

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

BARRY LYNN GIBSON,

Plaintiff,

V.

Warden AIMEE SMITH, *et al.*,

Defendants.

Case No. 5:21-cv-00328-TES-CHW

**Proceedings Under 42 U.S.C. §1983
Before the U.S. Magistrate Judge**

ORDER AND RECOMMENDATION

Before the Court are Defendants' motions for summary judgment. (Docs. 111, 116). Plaintiff has responded and opposes the motions. (Docs. 115, 119, 121). As discussed below, the undisputed facts show that Defendants were not deliberately indifferent to a serious medical need. For that reason, it is **RECOMMENDED** that Defendants' motions for summary judgment (Docs. 111, 116) be **GRANTED**.

BACKGROUND

In this Section 1983 lawsuit, Plaintiff Barry Gibson sues Dooly State Prison (DSP) administrative staff and two medical service providers for inaction resulting in the deterioration of his left eye vision. The facts underlying Plaintiff's claims arose as early as 2016, when he entered prison. Plaintiff alleged that "from 2016 until 2021[,], I have had a cataract on my left eye," and that Defendant Dr. Ulrich, "who does surgeries," provided inadequate care by refusing to remove the cataract. (Doc. 1, p. 5). Plaintiff also alleges that the delay rendered surgery riskier or required a more "difficult procedure because now the cataract [was] loose." (Doc. 1-1, p. 2). Plaintiff also sues Defendant Dr. Kendrick for refusing to treat him and alleges that Dr. Kendrick failed to see Plaintiff on February 13, 2021, May 11, 2021, July 15, 2021, and July 22, 2021. (Docs. 1, p. 5; 1-

1, p. 19; 107, p. 6). Plaintiff's complaint indicated that, at the missed appointments, Dr. Kendrick was to perform an eye exam and possibly to provide Plaintiff with glasses or contacts. (Doc. 4, p. 5). In the course of this litigation, Plaintiff clarified that if Dr. Kendrick had given Plaintiff soft contact lenses "everything would have been okay," and that Dr. Kendrick's failure to see him and prescribe eye medications also meant Plaintiff's glaucoma went unchecked, leading to nerve damage and loss of vision in his left eye. *See, e.g.*, (Docs. 107, p. 6, 18-19; 116-9, p. 25, 99-100). In addition to the deliberate indifference claims against Dr. Ulrich and Dr. Kendrick, the Court also allowed Plaintiff's claims to proceed against Defendant Smith, the Warden of Dooly State Prison, and Defendant Chaney, the Deputy Warden of Care and Treatment, based on their inaction after Plaintiff wrote and spoke to these officials complaining of Dr. Kendrick's missed appointments and lack of treatment. *See* (Docs. 1-1, p. 18-19; 6, p. 9).

This case has a long procedural history, including several motions and other preliminary matters. Early in this case, Defendants Ulrich, Smith, and Chaney unsuccessfully moved to dismiss this case for Plaintiff's failure to disclose his litigation history, and Plaintiff unsuccessfully moved for summary judgment before discovery was complete. (Docs. 18, 36 40, 52). Dr. Kendrick went into default, which led to a hearing and recommendation on Plaintiff's motion for default judgment. (Docs. 53, 55, 63, 70, 73). The District Court ultimately set aside the default and permitted Dr. Kendrick to defend this case. (Docs. 81, 84, 91, 97). Following discovery, Defendants now move for summary judgment. (Docs. 111, 116).

Discovery and HIPAA Challenges

Plaintiff made several requests for his medical records during discovery. Plaintiff's final motion to compel was denied after Defendants stated that they produced over 200 pages of relevant medical records reflecting Plaintiff's eye care, and Plaintiff failed to identify any specific records

that were missing. *See* (Doc. 122). In his responses to Defendants' motions for summary judgment and in his deposition, Plaintiff again contends that his entire medical history has not been produced, argues that summary judgment is improper under Rule 56(d), and alleges that the records that were produced were provided to counsel in violation of the Health Insurance Portability and Accountability Act (HIPAA) and his Fourteenth Amendment right to privacy. *See, e.g.*, (Docs. 115; 116-9, p. 13; 119-2, p. 2; 119-5; 121). Plaintiff's challenges and objections to the production and use of his medical records are without merit.

Plaintiff makes the same arguments that he made in his earlier motions to compel, which as the Court previously explained, are without merit. (Doc. 122). Plaintiff has not cited any particular treatment provider or other record that would further support his position or motions to compel. Defendants provided Plaintiff with his relevant medical records regarding his eye care. It is evident that Plaintiff was already in possession of some of the records because he attached them to his complaint. Further treatment records were produced in discovery at Plaintiff's request and are not being used against him prejudicially or without an opportunity for him to review them as Plaintiff alleges and challenges under Rule 56(d). The record shows that Plaintiff received the records and reviewed them to challenge Defendants' motions for summary judgment, as he attached a portion of those records to his responses. (Docs. 116, 119). Plaintiff has not made a showing that he cannot present facts sufficient to justify his opposition to summary judgment under Rule 56(d).

