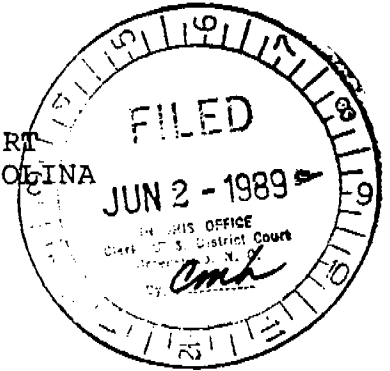


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R. 79 (a)

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BY: cmh

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION



JOHNNY GRAY,

Plaintiff,

v.

C-88-696-WS

DETECTIVE SPILLMAN, et al.,

Defendants.

MAGISTRATE'S FINDINGS AND RECOMMENDATION

Plaintiff is a convicted murderer who is now serving time in prison for his crime. Incident to that conviction, plaintiff spent time at the Forsyth County Jail. He brings this action pursuant to 42 U.S.C. § 1983 claiming his constitutional rights were violated by three Winston-Salem police officers who allegedly assaulted him, and against a Forsyth County deputy sheriff who allegedly failed to take appropriate action to protect plaintiff.

In his complaint, plaintiff claims that he is the victim of assaults which will require surgery, dental fittings and therapy for inability to use his right arm. The complaint focuses on two dates, to wit: December 11 and 14, 1987.

With respect to the December 11, 1987 date, plaintiff states that Winston-Salem police officers Spillman, Bishop and Riggs took him out of the Forsyth County Jail to an interrogation room at the Winston-Salem Public Safety Building and handcuffed him to

a chair. Detective Spillman then started to speak about the Mabe case instead of the Gilmore case. (Plaintiff evidently was willing to talk about the latter case, but not the former.) Plaintiff stated he would not answer any questions about the Mabe case because his lawyer, Bruce Frazier, was not present. Plaintiff allegedly was kept in this room for several hours and was not given any food, water or cigarettes. Plaintiff claims his hands became swollen because he had been handcuffed too tightly for several hours. Plaintiff also complains that he was not allowed to use the restroom.

Plaintiff continues that at one time he was told to stand up and Detective Spillman pushed him against a wall which cut and bloodied his lip and knocked three of his front teeth loose. Plaintiff was then set down onto the chair and the officers left for thirty minutes. The officers were also allegedly calling him names and threatened to beat him if he would not say what he did to Mr. Mabe. Thereafter, plaintiff states he was taken back to the jail by a black male detective and a white female detective.

With respect to the incident on December 14, 1987, plaintiff states that he told Deputy Owens and Sergeant Cartner of the Sheriff's Department that he did not want to go with the Winston-Salem police officers because he was afraid of being assaulted. In spite of his protest, plaintiff allegedly was taken to the Forsyth County Courthouse. While he was there, the

same three Winston-Salem police officers allegedly shoved, punched and threatened him in order to have him make a statement. The detectives then went to the state magistrate's office and when they returned, carried plaintiff to the interrogation room at the Winston-Salem Public Safety Building. There, the officers allegedly tried to force plaintiff to make a written statement and when he refused, Detective Bishop stomped plaintiff on his foot. Plaintiff was then returned to the jail. Plaintiff states that on December 15, 1987, Detectives Spillman and Riggs came to get him out of the jail around 10:00 a.m. but he refused to go with them.

The complaint further indicates that Detectives Riggs and Bishop are liable for these actions because they were present at the time Detective Spillman allegedly assaulted him. Sergeant Cartner is said to be liable because he was aware of the alleged beatings because plaintiff had shown him the injuries and bruises and expressed his fears to Sgt. Cartner. Plaintiff allegedly told Sgt. Cartner of this, and he allegedly replied that he did not care and stated that plaintiff had to go with the detectives in any event. Plaintiff also faults the deputy with failing to provide medical attention on December 14th and that Sgt. Cartner is responsible for denying plaintiff medical attention when requested on December 16, 1987.

Plaintiff claims he suffered obvious injuries which now require dental and oral surgery, along with plastic surgery. He claims that he has received permanent, 100% disability to his foot, can no longer stand up for any significant period of time and has severe pain because of this. Plaintiff also states he no longer can chew food because of the excruciating pain caused by the injury to his teeth. With respect to his lip, plaintiff states the injury is so obvious that he requires corrective plastic surgery, along with gum and tooth implants.

