UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

NOREMBERG BORJA,	**:**	
Plaintiff	**:**	**CIVIL ACTION NO. 4:04-2657**
v.	**:**	**(MANNION, M.J.)**
UNITED STATES OF AMERICA,	**:**	
Defendant	**:**	

MEMORANDUM AND ORDER

Before the court is the plaintiff's untimely filed "Response to Government's Motion Seeking Summary Judgment." For the following reasons, the court will reopen the case, reconsider the defendant's motion for summary judgment in light of the plaintiff's response in opposition and will again grant summary judgment for the defendant.

I. Procedural History

The plaintiff, formerly an inmate at the Allenwood Low Security Correctional Institution ("LSCI Allenwood") in White Deer, Pennsylvania, commenced this action on December 8, 2004, by filing a complaint against Susan Gerlinski, warden of LSCI Allenwood, the Federal Bureau of Prisons ("BOP"), and the United States of America. The action was brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq. (Doc. No. 1.) Since the filing of the action, the plaintiff has been deported to his native Columbia.

In lieu of an Answer, the defendants moved for summary judgment on February 7, 2005. They argued that the plaintiff' named improper defendants under the FTCA, as that statute requires the United States to be the sole defendant. (Doc. Nos. 4, 7, 8, & 9.) On September 6, 2005, the court granted summary judgment as to defendants Gerlinski and the BOP but ordered the case continued against the United States, only on the plaintiff's second claim, which alleged that the medical staff at LSCI Allenwood negligently mistreated the plaintiff's condition. (Doc. No. 10.) On September 19, 2005, the defendant United States answered the allegations left in the complaint following the courts partial grant of summary judgment. (Doc. No. 12.)

Subsequently, the court entered scheduling orders and adopted the parties' case management plan, and the case was set for trial before the undersigned on October 16, 2006. (Doc. Nos. 15, 16, 18, 19, 22, & 22.) On July 31, 2006, the defendant moved for summary judgment on the remaining claim. The defendant argued that the plaintiff could not meet his burden of proving, under the substantive medical malpractice law of Pennsylvania, that the United States was negligent in its treatment of the plaintiff's injuries. (Doc. No. 24.) The defendant submitted a brief in support and a statement of facts on August 14, 2006. (Doc. Nos. 25 & 26.)

The plaintiff failed to submit a brief in opposition, as required by the Middle District of Pennsylvania Local Rules. Local Rule 7.6 provides:

> Any party opposing any motion shall file a responsive brief, together with any opposing affidavits, deposition

> transcripts or other documents, within fifteen (15) days after service of the movant's brief, or, if a brief in support of the motion is not required under these rules, within five (5) days after service of the motion. Any respondent who fails to comply with this rule shall be deemed not to oppose such motion. Nothing in this rule shall be construed to limit the authority of the court to grant any motion before expiration of the prescribed period for filing a responsive brief.

On September 19, 2006, the court granted the unopposed motion for summary judgment, entered judgment for the defendant, and closed the case. (Doc. Nos. 27 & 28).

On September 20, 2006, the plaintiff, through counsel, filed a "Response to Government's Motion Seeking Summary Judgment." (Doc. No. 29.) The response adopts the factual recitation in the complaint and proceeds to argue that the defendant is responsible for the plaintiff's injury. The plaintiff blames the defendant for the litigation, claiming that the defendant refused his counsel's requests to provide proper medical treatment and avoid a lawsuit. He also claims that the defendant was "always unreasonably uncooperative" to his counsel's attempts to aid the plaintiff's remedy. (Doc. No. 29.) The response advances no legal argument and cites no case law in opposition to the defendant's arguments for summary judgment. It merely concludes that the issue of "whether it was unreasonable for the defendant to withhold the treatment [from the plaintiff] <u>is a question of fact yet to be decided</u>." (Doc. No. 29 (emphasis in original)). No affidavits or other exhibits were submitted with the response.

