. Sept. 28, 2006) (citing Holloway v. Brush, 220 F.3d 767, 772 (6th Cir. 2000)). Moreover, CMS is treated as a municipality for purposes of § 1983. Willis, 2006 WL 2827059, at *4 n.2 (citing Hicks v. Frey, 992 F.2d 1450, 1459 (6th Cir. 1993)).

No. 02-5694, 2004 WL 103000, at *3 (6th Cir. Jan. 21, 2004). As this court in Alexander v. Beale Street Blues Co., Inc., 108 F. Supp. 2d 934 (W.D. Tenn. 1999) explained:

> Under the liberal pleading requirements of the federal rules, all a plaintiff need do to set forth a cognizable § 1983 claim against a municipality, then, is to allege that agents of the municipality, while acting under color of state law, violated the plaintiff's constitutional rights, and that a municipal policy or policy of inaction was the moving force behind the violation. No further factual specificity is required at the initial pleading stage.

Id. at 949.

In the present case, the defendants argue as follows in their motions:

> Shelby County has contracted with CMS to provide medical care to its inmates. (Affidavits of Coleman and Yancey). Correctional officers are responsible for following the instructions of CMS employees with regard to such things as taking inmates to appointments and other medical facilities. (Affidavits of Coleman and Yancey). Correctional officers are not given access to the inmates' medical records and rely on CMS staff to inform them when inmates should be delivered to outside medical clinics and facilities. (Affidavits of Coleman and Yancey). In addition, both facilities have a grievance program in place wherein inmates have a mechanism to notify Shelby County personnel if they have complaints regarding the medical care being provided by CMS. (Affidavits of Coleman and Yancey). . . . The Affidavits submitted in the cause show that Shelby County had policies in place to prevent insect and pest infestation in [] both facilities and to ensure that inmates receive proper medical attention. The Defendant submits that this claim must be dismissed.

(Shelby County Motion at 12, 18).

The defendants must identify the material facts relevant to this claim upon which they rely, as required by Local Rule

7.2(d)(2). As best as the court can tell, on page eight of Shelby County's motion, there are only two material facts cited by the defendant in support of its motion: "Shelby County contracted with CMS to provide medical services to inmates at both facilities"; and "Shelby County contracted with pest control companies to keep the facilities free of spiders and other pests." However, these two facts, as well as the facts cited by Shelby County on pages twelve and eighteen of its motion, simply do not adequately support the motion for summary judgement. Because the court must view the evidence in the light most favorable to the plaintiffs, the defendants' motions for summary judgment are denied with respect to the plaintiffs' Eighth and Fourteenth Amendment claims.

D. Conspiracy Claim Under Sections 1985 and 1986

Defendants also seek to dismiss the plaintiffs' conspiracy claims brought under 42 U.S.C. §§ 1985 and 1986. The Third Amended Complaint alleges that "Defendants have acted together, in effect, conspired to achieve the unconstitutional and illegal acts alleged herein as well as to cover up and failure to adequately allow an investigation into these matters and allow these conditions to exist over time." (Third Amended Complaint V ¶ 23).

Section 1985(3) prohibits a conspiracy "for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws." 42 U.S.C. § 1985. To prevail on

a § 1985(3) claim, a plaintiff must prove "'(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities of the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.'" Vakilian v. Shaw, 335 F.3d 509, 518 (6th Cir. 2003) (quoting United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 828-29 (1983)); see also Radvansky v. City of Olmsted Falls, 395 F.3d 291, 314 (6th Cir. 2005).

Plaintiffs' complaint contains only general statements without any allegations to support any of the elements of the conspiracy claim. Most notably, plaintiffs do not allege that the conspiracy was motivated by "some racial or perhaps otherwise class-based, invidiously discriminatory animus." Bartell v. Lohiser, 215 F.3d 550, 559-60 (6th Cir. 2000) (internal quotation marks and citation omitted); see also Johnson v. Hills & Dales Gen. Hosp., 40 F.3d 837, 839 (6th Cir. 1994) (explaining that to maintain a cause of action under § 1985(3), a plaintiff must establish a conspiracy to deprive a person of equal protection of the laws and demonstrate that the conspiracy was motivated by a class-based animus, such as race). Failure to allege membership in a protected class, and discrimination based upon such membership, requires dismissal of

plaintiffs' § 1985(3) claim. Saunders v. Ghee, No. 94-4073, 1995 WL 101289, at *1 (6th Cir. Mar. 9, 1995). Plaintiffs' § 1986 claim also fails because it is derivative of § 1985. See Bartell, 215 F.3d at 560; see also Saunders, 1995 WL 101289, at *1 (noting that "since § 1986 contains no substantive provisions and was enacted only to enforce § 1985, Saunders's § 1986 claim was properly dismissed"). Therefore, the defendants' motions to dismiss plaintiffs' conspiracy claims for failure to state a claim under Rule 12(b)(6) are granted.

E. State Law Claims

1. Intentional Infliction of Emotional Distress

Shelby County moves to dismiss the plaintiffs' claims for intentional infliction of emotional distress on the grounds that this tort claim is barred by sovereign immunity. The Tennessee Governmental Tort Liability Act waives in part the immunity traditionally afforded to governmental entities. Tenn. Code Ann. § 29-20-101 et seq. (2005). Although the GTLA generally waives sovereign immunity for negligent acts committed by government employees, Section 29-20-205(2) specifically preserves immunity from claims arising out of, inter alia, "infliction of mental anguish." Tenn. Code Ann. § 29-20-205(2) (2005). The Supreme Court of Tennessee has interpreted this language to include the common law tort of intentional infliction of emotional distress. See Sallee v. Barrett, 171 S.W.3d 822, 828-29 (Tenn. 2005).