Defendants have moved for summary judgment supported by the deposition of plaintiff, their own affidavits, and affidavits of witnesses and medical personnel. These affidavits show plaintiff did not receive any injuries as he alleged in his complaint. Reading between the lines, it appears that plaintiff brought this action as some type of petty spite action because he made an incriminating statement to Detective Spillman, perhaps on December 14, 1987. Even when confronted with the uncontradicted evidence proving there could not have been any assaults, plaintiff is still unable to admit he manufactured the complaint.

Deputy Cartner shows with his affidavit that plaintiff was checked out of the Forsyth County Jail by Detectives Spillman and Bishop on December 11, 1987 from 12:50 p.m. until 5:30 p.m. Deputy Cartner is the leader of the Adam Platoon at the Forsyth County Jail. Other members of this platoon are Deputies Owens

and Purvis. This platoon was not on duty on December 14, 1987. It was relieved by the Baker Platoon at 6:10 p.m., December 13, 1987, and did not return to duty until 6:00 a.m. on December 16, 1987.

Deputy Cartner states that the members of his platoon did inform him on December 16, 1987 that plaintiff alleged that he had been physically assaulted and did not want to be released to the Winston-Salem detectives. (This, as appears from plaintiff's deposition, was after plaintiff had been criminally charged by the officers and likely was mad at them because he was not able to talk his way out of the situation.) At that time, Sgt. Cartner directed Deputies Owens and Purvis to examine plaintiff for cuts, bruises and swelling, but after the examination, they found no evidence at all that he had been injured. Even though there was no reason not to release plaintiff to the Winston-Salem police officers, plaintiff refused to go and, therefore, was returned to his cell within five minutes on December 16th.

Deputy Cartner also includes affidavits from two inmates at the Forsyth County Jail, Reginald Craven and Darryll Ford. These inmates indicate that they perceived no evidence that plaintiff had ever been physically assaulted. In fact, inmate Ford states that prior to plaintiff's leaving the Forsyth County Jail, plaintiff requested that he (Ford) provide a written statement about plaintiff being physically abused. In his letter, plaintiff

states that if Ford will provide this statement, he (plaintiff) will take care of Ford by providing him money. Ford, however, says in his affidavit that he did not witness any conversation between plaintiff and Sgt. Cartner and never saw any evidence that plaintiff had been physically assaulted.

Reginald Craven states that in May 1988 he was confined in the same cell block at the Forsyth County Jail as plaintiff. At that time, plaintiff claimed that he had been assaulted. Later, however, while he was in Central Prison, plaintiff told Craven that the police did not knock his teeth loose but this occurred during a fight in a pool hall in Winston-Salem sometime prior to his arrest. Craven states that he never saw any cuts, bruises, bleeding or any indication that plaintiff had been physically assaulted.

Craven also relates that after his arrival at Central Prison, plaintiff requested a false statement, but Craven refused. At that time, plaintiff threatened to tell other inmates that he had been convicted of a sex offense so these inmates would kill him. Plaintiff further threatened Craven that if the other inmates did not kill him, then plaintiff would. Because of this, Craven did provide a written statement as requested by plaintiff. He states he does not recall the details but most, if not all, of the statements therein would be untrue. This statement was only made because of fear for his life. After the statement was

provided to plaintiff, plaintiff stated that he would give Craven \$5,000.00 if he won the case.

Deputy Purvis states that on December 16, 1987, plaintiff did submit a request for medical attention claiming that he had headaches, a loose tooth and numbness in his hands. A copy of the medical request is attached. This request was placed in the distribution box in the control room at the jail. Thereafter, a jail doctor or member of the staff would have picked up the form and scheduled an examination. Deputy Purvis states that, however, he did not see any evidence that plaintiff had ever been injured. Deputy Owens also states that at that time he and Deputy Purvis examined plaintiff's arms, neck, face, head and mouth, but found no cuts, bruises, swelling or any evidence of injury.