Despite the fact that the plaintiff's response was untimely and the plaintiff failed to even move the court to reopen the judgment, the court will do so sua sponte because the court's earlier judgment was entered on a procedural ground. In the interest of justice, the court will now vacate its previous judgment, reopen the case, and reconsider the motion for summary judgment in light of the untimely filed brief in opposition. As discussed below, the court will again grant summary judgment to the defendant, this time on the merits.

II. Discussion

A. Standard of Review for Summary Judgment

Summary judgment is appropriate when the pleadings and any supporting materials, such as affidavits and other documentation, show that there are no material issues of fact to be resolved and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); see Turner v. Schering-Plough Corp., 901 F.2d 335, 340 (3d Cir. 1990). Federal Rule of Civil Procedure 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, 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 Corp. v. Catrett, 477 U.S. 317 (1986). Furthermore, "Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by

[its] own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Id. at 324; Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990); Pastore v. Bell Tel. Co. of Pennsylvania, 24 F.3d 508, 511 (3d Cir. 1994) (quoting Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992)). The party moving for summary judgment bears the burden of showing the absence of a genuine issue of any material fact, but the nonmoving party must adduce more than a mere scintilla of evidence in its favor and cannot simply reassert factually unsupported allegations contained in the pleadings. Celotex Corp., 477 U.S. at 323, 325; Anderson v. Liberty Lobby, Inc., 477 U.S. 248-52 (1986); Young v. Quinlan, 960 F.2d 351, 357 (3d Cir. 1992).

Local Rule 56.1 reinforces the requirement that the nonmoving party must submit evidence, and not mere assertion, to oppose summary judgment by providing:

> A motion for summary judgment filed pursuant to Fed.R.Civ.P.56, shall be accompanied by a separate, short and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried.
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> The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts, responding to the numbered paragraphs set forth in the statement required in the foregoing paragraph, as to which it is contended that there exists a genuine issue to be tried.
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> Statements of material facts in support of, or in opposition to, a motion shall include references to the parts of the record that support the statements.
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> All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the

opposing party.

See Anchorage Assocs. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 175-76 & n.7 (3d Cir. 1990); Novak v. Lackawanna County Prison, No. 05-CV-0213, 2006 WL 2709745, slip op. at *2 (M.D. Pa. Sept. 20, 2006).

To determine whether the nonmoving party has met its burden, the court must focus on both the genuineness and the materiality of the factual issues raised by the nonmovant. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 242, 247-48 (emphasis in original). A dispute is genuine if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. Id. at 250. A disputed fact is material when it could affect the outcome of the suit under the governing substantive law. Id. at 248. If the court determines that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (quoting First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 289 (1968)). All inferences, however, "should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Pastore, 24 F.3d at 512 (quoting Big Apple BMW, Inc. v. BMW of N. America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert.

denied, 507 U.S. 912 (1993)).

B. Factual Background

With the standard for summary judgment in mind, the court has compiled the following factual background by which to judge the defendant's motion. Because the plaintiff has failed to submit a counter-statement of facts, the court will accept the defendant's statement, and the attached affidavits and exhibits on which it is based, as undisputed.

Between October 8, 1996, and May 27, 1998, the plaintiff was imprisoned at the Federal Detention Center in Miami, Florida. While in Miami, between October 29, 1996, and April 8, 1998, he was examined for "dermatitis, acne and 'other skin diagnosis.'" (Doc. No. 26 ¶¶ 1, 4.[1]) On April 8, 1996, the plaintiff complained of "multiple diffuse skin lesions" over a period of six years. (Doc. No. 26 ¶ 5.) But, when he arrived at LSCI Allenwood on June 15, 1998, the plaintiff was in "no apparent distress." (Doc. No. 26 ¶¶ 2, 6.)

The plaintiff first reported at sick call on June 17, 1998, where he complained of a rash, for which he was prescribed an antihistamine and a steroid cream. Through an interpreter, the medical staff explained to the plaintiff the proper use of the medication. (Doc. No. 26 ¶¶ 7-8.)

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[1]All internal quotations are from Defendant's Exhibit 1, which is docketed to Document Number 26.

The plaintiff next reported a problem on September 29, 1998, when he was treated for a reaction to an unknown allergen that had caused swelling in his face and hands. The medical staff treated the plaintiff by administering a medication, an IV and taking him to a local hospital. (Doc. No. 26 ¶¶ 9-11.)