Plaintiff also misunderstands the purpose of HIPAA, under which he has waived privacy rights concerning his relevant medical records by placing his medical care at issue. *See, e.g., Spore v. Rogers*, 2015 WL 5046582, *6 (M.D. Ga. Aug. 26, 2015) (recommendation explaining that attorney's use and possession of plaintiff's relevant medical records do not violate a plaintiff's

right to privacy). Even if Plaintiff could show a HIPAA violation, there is no independent private right of action for such a violation or a remedy that would exclude the records from being considered in this case. *See, e.g., Sneed v. Pan American Hosp.*, 370 F. App'x 47, 50 (11th Cir. 2010) (explaining “HIPAA generally provides for confidentiality of medical records and governs the use and disclosure of protected health information.... It provides both civil and criminal penalties for improper disclosure of medical information and limits enforcement to the Secretary of Health and Human Services. ...HIPAA contains no express provision creating a private cause of action.”) (internal citations omitted). Plaintiff’s objections to the dissemination and use of his medical records in this case are without merit.

SUMMARY JUDGMENT STANDARD

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper “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). The party moving for summary judgment bears the burden of informing the Court of the basis for its motion, and of citing “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” that support summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986). In resolving motions for summary judgment, the Court must view the evidence¹ in the light most favorable to the non-moving party. *Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014).

¹ Plaintiff appears to rely on the Court’s screening recommendation and other proceedings, such as the now vacated default judgment recommendation against Dr. Kendrick, as if certain facts and conclusions were established that should now be accepted as true. *See, e.g.*, (Docs. 115-1, p. 3-4; 116-9, p. 69, 71; 119, p. 3). At this stage of the case, however, the summary judgment standard applies. While the evidence is viewed in the light most favorable to Plaintiff as the non-moving party, his allegations are no longer accepted as true as they were during screening, and no liability is presumed as at a default judgment hearing.

RELEVANT FACTS

Plaintiff entered the custody of the Georgia Department of Corrections (GDC) at Georgia Diagnostic and Classification Prison in May 2016. (Docs. 1, p. 4; 116-9 (Plaintiff's Deposition), p. 136²). Since his incarceration, he has been housed in several prisons: Dodge State Prison, Central State Prison, Washington State Prison, DSP, Wilcox State Prison, Riverbend Correctional Center, and Wheeler Correctional Facility, where he is currently housed. (Docs. 1, p. 4; 116-9, p. 136-137; 128). Plaintiff transferred to DSP in May 2019 and was incarcerated at DSP when he commenced this suit. (Docs. 1; 4; 111-2, ¶ 15). While Plaintiff was at DSP, Defendant Smith served as Warden, and Defendant Chaney served as Deputy Warden of Care and Treatment. (Doc. 116-1, ¶¶ 8-9). Dr. Ulrich, with whom Plaintiff has treated since 2016, is an ophthalmologist employed at Augusta University and contracted with the GDC to provide eye care to inmates. (*Id.*, ¶¶ 4-6). Dr. Kendrick is an optometrist who sees inmates at Dodge State Prison and DSP, but he did not serve the other prisons where Plaintiff has been housed. (Doc. 111-1, ¶¶ 12, 16-18). Although Plaintiff saw multiple ophthalmologists, optometrists, and other eye professionals on a regular – almost monthly – basis during his term of incarceration (*see* (Docs. 116-4, 116-5, 116-6), Plaintiff's claims in this case focus on the treatment provided by Dr. Ulrich and Dr. Kendrick and on Defendant Smith's and Defendant Chaney's actions with regard to facilitating his eye care.

Dr. Ulrich's Treatment and Plaintiff's Cataract Surgery

The first requested optometry consultation for Plaintiff is dated June 7, 2016, and described Plaintiff as having a history of glaucoma. (Doc. 116-6,³ p. 13). At Plaintiff's initial optometrist visit with a non-party provider, also in June 2016, treatment notes indicate a history of retinal

² The page numbers cited correspond to the individual deposition pages.

³ For purposes of the recommendation, Defendants Ulrich, Smith, and Chaney's exhibits of Plaintiff's relevant medical records are most often cited for efficiency. However, portions of records appear in several documents in the record, including the records provided by Plaintiff in his original complaint. (Doc. 1).

detachment in Plaintiff's left eye, cataracts, and POAG (primary open angle glaucoma). (*Id.*, p. 211); *see also* (Doc. 111-1, ¶¶ 27(1)). The provider requested that Plaintiff be approved for an urgent referral to Dr. Ulrich, an ophthalmologist at Augusta State Medical Prison (ASMP) for "cataracts, posterior staphyloma, POAG, and sclerel buckle for the left eye." (Doc. 116-6, p. 8-9).