Dr. Robert Jackson, who is Board Certified in Radiology and currently serves on the staff at Central Prison, provided an affidavit. He states that a medical history was completed upon plaintiff's arrival at Central Prison on May 27, 1988. The history showed that plaintiff had an ankle problem dating back to 1970 but that plaintiff indicated that he had no swollen areas and that his only medical problem was a loose front tooth. In August, plaintiff complained of swelling in both his foot and hand, claiming this stemmed from the December 1987 incident. An examination revealed some swelling of the right ankle. A review of the x-rays of plaintiff's right hand, foot and ankle indicates

the only problem to the right hand concerns a joint space problem with the little finger which had to have been caused long prior to any incident in December 1987. Furthermore, the x-ray of the right foot and ankle shows another long-standing deformity probably arising from a 1970 injury and, in any event, well before December 1987. Thereafter, Dr. Jackson states he reviewed plaintiff's medical records and finds that plaintiff has made no subsequent complaints concerning the condition of his right foot, ankle or hand.

Defendant Cartner submits an affidavit from Ray Drewry who is a physician's assistant at Central Prison Hospital and attaches plaintiff's prison medical records. He states that on August 17, 1988, plaintiff complained to him about having a swollen right foot and hand. At that time, plaintiff claimed that the swelling was due to being struck in the foot and hand in December 1987. An examination revealed some swelling in the area of the right ankle and heel, as well as the third metacarpal of the right hand. He states that Dr. Jackson found that any injuries to the hand and foot were of long-standing as is more fully set out in Dr. Jackson's affidavit.

Larry Ray, a doctor of dentistry who practices at the Central Prison Dental Clinic, also filed an affidavit. He shows that plaintiff's Central Prison screening record completed on May 27, 1988 shows that plaintiff complained of a loose front tooth.

Dr. Ray examined plaintiff for this on June 23, 1988 and found "no loose front teeth or evidence of trauma." He further states there was a severe loss of bone around some of plaintiff's teeth caused by peridontal disease and that some teeth were extracted due to decay. Dr. Ray states that he has examined and treated plaintiff on seven different occasions and has never found any evidence of peridontal injury or injury to plaintiff's mouth or lip.

Plaintiff was informed of his right to respond and did so by filing the affidavit of another prison inmate named James Hines. Hines' affidavit is very unspecific. It merely states that he received a telephone call from a friend at the Forsyth County Jail who asked him to come down and post a bond sometime in December 1987. Hines states that when he got there, plaintiff was coming out of the jail with Detectives Spillman, Bishop and Riggs. Hines states that he asked plaintiff what he wanted to do but Detective Bishop told plaintiff to be quiet and get into the car. Then, according to Hines, about three hours later he came back to the jail and a black detective and a white detective brought plaintiff back and plaintiff was bleeding from his mouth. Hines states that plaintiff said that Detective Spillman pushed him into a wall. Without giving any other details, Hines relates that plaintiff allegedly asked Deputy Cartner to take him to a doctor but this was refused. It should be noted that Hines

nowhere sets out the time, date or location of these incidents, nor that he even knew Deputy Cartner to recognize him.

The three Winston-Salem police officers have also filed a motion for summary judgment supported by affidavits and plaintiff's deposition. They supply their own affidavits where they deny that they assaulted plaintiff in any way. Also, they have supplied the affidavits of Officers McCoy and Gatto who escorted plaintiff back to the jail on December 11, 1987. These two officers state that plaintiff did not complain about being assaulted nor did they see any evidence of any blood, cuts, bruises or any injury. Lieutenant McCoy of the Winston-Salem Police Department also filed an affidavit. He stepped into the interrogation room on December 11th and saw plaintiff but did not see any blood on plaintiff's shirt, face or any evidence of injury and had plaintiff made any complaint, he would have investigated it immediately.

Defendants also introduce plaintiff's own deposition which shows that many of his allegations set out in his complaint are simply untrue. For example, in his complaint, plaintiff alleges that both hands were swollen from being handcuffed and that in particular, his right hand was injured. However, in his deposition, it is revealed that it was only plaintiff's left hand that was handcuffed during the interrogation. (Depo. at 24.) Moreover, the deposition further shows that plaintiff was not with the

officers for many hours on December 11th, but for a much shorter period of time. Plaintiff admits that Detective Bishop was not present during the assault. (Depo. at 36.) Plaintiff further states that as a result of being pushed into a mirror, his teeth were so loose that they almost were falling out. (Depo. at 38.) He states that the teeth were actually hanging out of his mouth. (Depo. at 91.)