He next reported sick on February 12, 1999, with a rash on his torso, which he stated had been a problem for eight years. The medical staff found various lesions, some of which were discharging pus. They prescribed two medications and told the plaintiff to return for a follow-up visit in two weeks. The plaintiff failed to return. (Doc. No. 26 ¶¶ 12-16.)

On March 25, 1999, the plaintiff again reported to sick call because of "a generalized rash over his entire torso, but not involving his hands or feet." (Doc No. 26 ¶ 17.) The rash continually recurred, but had improved with the use of the previous prescriptions. One of the prescriptions was renewed, and the plaintiff was told to return in two weeks, if necessary. He did not return. (Doc No. 26 ¶¶ 18-21.)

The plaintiff next sought treatment for a skin problem on June 27, 2000, when he complained of a rash that he claimed had been caused by ant bites years earlier. (Doc No. 26 ¶¶ 22-23.) Based on the physical symptoms, the medical staff diagnosed the plaintiff with acute chronic bacterial dermatitis. The plaintiff was given three medications, underwent a complete blood screening, and he was told to keep clean. During a follow-up visit on July 11, 2000, the medical staff found the rash to be improved, but not cleared up.

The plaintiff's prescriptions were renewed, and he was told to follow up in a month. (Doc No. 26 ¶¶ 23-28.)

On August 9, 2000, the plaintiff went to the prison clinic for his follow-up visit. Although the plaintiff was "not in distress," he had skin lesions on his hips and torso, some of which were infected. (Doc No. 26 ¶¶ 29-31.) The treating physician determined that the plaintiff had "dermatitis of an unknown origin." (Doc No. 26 ¶¶ 31.) One of the plaintiff's prescriptions was renewed, the case was to be referred to a dermatologist, and a skin biopsy was to be arranged. (Doc No. 26 ¶¶ 32-33.) On September 18, 2000, the plaintiff was seen again, at which time his rash was found to have "scal[ed] and crust[ed] over much of his body." (Doc No. 26 ¶¶ 34, 36.) At this visit, there was no time for a biopsy. (Doc No. 26 ¶ 35.)

After being rescheduled, the biopsy was performed on October 6, 2000. The outside medical laboratory's analysis indicated that the plaintiff had reactive perforating collagenosis,[2] which is untreatable but symptomatically controllable. The plaintiff told the physician that antibiotics had previously helped his condition. The physician then prescribed an antibiotic to ward infection. (Doc No. 26 ¶¶ 37-47.)

During a clinic visit on November 21, 2000, an examination confirmed that the plaintiff's skin lesions were spreading. Plaintiff also complained that

[2]Collagenosis is a disease of the connective tissue. TABERS' CYCLOPEDIC MEDICAL DICTIONARY 447 (20th ed. 2005).

one of his medications made him very drowsy and that two others had helped in the past, although he could not remember the one medications name. The medical staff prescribed the medication whose name the plaintiff remembered and two additional medications. The plaintiff was also told to avoid fragrant and colored soaps. (Doc No. 26 ¶¶ 48-53.)

On December 18, 2000, the plaintiff told the medical staff that he was "'much better' with the new medication." (Doc No. 26 ¶ 54.) He also said that he wanted to try a medication that had helped his brother and sister with the same problem, but he did not know that medication's name. The staff informed the plaintiff how to get approval of non-formulary medications and instructed him to discuss it with the physician in an upcoming visit. The plaintiff's medications were continued. (Doc No. 26 ¶¶ 55-57.)

On December 19, 2000, the plaintiff visited the physician and informed him that his itching had improved with the antibiotics. The physician found that the plaintiff's skin was covered with mostly dry "eruptions" and that there was "little sign of itching." (Doc No. 26 ¶¶ 58-60.) The physician prescribed a drug to "treat any superimposed bacterial infection triggered by scratching," but as of December 28, 2000, the plaintiff had not picked up this prescription. (Doc No. 26 ¶¶ 60-61.)