At the first visit with Dr. Ulrich on July 14, 2016, Plaintiff disclosed a history of cataracts in both eyes but worse in the left eye and a history of retinal detachment and glaucoma, and reported that he wore a contact on his right eye. (*Id.*, p. 10). Plaintiff used three prescription medications for his eyes, timolol, brimonodine, and latanoprost. (*Id.*) Plaintiff's vision was 20/40 in his right eye and 20/400 in his left. (*Id.*) Vision acuity of 20/400 indicates that a person is legally blind. (Docs. 111-1, ¶ 56; 116-3, ¶ 10). Plaintiff's intraocular pressure (IOP) for his right and left eyes was 17 and 14, respectively. (*Id.*) Dr. Ulrich found that Plaintiff had cataracts and advanced POAG in both eyes. (*Id.*) Dr. Ulrich continued Plaintiff's eye medicines with a hope of keeping his IOP at 9 to 11 for both eyes. (*Id.*) Dr. Ulrich ordered that Plaintiff follow-up with him in 2 to 3 months. (*Id.*) No mention about the need for cataract surgery was noted at this initial visit.

The record indicates that Plaintiff saw Dr. Ulrich or other providers at ASMP ophthalmology at least 12 times for treatment between July 2016 and the filing of this suit in August 2021. (Docs. 1; 116-3, ¶¶ 9, 11-22). In October 2016, Dr. Ulrich documented that Plaintiff's pressure was 17 and 14 and that Plaintiff's vision in his left eye was 20/400. (Doc. 116-6, p. 5). In his declaration, Dr. Ulrich explains that that "[h]aving 20/400 vision means that a person must be 20 feet away to see what a person with normal vision can see at 400 feet away" and that "[a]nything worse than 20/200 vision is legally blind." (Doc. 116-3, ¶ 10). Plaintiff's glaucoma was therefore advanced and "nearing end stage" in his left eye, which indicates either "an extreme decrease in peripheral vision or a vision acuity of 20/200 or less as a result of glaucoma." (Doc.

116-6, p. 5; Doc. 116-3, ¶ 11). Throughout Dr. Ulrich’s treatment, Plaintiff’s left eye vision was recorded as 20/400, 20/CF, 20/HM, and 20/LP. (Docs. 116-3, ¶¶ 11-21; 116-5, p. 74-75, 84, 92, 95, 100; 116-6, p. 1-5).⁴

While Plaintiff mentioned his desire for cataract surgery to prison staff and other outside providers and even eventually refused that treatment (*see, e.g.*, (Docs. 116-4, p. 43; 116-5, p. 54-55; 119-3, p. 8, 29)), there is no mention of Plaintiff’s request for cataract surgery in Dr. Ulrich’s treatment records until July 15, 2021. (Docs. 116-3, ¶ 22; 116-5, p. 74). At this appointment, Plaintiff stated that he had not seen optometry, his left eye vision was 20/HM, and his IOP was 18 in his right eye and 16 in his left eye. (Doc. 116-5, p. 74). Dr. Ulrich explained his concerns about the outcome of cataract surgery with Plaintiff at this appointment. (Doc. 116-5, p. 74). The treatment record also shows that Dr. Ulrich explained to Plaintiff that his lens was loose when he first saw Plaintiff and that it did not come loose in prison. (Doc. 116-5, p. 74). Although he questioned the merits of surgery, Dr. Ulrich referred to Dr. Espinosa for a cataract surgery evaluation. (Doc. 116-3, ¶ 22, 36; 116-5, p. 71).

Dr. Ulrich explained that he had not previously referred Plaintiff for cataract surgery because he did not believe that Plaintiff was an appropriate candidate for surgery or that he would see any benefits or improved vision. (Doc. 116-3, ¶ 22, 36). Specifically, Dr. Ulrich concluded that Plaintiff’s “history of retinal detachment would complicate cataract surgery, and the state of his glaucoma condition was such that his vision would not be meaningfully improved even if he had a good surgical outcome following cataract surgery.” (Doc. 116-3, ¶ 8). Plaintiff challenged Dr. Ulrich’s concerns about the efficacy of surgery both at the appointment and in a grievance

⁴ As Dr. Ulrich explains in his declaration, “A person with 20/CF is capable of ‘counting fingers’ only when a hand is held close to his face.” (Doc. 116-3, ¶ 16). “A person with 20/HM is capable of noticing only ‘hand movement’ even when the hand is held at a close distance from his face.” (*Id.*, ¶ 18). “A person with 20/LP is capable of only ‘light perception.’” (*Id.*, ¶ 19).

demanding the surgery. (Docs. 116-5, p. 74; 119-3, p. 11). In November 2020, an outside, non-party provider, Dr. Gayton, told Plaintiff that his cataract on his left eye was loose and that he should consider surgery after he left prison. (Doc. 116-5, p. 61). In April 2021, Dr. Gayton recommended Plaintiff for a Xen gel implant surgery on his right eye due to a high IOP. (Docs. 116-3, ¶¶ 32-33; 116-4, p. 57). He also told Plaintiff that he would perform cataract surgery on Plaintiff's left eye if another provider would not operate. (*Id.*) Plaintiff refused both surgeries and specifically requested to be treated by Dr. Ulrich. (Docs. 116-4, p. 46, 55; 116-5, p. 54, 61).