In the deposition, plaintiff does claim that he did see an individual named Hines on December 11th and saw Deputy Cartner in the lobby. (Depo. 41-2.) However, this allegation does not appear in the complaint in any way and was only added after Deputy Cartner filed a motion for summary judgment showing that he could not have been present on December 14th in order to be able to talk to plaintiff as plaintiff alleged in his complaint.

With respect to the events occurring on December 14, 1987, plaintiff's deposition also shows that while he claimed that he was shoved and pushed around while at the courthouse, he was not hurt in any way by this activity. (Depo. at 55.) The officers were allegedly threatening him and putting their fingers in his face and perhaps touching him, but plaintiff states that he did not receive any injury from this activity. Rather, he claims that he was injured when the officers took him back to the interrogation room at the Public Safety Building where Detective Bishop stomped on his foot. (Depo. at 60.)

Plaintiff further admits that even though he has seen doctors for these problems, that none of them said that he was injured due to his foot being stomped. Moreover, as will be discussed later, it is a matter of no little concern that plaintiff states that his foot has in fact been swollen ever since the time Detective Bishop allegedly stepped on it, including the date of the deposition. (Depo. 61-2.) Plaintiff further states that the only injuries for which he is seeking compensation in this case are the injuries to his teeth, foot and hand. (Depo. 63-4.)

Plaintiff was again notified of his right to respond to the defendant police officers' motion for summary judgment and the consequences for failing to do so. Plaintiff did not file any further affidavits, but did file a memorandum. Therein, plaintiff does everything but face the facts that there is no evidence that he was injured. For example, even though Darryll Ford and Reginald Craven show that plaintiff was guilty of subornation of perjury or attempted subornation by threatening, he states that the defendants have misconstrued their affidavits and that the Court should ignore them. Likewise, with respect to the affidavits from the medical personnel, plaintiff charges them with conveniently misreading the x-rays and makes other aspersions as to their character and the truthfulness of the affidavits. However, he fails to come forward with any specific facts showing that he had any injury whatsoever.

Discussion

Even though the Court finds plaintiff's complaint and continued resistance to defendants' motions for summary judgment to be incredible, it is not the duty of this Court in ruling on a motion for summary judgment to decide the credibility of conflicting testimony. Summerlin v. Edgar, 809 F.2d 1034 (4th Cir. 1987). Rather, it is the function of the Court, at this stage, to determine what facts are disputed and whether they are material to deciding the controversy. The Court may not only consider the affidavits but deposition testimony as well. Id.

The general rule is that when a plaintiff is confronted with a motion for summary judgment, he must make a sufficient showing of all essential elements to his case at which he bears the burden at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In presenting this evidence, the plaintiff must come forward with specific facts as to these elements. It is insufficient for him, as plaintiff does in this case, to make bare allegations of error, or to point to the falsity of defendants' affidavits or otherwise attempt to cast aspersions on the defendants. Such attempts or activity simply do not constitute a cognizable response. Bloodgood v. Garraghty, 783 F.2d 470, 475 (4th Cir. 1986). The plaintiff must set forth specific facts within his knowledge. He may not simply attempt to verify by more conclusory allegations. Kipps v. Ewell, 538

F.2d 564 (4th Cir. 1976); Fullman v. Graddick, 739 F.2d 553 (11th Cir. 1984).

Furthermore, in resisting a motion for summary judgment, it is not merely sufficient for a plaintiff to produce some evidence which shows a factual dispute. Thus, defendants have a burden of showing that there is no genuine issue of material fact and in doing so, may use affidavits, exhibits, depositions and other discovery material. DeLeon v. Saint Joseph Hospital, Inc., No. 88-1018 (4th Cir. Apr. 6, 1989) (citing Barwick v. Celotex Corp., 736 F.2d 946, 958 (4th Cir. 1984)). However,

[o]nce a defendant has met this burden, the plaintiff must go forward and produce sufficient evidence to support his contentions. "A mere scintilla of evidence is not enough to support a fact issue; there must be evidence on which a jury might rely." Barwick, 736 F.2d at 958-59 (quoting Seago v. North Carolina Theaters, Inc., 42 F.R.D. 627, 640 (E.D.N.C. 1966), aff'd, 388 F.2d 987 (4th Cir. 1967), cert. denied, 390 U.S. 959 (1968)).