The physician next saw the plaintiff on March 21, 2001, at which time he again diagnosed the plaintiff with perforating collagenosis because of the lesions all over the plaintiff's body. The physician told the plaintiff to follow

treatment instructions and prescribed a lotion to be used for three months. When the plaintiff next visited the clinic on August 7, 2001, he suffered from itchy lesions and reported that the lotion was ineffective. The medical staff reaffirmed the diagnosis, advised the plaintiff that the lotion was the proper treatment and might be slow to take effect. They prescribed the same lotion, but in a different strength, for another three months. The plaintiff returned later that day with an interpreter to discuss his rash. (Doc No. 26 ¶¶ 62-67.)

On November 5, 2001, the plaintiff returned to the clinic, complaining that his body persistently itched and he had too little medication. The medical staff "adjusted and increased" the medications because the collagenosis was not responding to the current amounts. (Doc No. 26 ¶¶ 68-69.) Twelve days later, the plaintiff requested a copy of his medical records so he could seek outside treatment for "the infection I have developed during my incarceration." The prison officials provided him with thirty-six pages of medical records. (Doc No. 26 ¶¶ 70-71.)

On November 30, 2001, the plaintiff complained about his rash and said that his prescription, which was effective, had now run out. An examination revealed "raised eruptions," but no itching or pus. (Doc No. 26 ¶¶ 72-73.) His prescription was renewed again. However, the plaintiff had not picked up his prescriptions as of January 2, 2002. (Doc No. 26 ¶¶ 73-74.)

On January 3, 2002, the plaintiff went to the clinic because the eruptions on his leg has become infected. Cultures of the pustules were sent to a

laboratory, and the medical staff gave the plaintiff soap with instructions "to use it in the shower 'head to toe.'" (Doc No. 26 ¶¶ 75-76.) The plaintiff was told to return on January 7, 2002, for the lab results, but did not return. He did return on January 10, 2002, for a follow-up visit, where it was observed that his rash had improved. A previous prescription was renewed, and a new antibiotic prescribed. (Doc No. 26 ¶¶ 77-78.)

On February 7, 2002, the physician requested an examination for the plaintiff by a skin specialist. On February 27, 2002, the physician examined the plaintiff and found that he had "a multi-stage rash." The physician prescribed a lotion. On March 1, 2002, the plaintiff was seen by a contract dermatologist, who confirmed the diagnosis of reactive perforating collagenosis and noted that the disease is "usually idiopathic."[3] (Doc No. 26 ¶¶ 82-83.) The dermatologist recommended that the plaintiff undergo renal function studies because collagenosis can cause renal failure. Despite this precaution, the physician doubted that renal failure would occur because the plaintiff had experienced this problem for more than four years. He recommended a specific medication, but noted that one of two other drugs could be used instead. On March 15, 2002, after approval to use a non-formulary drug was granted by the BOP, the plaintiff received the recommended medication. (Doc No. 26 ¶¶ 84-92.) Also on March 15, 2002,

[3] Idiopathic refers to illnesses whose cause is either uncertain or as yet undetermined. TABERS', supra, at1064.

the plaintiff requested his medical records, and the prison officials gave him seventy-four pages of his records. The plaintiff's attorney also spoke with the Health Services Administrator about the plaintiff's medications. (Doc No. 26 ¶¶ 93-94.)

The plaintiff again saw the physician on August 30, 2002, saying that he had taken the dermatologist's prescription for sixty days, but disagreed with the dermatologist's diagnosis. The physician "reinforced" the dermatologist's diagnosis and recommended treatment. (Doc No. 26 ¶¶ 95-96.) The physician found that the plaintiff's skin was "covered completely with a polymorphic rash with very little healthy skin." (Doc No. 26 ¶ 97.) The physician doubted whether the plaintiff had properly followed his treatment and reiterated that the plaintiff needed to comply with instructions to ensure its efficacy. He renewed the prescription recommended by the dermatologist, as well as the prescription for the prior lotion. (Doc No. 26 ¶¶ 98-99.)

On September 25, 2002, the plaintiff notified the medical staff that his prescription for the lotion had run out. "At this time over 50% of Borja's skin lesions were old." (Doc No. 26 ¶¶ 100-01.) The prescription was renewed. (Doc No. 26 ¶ 101.)