On October 6, 2021, Dr. Espinosa, who is not a party to this case, performed the cataract surgery but was not able to replace or attach a lens due to the shape of Plaintiff's eye. (Doc. 116-3, ¶ 27; 116-4, p. 29, 31). Plaintiff's vision in his left eye remained 20/HM at his October 18, 2021 appointment with Dr. Espinosa. (Doc. 116-3, ¶ 28; 116-5, p. 48). At a February 28, 2022 follow-up at ASMP, Plaintiff's left eye vision was 20/CF and his eye pressure was 16 in both eyes. (Doc. 116-5, p. 45). Even as late as April 2022, at an optometry visit with a non-party provider, Plaintiff's left eye vision was described as "Blind." (*Id.*, p. 43). No IOP is noted for this visit. (*Id.*)

Dr. Kendrick's Treatment

Plaintiff first saw Dr. Kendrick at Dodge State Prison on December 6, 2017. (Doc. 116-5, p. 101). Dr. Kendrick noted that Plaintiff was treating with Dr. Ulrich for advanced and near end-stage glaucoma. (*Id.*) Dr. Kendrick also noted that Plaintiff had a gel contact lens for his right eye, but there was instruction from Dr. Ulrich to fit Plaintiff with a contact lens at this appointment. (*Id.*) Dr. Kendrick advised that he would fit a lens with approval from Dr. Ulrich. (*Id.*) Plaintiff transferred to Washington State Prison in February 2018. (Doc. 111-2, ¶ 15).

In March 2018, a consultation request noted that Dr. Ulrich referred Plaintiff to optometry to be fitted for a contact and requested Dr. Kendrick. (Doc. 116-5, p. 99). However, Dr. Kendrick

did not treat patients at Washington State Prison. (Doc. 111-1, ¶ 17). Plaintiff saw another provider in May and June 2018 to have a contact lens issued and his sunglasses replaced. (Doc. 116-5, p. 96-98). Plaintiff continued in this manner with other optometry providers until he was transferred to DSP in May 2019. (*Id.*, p. 85-91; Doc. 111-1, ¶ 32).

Dr. Kendrick next saw Plaintiff on August 29, 2019. (Doc. 116-5, p. 81). Since Dr. Kendrick last saw Plaintiff at Dodge State Prison in December 2017, Plaintiff had been prescribed gel lenses by Dr. Edwards. (*Id.*) Plaintiff stated his lens needed changing. (*Id.*) In Dr. Kendrick noted his opinion that Plaintiff would benefit from a rigid gas permeable (RGP) contact lens, and Dr. Kendrick intended to fit the lens at Plaintiff's next appointment. (*Id.*, Doc. 111-1, ¶¶ 48-49). Dr. Kendrick did not note Plaintiff's vision for his left eye, but at a January 2019 appointment at ASMP, Plaintiff's left eye vision was 20/HM. (Docs. 116-3, ¶18; 116-5, p. 92).

When Plaintiff returned to Dr. Kendrick on November 20, 2019, Dr. Kendrick wrote an indefinite prescription for contact solution, fitted the RGP lens, and instructed Plaintiff on how to use it. (Docs. 111-1, ¶ 50; 116-5, p. 178-179). Plaintiff disputes that the lens was properly fitted or that he was given instruction on its use. (Doc. 116-9, p. 75-78). When Plaintiff returned on December 12, 2019, he complained to Dr. Kendrick about the RGP lens, accused Dr. Kendrick of failing to fit the lens properly, and stated that Plaintiff did not like it after wearing it for 8 hours. (Doc. 116-5, p. 77). Dr. Kendrick noted that Plaintiff wore the RGP lens too long. (*Id.*) Plaintiff stated that he had always worn a gel lens. (*Id.*) After Dr. Kendrick told Plaintiff that he would refer Plaintiff to Dr. Ulrich for another opinion, Plaintiff became angry and stated that he would sue Dr. Kendrick. (*Id.*) Dr. Kendrick made the referral to Dr. Ulrich. (Doc. 111-4, p. 5).

Dr. Kendrick also stated that he placed a note in Plaintiff's file explaining that Plaintiff could not be seen by Dr. Kendrick. (Doc. 111-1, ¶ 33). While the note is undated (Doc. 111-4,

p. 6), Plaintiff's treatment record indicates that this note was placed in Plaintiff's file because, despite remaining at DSP, Plaintiff was not sent to Dr. Kendrick for treatment. (Doc. 111-1, ¶ 34). Plaintiff also filed a grievance about Dr. Kendrick prescribing a RGP contact lens instead of a soft one, further suggesting there was an issue at the December 2019 appointment. *See, e.g.*, (Doc. 119-3, p. 7).

Plaintiff saw Dr. Ulrich, other GDC medical staff, and at least one private treatment provider multiple times, from December 2019 until July 2021, and this treatment included various prescription refills. (Docs. 116-4, p. 10, 12, 41-53; 116-5, p. 54-68). For example, Plaintiff's eye medications were prescribed by general medical staff and sent to the pharmacy on July 7, 2021, contrary to Plaintiff's later complaint to Dr. Ulrich that they were not prescribed. (Docs. 116-4, p. 9; 116-5, p. 74).