DeLeon v. Saint Joseph Hospital, Inc., supra, slip op. at 8.

A plaintiff may not avoid summary judgment by adducing evidence which may be deemed merely "colorable" or "not significantly probative." Id. (citing and quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The Court does not determine whether the evidence unmistakably favors one side or the other, but "whether a

fair-minded jury could return a verdict for the plaintiff on the evidence presented." Id.

In the instant case, a consideration of the evidence reveals that a fair-minded jury could not return a verdict for plaintiff on the evidence before the Court. In making this decision, the Court does not rely on the contested allegations by plaintiff that he was assaulted by being pushed into a mirror and having his foot stomped. If this were the only evidence before the Court, summary judgment could not be granted. However, the evidence before the Court goes beyond mere allegations and denial of assault. It also includes indirect and circumstantial evidence with respect to the nonexistence of any injuries which not only cast doubt on plaintiff's allegations of assault, but in addition, is one of the essential bases for plaintiff's claim which he fails to establish.

The incidents which allegedly form the basis of this complaint took place while plaintiff was a detainee, after arrest and before his conviction. Therefore, the Court looks to the due process clause of the fourteenth amendment in order to determine the constitutional standards for the claims raised here. Martin v. Gentile, 849 F.2d 863, 868 n.6 (4th Cir. 1988). Contrast Graham v. Connor, ____ U.S. ____ (1989) (use fourth amendment for arrest and seizure situations). In making the determination as to whether a particular act by an officer violates a pretrial

detainee's constitutional rights, the Court must keep in mind that "the due process clause is not intended to superimpose a 'font of tort law' upon whatever systems may already be administered by the state." Justice v. Dennis, 834 F.2d at 382 (quoting Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 666 88 L.Ed.2d 662, (1986) (quoting Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976))).

In the context of delivering medical care, it has been stated that in order to determine whether a pretrial detainee's constitutional rights under the fourteenth amendment have been violated, the Court must look to whether defendants acted with an intent to punish and whether the actions are reasonably related to a legitimate, non-punitive government purpose. Moreover, the injury must be serious as opposed to de minimis. Martin v. Gentile, supra.

With respect to a claim of excessive use of force, the Court in all events must determine whether the force is unreasonable under the circumstances. In doing this, the Court considers the flexible interplay of a number of factors which include the need for applying the force, the relationship between the need for such force and the amount of force actually used, and finally, the extent of injury. In addition to these factors, the Court must consider whether defendants' actions were such so as to shock the conscience in that they were taken maliciously and

sadistically for the very purpose of causing harm. Martin v. Gentile, supra; and Pressly v. Gregory, 831 F.2d 514 (4th Cir. 1987).

As stated previously, if the only thing which existed in this case were the parties' respective claims of an assault and the denial of an assault, summary judgment could not be granted. There is no question that under plaintiff's version of the facts, he was assaulted without any cause whatsoever and, therefore, the actions necessarily would have had to have been done without excuse and for the very purpose of causing harm. The point where plaintiff's case falls apart concerns the factor concerning the extent of injury inflicted. Indeed, the Fifth Circuit in Mark v. Caldwell, 754 F.2d 1260 (5th Cir. 1985), stated that to merit recovery under section 1983, plaintiff must show that he sustained severe injuries. Thus, the mere fact that an officer slapped an arrestee several times with an open hand which did not produce any injury, bleeding or medical attention, and did not knock him down did not state a cognizable claim.

The Fourth Circuit agrees that a court may look at the extent of injury in order to determine whether to permit a claim to proceed. Pressly v. Gregory, supra. In Pressly, the plaintiff complained of being assaulted by officers who inflicted injury to his face and groin which caused pain for weeks afterwards. However, the defendants introduced evidence of a medical examination

and a photograph of plaintiff taken the next day which revealed no indication of any injury whatsoever. The Court upheld the dismissal by summary judgment, finding no verifiable injury to support a claim of constitutional violation.

It is just this same situation which presents itself in the instant case. Plaintiff's failure to substantiate his alleged injuries goes far beyond the lack of witnesses. Plaintiff mentioned witnesses in his complaint who he claimed could verify his injuries. However, these witnesses deny plaintiff was injured and show that plaintiff threatened them and tried to buy testimony on his behalf. The only witness plaintiff has come up with is some prison friend named James Hines who filed a very non-specific and conclusory affidavit after defendant moved for summary judgment and showed that a large part of plaintiff's complaint was false.