Two days later, the plaintiff was examined by the physician, who found that the plaintiff's condition had "improved a bit." (Doc No. 26 ¶¶ 102-03.) The physician told the plaintiff to continue with the current treatment. The plaintiff indicated his understanding and agreement with this plan. The

physician renewed the prescriptions for the dermatologist's recommended medication, the lotion, and ordered lipid and hepatic function studies. (Doc No. 26 ¶¶ 104-05.)

On October 15, 2002, the plaintiff complained of an infected ingrown toenail, respiratory problems, and rectal bleeding. He was treated for each of these. He did not complain of a skin problem. He was again given copies of his medical records. (Doc No. 26 ¶¶ 106-08.)

On October 24, 2002, the plaintiff complained to the physician that "the itching still persisted and that it was no better than before the treatment began." (Doc No. 26 ¶ 109.) The physician told the plaintiff that he had spoken to the dermatologist ten days earlier. The dermatologist said that, at the plaintiff's attorney's request, he had consulted with another doctor who, based upon the medical records, diagnosed the plaintiff's condition as prurigo nodularis,[4] not reactive perforating collagenosis. The dermatologist recommended a new course of steroid treatment in place of his prior medication, which he believed would show results in three to four weeks. The physician told the plaintiff that he could have another biopsy to confirm a diagnosis. The plaintiff said he would consider this option. (Doc No. 26 ¶¶ 110-15.)

On December 2, 2002, the plaintiff visited the clinic for a follow up. He

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[4]Prurigo nodularis is a chronic skin disease of unknown etiology, "marked by constantly recurring, discreet, pale, deep-seated, intensely itchy papules" on the limbs' extensor surfaces. TABERS', supra, at 1799.

complained that his condition had not improved. He also indicated that one of the medications had worked better than the others. The physician observed that more than two-thirds of the plaintiff's skin had "healing lesions." (Doc No. 26 ¶¶ 116-18.) The physician again offered the plaintiff a second biopsy and the option to switch from his current treatment to the newly recommended treatment. He set a date for the biopsy, the beginning of the new treatment and renewed the prescription for the lotion. On December 11, 2002, the plaintiff underwent a second biopsy and the new treatment. (Doc No. 26 ¶¶ 119-21.)

The medical staff received the biopsy report on January 3, 2003. It inconclusively identified the plaintiff's problem as folliculitis[5] and perifolliculitis[6] and recommended an additional biopsy, tested by a different method, that would exclude any immunobullous disorder. On January 10, 2003, the medical staff reported to the plaintiff his biopsy results and prescribed additional antibiotics. Six days later, the plaintiff underwent a third biopsy as recommended in the second biopsy report. (Doc No. 26 ¶¶ 122-25.)

On January 24, 2003, the plaintiff returned to the clinic. He said that his rash was improving. An examination showed that it still covered his body, but to a lesser extent. Many lesions were healing. The medical staff also noted

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[5] Folliculitis is an "[i]nflamation of a follicle or follicles." TABERS', supra, at 818.

[6] Perifolliculitis is an "[i]nflamation of an area around the hair follicles." TABERS', supra, at 1629.

that the plaintiff had never been observed itching his rash during any of his examinations and never appeared to be in distress. The medical staff told the plaintiff to obtain his medical records and follow instructions in the use of his medications, two of which were prescribed for him. The plaintiff asked about the results of the third biopsy and was told that they had not come back yet. Before the results came back, on January 31, 2003, the plaintiff was released from LSCI Allenwood to the Bureau of Immigration and Customs Enforcement for deportation to Colombia. Upon his release, the medical staff supplied the plaintiff with his current medications and informed him of their proper use. They also advised him that he was to seek follow-up treatment. (Doc No. 26 ¶¶ 2-3, 126-32.)