The record also includes notes for treatment on or near three of the dates for which Plaintiff alleged that Dr. Kendrick refused to see him, February 13, May 11, and July 15, 2021. Nothing in the record indicates, however, that Plaintiff had appointments with Dr. Kendrick on these dates as alleged. (Doc. 111-1, ¶ 36). There is no treatment record dated February 13, 2021, but Plaintiff saw the nurse practitioner on February 18, 2021, and requested an eye appointment. (Doc. 116-4, p. 47). On May 12, 2021, Plaintiff was referred for a rapid COVID test due to an outside appointment, and he received an optometry referral from the nurse practitioner on May 24, 2021. (*Id.*, p. 9). As discussed above, Plaintiff saw Dr. Ulrich on July 15, 2021. (*Id.*, p. 74). Overlapping with this time period, Plaintiff saw outside private providers in late 2020 and early 2021. (Doc. 116-5, p. 54-66)

Plaintiff's central complaint regarding Dr. Kendrick stems from Dr. Kendrick's failure to see him on July 22, 2021. Plaintiff argues that he waited over 9 hours to see Dr. Kendrick before

being told Dr. Kendrick would not see him. (Docs. 49; 107, p. 9; 116-9, 69). While Dr. Kendrick does not concede that Plaintiff waited as long as 9 hours (Doc. 111-1, ¶ 35) – indeed Plaintiff’s description of the time frame has expanded since he filed suit (Doc. 1-1, p. 2; Doc 4, p. 5) – it is undisputed that Plaintiff was brought to see Dr. Kendrick on July 22, 2021 (Docs. 49; 111-1, ¶ 35), and that Dr. Kendrick did not see him based upon their past interactions. (Doc. 111-1, ¶ 35). This is the last encounter between Dr. Kendrick and Plaintiff. (*Id.*)

The records show that on July 15, 2021, when Plaintiff saw Dr. Ulrich, Plaintiff’s IOP was 18 in his right eye and 16 in his left eye. (Doc. 116-5, p. 74). Plaintiff alleges that his pressure was “sky high” at the next appointment following the missed July 22, 2021 appointment, but he does not specify the date of that appointment. (Doc. 116-9, p. 97). At the next appointment in the record, which was Dr. Espinosa’s cataract surgical consultation on September 3, 2021, Plaintiff’s pressure was 18 in his right eye and 13 in his left eye. (Doc. 116-5, p. 70). On September 30, 2021, when Dr. Ulrich saw Plaintiff to fit an IOL lens in the event it could be replaced during cataract surgery, Plaintiff’s IOP was 24 in his right eye and 17 in his left. (Doc. 116-5, p. 68). Dr. Ulrich described Plaintiff’s IOP as uncontrolled, but the notes do not indicate that Plaintiff was out of or had not taken his medication. (*Id.*)

Interaction with Defendants Smith and Chaney Regarding Plaintiff’s Eye Care

Plaintiff argues that Defendants Smith and Chaney were aware of his lack of proper treatment through his ADA grievances, traditional grievances, and letters and conversations with them, yet they refused to facilitate treatment. (Doc. 119, p. 9). Plaintiff attached his letters to DSP staff to his original complaint. (Doc. 1). Plaintiff also filed Grievance No. 327128 following Dr. Kendrick’s refusal to see him on July 22, 2021. (Doc. 111-2, ¶ 145). It is undisputed that neither

Defendant Smith nor Defendant Chaney are medical providers, and they are not involved in an inmate's direct medical treatment. (Docs. 116-7, ¶¶ 6-7; 116-8, ¶¶ 8-9).

Defendant Smith stated that she did not recall receiving Plaintiff's letters, but she did recall that Plaintiff filed grievances about his medical treatment. (Doc. 116-7, ¶¶ 10, 13). Defendant Smith's normal practice would be to defer to her medical staff for investigation of medical-related complaints. (*Id.*, ¶¶ 11, 14). She did not find any reason not to trust how the medical unit was being managed. (*Id.*, ¶ 15).

In her role as Deputy Warden of Care and Treatment, Defendant Chaney served as a liaison between prison administration and medical staff, but she did not have a supervisory role over the medical staff. (Doc. 116-8, ¶ 4, 6-7). Defendant Chaney recalled that Plaintiff complained about his medical treatment both in writing and in person. (*Id.*, ¶¶ 10, 13, 14). She also received calls from Plaintiff's family members. (*Id.*, ¶¶ 17-19). For each complaint, Defendant Chaney followed-up with staff and found that Plaintiff had been seen by various providers or had been scheduled for consultations. (*Id.*, ¶¶ 12, 15-20).

ANALYSIS

Plaintiff alleges that Dr. Ulrich's delay in treating Plaintiff's cataracts made the surgery, which Plaintiff claims he received only after he sued, more difficult and caused additional side effects. Plaintiff likewise alleges that Dr. Kendrick failed to prescribe his correct contacts and to treat him leading up to the missed July 22, 2021 appointment, which caused his glaucoma to progress unchecked. Plaintiff asserts that these issues together caused vision loss in his left eye. Plaintiff argues that Defendants Smith and Chaney knew about the lack of treatment yet failed to do anything to help him. Defendants Smith, Chaney, Kendrick, and Ulrich argue that they are entitled to qualified immunity and that Plaintiff's claims for compensatory damages are barred.