Defendants, on the other hand, have presented medical evidence and records which show that plaintiff simply was not injured as he alleged. With respect to plaintiff's foot, he stated in his deposition that it was just as swollen at that time as it was after defendant Bishop allegedly stomped on it. However, a review of plaintiff's medical records and examinations which cover the time period after the alleged assault, but before the deposition, shows that plaintiff was not suffering from any injury as a result of some alleged assault in December 1987. Rather, the evidence showed some sign of a prior injury, almost two decades ago. Plaintiff's medical records also show that upon

his admission to Central Prison he was not suffering from any injury.

Plaintiff's medical records also show that he did not suffer from any injury to his hands. Plaintiff testified at his deposition that only his left hand was handcuffed to the chair. Notwithstanding this, plaintiff states in his complaint that both his hands were injured and in particular, his right hand. However, a medical examination of plaintiff's hands shows no injury whatsoever and to the extent plaintiff had an injury with his right hand, it originated long prior to any assault. Finally, plaintiff has failed to show that his teeth or face were injured in any way. Plaintiff stated that after he came back to the jail he had been hit so hard that his teeth were hanging out of his mouth. (Depo. at 91.) He also claimed that his lip was cut and bleeding. Contrary to these statements, the medical examination by plaintiff's dentist showed that he suffered no injury to his teeth or lips whatsoever. The only abnormality of note found during the examination was some peridontal disease and tooth decay. Therefore, plaintiff's claim that the assault dislodged his teeth so that they were hanging out of his mouth is simply an impossibility.

Plaintiff has not come forward with the competent evidence, as he is obliged to do, in order to challenge the undisputed evidence of defendants that plaintiff suffered no injury whatsoever at the hands of defendants. His conclusory denials are insufficient.

In Martin v. Gentile, supra, the Fourth Circuit suggested that lack of a serious injury may lead to the conclusion that plaintiff's constitutional rights were not violated. Other courts have explicitly adopted such a rule. In Johnson v. Moral, 843 F.2d 846 (5th Cir. 1988), the court found that treating an arrestee roughly, putting handcuffs on too tight, jerking them so as to cause minor cuts and bleeding but not leaving a permanent scar, did not constitute a severe injury necessary to recover pursuant to 42 U.S.C. § 1983 on a complaint that officers used undue force. The court held that some objective, severe physical injury was a necessary element of section 1983. See also Hinojosa v. City of Terrell, Tex., 834 F.2d 1223 (5th Cir. 1988).

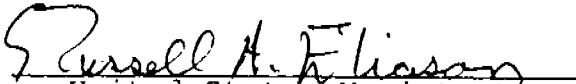
In the same fashion, the court in In re Scott County Master Docket, 672 F. Supp. 1152 (D. Minn. 1987), found that the twisting of an arrestee's arm which caused some injury to a pre-existing shoulder condition did not state a cognizable claim under section 1983 because the force used was minimal and the injury, if any, caused solely by the handcuffing was difficult to ascertain. The court indicated that in order to recover plaintiff would need to show some sort of physical abuse which could be deemed serious or shocking to the conscience. In this case, plaintiff fails to present any substantial evidence of any injury, much less a serious injury.

Likewise, plaintiff has not shown that he suffered any serious medical injury for which treatment was delayed as he is required to do. Martin v. Gentile, supra. The Court may rely on medical records in order to assess whether a further hearing is needed or whether an injury was serious. West v. Keve, 571 F.2d 158, 162 (3d Cir. 1978); Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969).

The Court further finds that plaintiff's lack of injury is a material fact and without proof of injury, plaintiff is not entitled to further proceed in face of the defendants' motions for summary judgment. The evidence, including all the medical evidence, indicates plaintiff was not injured in any manner. Given this fact, a fair-minded jury could not possibly render a verdict in plaintiff's behalf. Plaintiff's supporting evidence is at most a mere scintilla. Therefore, this action should be dismissed on defendants' motions for summary judgment. DeLeon v. Saint Joseph Hospital, Inc., supra.

IT IS THEREFORE RECOMMENDED that defendants' motions for summary judgment be granted and that this action be dismissed.

June 2, 1989


United States Magistrate