C. The FTCA

The FTCA "'was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances.'" Sosa v. Alvarez-Machain, 542 U.S. 692, 700 (2004) (quoting Richards v. United States, 369 U.S. 1, 6 (1962)); see 28 U.S.C. §§ 2647, 1346(b); In re Orthopedic Bone Screw Prod. Liab. Litig., 264 F.3d 344, 361-62 (3d Cir. 2001). It allows one, including a federal prisoner, United States v. Muniz, 374 U.S. 150 (1963), to sue the United States for its employees' tortious acts or omissions, including medical negligence, that occur in the

scope of their employment and under circumstances where a private individual would be liable under state law. § 1346(b)(1); Sosa, 542 U.S. at 700; Orthopedic Bone Screw Prod. Liab. Litig., 264 F.3d at 361-62. Consequently, it is generally substantive state law that governs an FTCA claim. §1346(b)(1); Sosa, 542 U.S. at 700; Orthopedic Bone Screw Prod. Liab. Litig., 264 F.3d at 361-62 (citing Reo v. United States Postal Serv., 98 F.3d 73, 75 (3d Cir.1996)).

Under Pennsylvania law, a plaintiff must make four showings to establish a prima facie case of medical malpractice. First, the plaintiff must show that the physician owed a duty to the plaintiff. Toogood v. Rogal, 824 A.2d 1140, 1145 (Pa. 2003) (citing Hightower-Warren v. Silk, 698 A.2d 52, 54 (Pa. 1997)). In a case brought by a federal prisoner, federal law preempts any standard of care under state law and provides that the BOP owes the prisoner ordinary diligence. 18 U.S.C. § 4042. Second, the plaintiff must show that the physician breached his duty. Toogood, 824 A.2d at 1145. Third, the plaintiff must show that the breach proximately caused the harm. Toogood, 824 A.2d at 1145. Finally, the plaintiff must show that his damages directly resulted from the harm. Id.

"Because the negligence of a physician encompasses matters not within the ordinary knowledge and experience of laypersons a medical malpractice plaintiff must present expert testimony to establish" all four elements. Id. The only exception to this requirement is "where the matter is so simple or the lack

of skill or care so obvious as to be within the range of experience and comprehension of even non-professional persons." Id. (quoting Hightower-Warren, 698 A.2d at 54 n.1). The Pennsylvania Supreme Court has indicated that this "very narrow exception" is implicated only in instances of res ipsa loquitur. Id.

In this case, the plaintiff has failed to produce the required expert evidence to substantiate his claim, and this is not an instance of res ipsa loquitur. Therefore, he cannot make a prima facie showing of medical malpractice.

But even assuming, *arguendo*, that the court ignore the medical expert requirement, the facts before the court do not establish the defendant's negligence in its employees' treatment of the plaintiff. Indeed, the record indicates that the physician and medical staff frequently examined and consulted the plaintiff concerning his complaints and made substantial efforts to diagnose the affliction and prescribe appropriate medications. These actions include hiring an outside specialist and having the plaintiff undergo three biopsies.

No treatment is a panacea, and some conditions do not respond well to what is, nonetheless, proper treatment. Furthermore, there are indications that the plaintiff did not properly follow the medical staff's and physician's instructions and treatment. The court notes, as well, that, according to the record before it, the plaintiff admitted that his condition, which also affected

his siblings, was acquired and uncured before the BOP obtained custody of him. Thus, even without expert substantiation, the plaintiff cannot establish a case of medical malpractice.

Accordingly, the defendant is entitled to summary judgment as a matter of law because the plaintiff cannot show that there is a genuine issue of material fact.

IV. Conclusion

On the basis of the foregoing, **IT IS HEREBY ORDERED THAT**:

(1). the Clerk is directed to reopen the case;

(2). the order granting summary judgment (Doc. No. 27) and the judgment (Doc. No. 28) entered in favor of the defendant and against the plaintiff on September 19, 2006, are **VACATED**;

(3). the defendant's motion for summary judgment, (Doc. No. 24) as reconsidered on the merits here, is **GRANTED**;

(4). judgment is **ENTERED** in favor of the defendant and against the plaintiff; and,

(5). the Clerk is direct to close the case.

S/ Malachy E. Mannion
MALACHY E. MANNION
United States Magistrate Judge

Date: October 24, 2006

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