1. No Defendant was deliberately indifferent to a serious medical need.

To establish a deliberate indifference claim, Plaintiff “must establish (1) a serious medical need; (2) [Defendants’] deliberate indifference to that need; and (3) causation between that indifference and the plaintiff’s injury.” *Ross v. Corizon Med. Servs.*, 700 F. App’x 914, 916 (11th Cir. 2017) (citing *Mann v. Taser Int’l Inc.* 588 F.3d 1291, 1306-1307 (11th Cir. 2009)). As explained in the Court’s screening order (Doc. 6), 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.” *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003) (internal quotations and citations omitted). “The medical need must be one that, if left unattended, poses a substantial risk of serious harm.” *Id.*; see also *Mann*, 588 F.3d at 1307 (explaining that a delay which worsens the condition can also be a serious medical need). As to the second prong, “[P]laintiff must demonstrate ‘(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence.’” *Id.* (citing *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)). “Disagreement over a matter of medical judgment does not constitute cruel and unusual punishment.” *Harris v. Leder*, 519 F. App’x 590, 596 (11th Cir. 2013) (citing *Estelle v. Gamble*, 429 U.S. 97, 107 (1976)). As discussed below, the undisputed facts show that no Defendant acted with deliberate indifference to a serious medical need.

To establish a claim of deliberate indifference, Plaintiff must show that his glaucoma and cataracts are serious medical needs. Plaintiff could make this showing if delaying treatment worsened his condition, and it was this avenue which allowed Plaintiff’s deliberate indifference claims to survive screening. (Doc. 6). Whether the worsening of Plaintiff’s eye condition constituted a serious need is intrinsically linked to whether his condition deteriorated due to

Defendants' conduct. Accordingly, the deliberate indifference and causation prongs will be examined first. As discussed below, under the undisputed facts of this case, Plaintiff would be unable to establish these prongs because there is no evidence to indicate that Defendants' actions or inaction worsened Plaintiff's left eye vision.

There is nothing in the record to indicate that Plaintiff's eye condition is worse because of something Defendants did or did not do throughout his incarceration and especially during his time at DSP. Construed most favorably to Plaintiff, the evidence shows that Plaintiff's eye condition pre-dated his incarceration. The undisputed facts show that Plaintiff suffered a retinal detachment in 2002. (Docs. 116-5, p. 59; 116-6, p. 10; 116-9, p. 32-33). Plaintiff was legally blind in his left eye with cataracts and glaucoma bilaterally at his first appointment with Dr. Ulrich in 2016. (Doc. 116-6, p. 10). Plaintiff's left eye vision was 20/400 when he entered GDC custody, 20/HM before he transferred to DSP, and 20/CF or "Blind" at the latest appointments in the record. (Docs. 116-5, p. 43, 45, 92; 116-6, p. 10). Nothing in the record suggests that the changes after Plaintiff arrived at DSP constituted a significant deterioration of Plaintiff's vision acuity because Plaintiff was legally blind in his left eye before he came to prison.

There is also nothing in the record to show that Plaintiff's lens became loose in prison, which Plaintiff argues made his cataract surgery more difficult than it would have been if it had been performed sooner. The undisputed record reflects that Dr. Ulrich, Dr. Espinosa, and Dr. Gayton all expressed concerns about the obstacles Plaintiff's pre-existing conditions would present during surgery and about the lack of benefit Plaintiff would likely receive. Dr. Gayton even suggested that Plaintiff should wait to have the cataract surgery after being released from prison. Nothing in the record shows that the surgery was mandatory, much less inappropriately or detrimentally delayed.

Plaintiff also argues that his glaucoma progressed unchecked when Dr. Kendrick failed to see him on several appointments, because Plaintiff could not receive prescriptions or referrals to Dr. Ulrich for treatment. Nothing in the records suggests that Plaintiff suffered injury or vision loss from his glaucoma during this time period. Even if Plaintiff could demonstrate injury, the record contradicts his contention that he went without treatment or prescriptions. From November 2020 through April 2021, Plaintiff was under the care of Dr. Gayton. He saw other medical staff at DSP who were able to write prescriptions for Plaintiff's eye medications. The record also fails to support Plaintiff's argument that Dr. Kendrick's failure to see Plaintiff on July 22, 2021, represented the end of his glaucoma treatment and a final loss of vision. Two weeks earlier, on July 7, 2021, DSP staff had prescribed eye drops. A week earlier, on July 15, 2021, Dr. Ulrich had recorded Plaintiff's IOP at 18 and 16. On September 30, 2021, at his pre-op appointment, Dr. Espinosa measured Plaintiff's IOP at 16 in both eyes. Again, Plaintiff's left eye vision remained below legally blind levels at these appointments. The record does not support a finding that anything Dr. Kendrick did or failed to do regarding Plaintiff's glaucoma worsened Plaintiff's vision or eye condition.