Therefore, Shelby County's motion to dismiss is granted with respect to plaintiffs' claims for intentional infliction of emotional distress against the county.

2. Negligence

In their motions, defendants argue that the plaintiffs' negligence claims should be dismissed and that they rely "upon the Affidavits in support of this motion that set forth the steps taken to ensure the institutions were maintained in a safe manner for the inmates and Shelby County employees."[19] (Shelby County Motion at 21; CMS Motion at 17-18). As was the case with the defendants' argument relating to the Eighth Amendment claims, the defendants have not identified the material facts relevant to this claim upon which they rely, see Local Rule 7.2(d)(2), nor is it apparent to the court which portions of the affidavits relate to the negligence claim. For these reasons, the motions are denied with respect to the negligence claims.

3. Violations of the Tennessee Constitution

The defendants contend that plaintiffs' claims for violation of the Tennessee Constitution fails to state a claim under Rule 12(b)(6). The court agrees. The Sixth Circuit has held that

[19]A claim of negligence requires proof of the following elements: (1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause. McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995).

§ 1983 does not provide a cause of action for state constitutional violations. Washington v. Starke, 855 F.2d 346, 348 (6th Cir. 1988) ("a section 1983 claim must be predicated on the deprivation of a federal constitutional right, as a right guaranteed only under state law is inadequate."). In addition, Tennessee law does not recognize a cause of action for damages for violations of the Tennessee Constitution by state officers. See Lee v. Ladd, 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992) ("we know of no authority for the recovery of damages for a violation of the Tennessee Constitution by a state officer"); see also Bowden Bldg. Corp. v. Tennessee Real Estate Com'n, 15 S.W.3d 434, 446 (Tenn. Ct. App. 1999) (same). Therefore, defendants' motions to dismiss this claim are granted.

4. Punitive Damages Against Shelby County

Shelby County moves to dismiss the plaintiffs' claims for punitive damages. Punitive damages are not recoverable from a municipality under § 1983 or under the GTLA. Alexander v. Beale Street Blues Co., Inc., 108 F. Supp. 2d 934, 950 (W.D. Tenn. 1999) (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (no punitive damages under § 1983); Tipton County Bd. of Educ. v. Dennis, 561 S.W.2d 148, 153 (Tenn. 1978) (no punitive damages under the GTLA)); see also Johnson v. Smith, 621 S.W.2d 570, 572 (no punitive damages under the GTLA); Thurlby v. Sevier County, No. E2005-01328, 2006 WL 243546, at *2 (Tenn. Ct. App. Aug.

23, 2006) (trial court held that punitive damages are not available under the GTLA). For these reasons, Shelby County's motion is granted.

E. Rodriques McKinney

Finally, defendants argue that plaintiff Rodriques McKinney's § 1983 claims are barred by the statute of limitations. McKinney was not named in the First Amended Complaint and was added for the first time as a plaintiff in the Third Amended Complaint. Although the defendants did not raise the statute of limitations issue when plaintiffs filed their motion for leave to file the Third Amended Complaint, "the defense of limitations may be raised by a Rule 12 motion to dismiss, when, as here, the time alleged in the complaint shows that the action was not brought within the statutory period." Rauch v. Day and Night Manufacturing Corp., 576 F.2d 697, 702 (6th Cir. 1978). The Sixth Circuit has held that "in all actions brought under § 1983 alleging a violation of civil rights or personal injuries, the state statute of limitations governing actions for personal injuries is to be applied." Brandt v. Tennessee, 796 F.2d 879, 883 (6th Cir. 1986); see also Frasure v. Shelby County, 4 Fed. Appx. 249, 250 (6th Cir. 2001). The statute of limitations for civil rights actions arising in Tennessee is one year. Frasure, 4 Fed. Appx. at 250 (citing Jackson v. Richards Med. Co., 961 F.2d 575, 578 (6th Cir. 1992)). The Third Amended Complaint, filed in 2006, alleges that all of the plaintiffs'

injuries (including McKinney's) occurred sometime in 2002 and/or 2003. Therefore, it is clear from the face of the complaint that McKinney's § 1983 claims were brought well beyond the one-year statute of limitations period. Therefore, the defendants' motions to dismiss McKinney's federal claims are granted.[20]

III. CONCLUSION

For the reasons above, the motions to dismiss are GRANTED in part and DENIED in part. The motions for summary judgment are denied. The court dismisses the plaintiffs' § 1983 claims brought under the First, Fourth, and Sixth Amendments; conspiracy claims brought under §§ 1985 and 1986; claims under the Tennessee Constitution; claims for intentional infliction of emotional distress against Shelby County; and claims for punitive damages against Shelby County, pursuant to Rule 12(b)(6). The court also dismisses all of plaintiff Rodriques McKinney's federal claims. The court denies the motions to dismiss, and in the alternative, motions for summary judgment, with respect to all other remaining claims.

IT IS SO ORDERED.

s/ Tu M. Pham

TU M. PHAM

United States Magistrate Judge

[20]McKinney's federal claims also would not have been timely even if he had been added as a plaintiff in the Second Amended Complaint.

March 30, 2007

Date