The record does not show that any medical defendant disregarded Plaintiff's condition or that they acted in a way that was negligent *at all*, much less in the "more than merely negligent" that is required to show deliberate indifference. Plaintiff's filings instead demonstrate that he questioned the medical judgment of the doctor defendants, especially as to Dr. Kendrick's decision to prescribe the RGP lens and as to the timing of Dr. Ulrich's referral for cataract surgery. However, Plaintiff cannot show these decisions were negligent simply because he disagreed with his treatment. As noted above, "[d]isagreement over a matter of medical judgment does not constitute cruel and unusual punishment." *Harris*, 519 F. App'x at 596. Nothing suggests the care

given to Plaintiff by Dr. Kendrick or Dr. Ulrich was grossly inadequate, easier but less effective compared to other treatments, or amounted to no treatment at all. *Bingham*, 654 F.3d at 1176. Instead the undisputed record, even construed favorably to Plaintiff, shows that he has received eye treatment from multiple providers, including the medical defendants. Plaintiff cannot show that Dr. Kendrick or Dr. Ulrich acted with deliberate indifference to his eye care needs.

Lastly, to show deliberate indifference to a serious medical need, Plaintiff would need to show a causal link between any deliberate indifference and his alleged vision loss. It is doubtful that Plaintiff could prove that the medical defendants' action or inaction caused or exacerbated any eye damage or vision loss. Plaintiff was legally blind and had a history of retinal detachment, cataracts, and glaucoma when he entered prison. Moreover, Plaintiff's cataracts and glaucoma, which were already advanced or end-stage in 2016, are degenerative conditions that cause vision loss over time. (Docs. 116-3, ¶¶ 6, 7, 11, 22, 38). These are also conditions that made cataract surgery more difficult and would have existed regardless of when Plaintiff had surgery and whether or not he was under Dr. Ulrich's care. Plaintiff cannot prove or point to any resulting injury from his glaucoma treatment. Even if the record supported all the other necessary elements of a claim for deliberate indifference to a serious medical need, Plaintiff would not be able to prove causation.

Because the record does not demonstrate a worsening of Plaintiff's eye condition, Plaintiff is unable to show that he had a serious medical need to which Dr. Kendrick and Dr. Ulrich demonstrated deliberate indifference. Plaintiff's claims against Dr. Kendrick and Dr. Ulrich fail as a matter of law.

- a. Even if Plaintiff could show that Dr. Kendrick and Dr. Ulrich acted with deliberate indifference, Defendants Smith and Chaney would still be entitled to summary judgment.

Plaintiff alleges that Defendants Smith and Chaney knew about his issues receiving

medical care, but they did nothing to facilitate his treatment in their capacities as warden and deputy warden. Plaintiff attributes any failure to receive follow-up treatment and surgery to Defendants Smith and Chaney because in their administrative positions it would be impossible for them not to have been aware of the complications he experienced through his letters, grievances, and conversations with them. Supervisory officials are liable in limited circumstances, and their status alone does not create § 1983 liability. *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (11th Cir. 2009). The undisputed material facts in this case show the required circumstances for supervisory liability are not present. Therefore, Defendants are entitled to summary judgment on Plaintiff's deliberate indifference claims.

Defendants, as supervisory officials, can only be held liable under § 1983 if they personally participated in unconstitutional conduct or if there is a causal connection between their actions and alleged constitutional violation. *Douglas v. Yates*, 535 F.3d 1316, 1322 (11th Cir. 2008). "The standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate is extremely rigorous." *Hendrix v. Tucker*, 535 F. App'x 803, 805 (11th Cir. 2013). The alleged personal participation by Defendants in Plaintiff's medical care comes from Plaintiff's grievances, letters to them, and conversations with them in their roles at DSP.

Both Defendants Smith and Chaney acknowledge that Plaintiff filed grievances about his medical care, and Defendant Chaney explained why those grievances were denied. (Docs. 116-7, ¶ 13; 116-8, ¶¶ 14, 16). A "denial of a grievance, by itself without any connection to the [alleged violation], does not establish personal participation under § 1983." *Gallagher*, 587 F.3d at 1069. It is undisputed that Defendants are not medical professionals who would have directly provided Plaintiff medical care. There is no evidence that Defendants instructed any medical professional to withhold any treatment or refused to transport Plaintiff to an appointment. There is also no

evidence of willful blindness to his complaints or a failure to facilitate recommended treatment. *See Goebert v. Lee Cnty*, 510 F.3d 1312 (11th Cir. 2007) (allowing a claim for supervisory liability based on the official's personal participation in not providing outside medical care to a pregnant woman leaking amniotic fluid despite medical staff's recommendation for outside care). This is especially true regarding Defendant Chaney, who, aside from Plaintiff's denied grievances, acknowledged that she had further interaction with Plaintiff about his complaints and even received calls from Plaintiff's family. (Doc. 116-8, ¶¶ 10-20). The record shows that she investigated each complaint even though she did not have direct supervisory authority over medical staff. (*Id.*, ¶ 7-20). Plaintiff cannot show any personal participation by these Defendants.

Without any evidence of personal participation by Defendant, a causal connection must exist before supervisory liability may be present.

A causal connection can be established if:

(1) a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation and he fail[ed] to do so; (2) the supervisor's improper custom or policy le[d] to deliberate indifference to constitution rights; or (3) facts support an inference that the supervisor directed the subordinates to act unlawfully or know the subordinates would act unlawfully and failed to stop them from doing so.

Hendrix, 535 F. App'x at 805.

The record fails to show any causal connection between Defendants and a delay in Plaintiff's medical care. As noted above, there is no evidence that Defendants directed medical staff to not treat Plaintiff. There is no evidence of a history of widespread abuse⁵ that would inform Defendants that Plaintiff was not receiving medical care, and the undisputed evidence shows that

⁵ "[D]eprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences. *Hendrix*, 535 F. App'x at 805 (citing *Hartley v. Parnell*, 193 F.3d 1263, 1269 (11th Cir. 1999)).

Plaintiff indeed received eye care while he was at DSP. No evidence shows that Defendant had a custom or policy of not providing medical care to inmates. Nothing in the record supports the needed causal connection to support supervisory liability.

The undisputed material facts show that Plaintiff received consistent eye care throughout his incarceration and while he was housed at DSP. There is no evidence connecting the worsening of Plaintiff's eye condition to Dr. Kendrick or Dr. Ulrich, and Plaintiff cannot show that any causal connection from Defendants Smith and Chaney to any of Plaintiff's medical treatment, much less a failure to facilitate his treatment. There is no basis for Plaintiff's deliberate indifference claims. Defendants are entitled to summary judgment as a matter of law.

2. Defendants are also entitled to qualified immunity.

Defendants Smith, Chaney, and Ulrich⁶ argue that qualified immunity also bars Plaintiff's claim. (Doc. 116-2, p. 13-14). Qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotations omitted). Defendants "cannot obtain qualified immunity unless [they establish they were] acting within [her] discretionary authority." *Underwood v. City of Bessemer*, 11 F.4th 1317, 1328 (11th Cir. 2021). "A government official acts within [their] discretionary authority if the actions were (1) 'undertaken pursuant to the performance of [their] duties' and (2) 'within the scope of their authority.'" *Lenz v. Winburn*, 51 F.3d 1540, 1545 (11th Cir. 1995) (citing *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988)).

Once action under discretionary authority has been established, "the burden shifts to the plaintiff, who must show the [Defendants are] not entitled to qualified immunity." *Underwood*, 11

⁶ Dr. Kendrick argued only for summary judgment and did not raise qualified immunity in his motion. *See* (Doc. 111). If he had raised a qualified immunity defense, the analysis would be the same as to him.

F.4th at 1328. “At this stage, [the court asks] two questions: (1) ‘whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right,’ and (2) if so, ‘whether the right at issue was ‘clearly established’ at the time of the [defendants’] alleged misconduct.’” *Id.* at 1328 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231, 232 (2009)). Both must be present for a plaintiff to prevail. *Id.*

There is no dispute that the Defendants’ challenged actions fell within their discretionary authority. As discussed above, Plaintiff has not met his burden to show these Defendants violated his constitutional rights. Because Plaintiff failed to establish violation of a constitutional right, there is no need to examine the second prong of the qualified immunity analysis. Defendants are entitled to qualified immunity as a matter of law.

3. Plaintiff is not entitled to recover compensatory damages under the Prison Litigation Reform Act (PLRA).

Defendants Smith, Chaney, and Ulrich⁷ assert that compensatory damages are barred because Plaintiff suffered no physical injury. (Doc. 116-2, p. 14-151). The PLRA states that “[n]o federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility for mental or emotion injury suffered while in custody without a prior showing of a physical injury....” 42 U.S.C. § 1997e(e). In the absence of physical injury, a plaintiff is precluded from recovering compensatory damages against a defendant. *See, e.g., Hoever v. Marks*, 993 F.3d 1353 (11th Cir. 2021) (en banc) (keeping the bar against compensatory damages but recognizing a claim under the PLRA for punitive damages, where there is no physical injury). As discussed above, the evidence before the Court is insufficient to establish that Plaintiff suffered any physical

⁷ As with the qualified immunity analysis, had Dr. Kendrick raised a challenge to Plaintiff’s claim for compensatory damages, the outcome would be the same.

injury through the Defendants' action or inaction. Therefore, Plaintiff cannot recover any compensatory damages from Defendants.

CONCLUSION

Because the undisputed facts do not support Plaintiff's deliberate indifference claims, it is **RECOMMENDED** that Defendants' motions for summary judgment (Docs. 111, 116) be **GRANTED**.

OBJECTIONS

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 thereof. Any objection is limited in length to **TWENTY (20) PAGES**. *See* M.D. Ga. L.R. 7.4. The District Judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further 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 13th day of December, 2023.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge