

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
EASTERN-WATERLOO DIVISION**

WENDELL MALLET, ||

Plaintiff, ||

vs. ||

NAPH CARE, INC., Birmingham,  
Alabama, and NURSE "TERRY" at  
Black Hawk County Jail;

Defendants. ||

No. C04-2009-MWB

**REPORT AND  
RECOMMENDATION ON MOTION  
FOR  
SUMMARY JUDGMENT**

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## ***I. INTRODUCTION***

This matter is before the court on the defendants' motion for summary judgment, filed April 26, 2004. (Doc. No. 12) The plaintiff Wendell Mallett ("Mallett") resisted the motion on June 11, 2004. (Doc. No. 26) By order dated April 27, 2004 (Doc. No. 14), this matter was referred to the undersigned United States Magistrate Judge for the issuance of a report and recommended disposition.

A former inmate of the Black Hawk County Jail in Waterloo, Iowa, Mallett filed this action against the defendants NaphCare, Inc. ("NaphCare") and "Nurse Terry" (collectively referred to as "the defendants") under 42 U.S.C. § 1983, to redress the alleged deprivation of his constitutional rights. (See Doc. No. 16, Amended Complaint) Mallett contends the defendants violated his Eighth Amendment rights by being deliberately indifferent to his serious medical needs.<sup>1</sup> Specifically, Mallett alleges the defendants gave him the wrong medication which caused him to suffer an allergic reaction. For the alleged violation of his constitutional rights, Mallett seeks compensatory damages, punitive damages, interest at the maximum legal rate, court costs, attorney fees, and such other and further relief as the court deems equitable and just. (*Id.*)

The defendants contend there are no disputed material facts and they are entitled to judgment as a matter of law. (See Doc. No. 12) Each defendant asserts separate grounds for summary judgment. Nurse Terry argues: 1) Mallett has failed to state an Eighth Amendment claim for which relief can be granted because he offers no evidence that she purposefully gave him the wrong medication or intentionally failed to respond

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<sup>1</sup> The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. *Rhodes v. Chapman*, 452 U.S. 337, 344-45, 101 S. Ct. 2392, 2398, 69 L. Ed. 2d 59 (1981).

after realizing her mistake; 2) Mallett is unable to proceed because the Eleventh Amendment bars suits against state officials acting in their official capacities; and 3) she is entitled to qualified immunity because no violation of a clearly established constitutional right occurred. (*Id.*) NaphCare argues Mallett has failed to state a cognizable Eighth Amendment claim because he does not allege a violation of his constitutional rights through the adoption of an official policy, practice, or custom, and Mallett cannot rely on a *respondeat superior* theory to support his Eighth Amendment claim. (*Id.*)

In his resistance to the defendants' motion, Mallett: 1) disputes Nurse Terry's assertion that she was not deliberately indifferent to his serious medical needs; 2) asserts his Eighth Amendment claim is not barred by 42 U.S.C. § 1997e(e), because he suffered an actual physical injury; and 3) disputes Nurse Terry's contention that she is entitled to qualified immunity. (See Doc. No. 26) Mallett does not directly address either Nurse Terry's assertion that the Eleventh Amendment bars suits against state officials acting in their official capacities or NaphCare's assertion that Mallett cannot rely on a *respondeat superior* theory to support his Eighth Amendment claim.

Finding the motion for summary judgment to be fully submitted and ready for decision, the court turns now to consideration of the defendants' motion.

## ***II. STANDARDS FOR SUMMARY JUDGMENT***

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment and provides that either party to a lawsuit may move for summary judgment without the need for supporting affidavits. See Fed. R. Civ. P. 56(a), (b). Rule 56 further states that summary judgment:

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

Fed. R. Civ. P. 56(c). A court considering a motion for summary judgment “must view all of the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts.” *Webster Indus., Inc. v. Northwood Doors, Inc.*, 320 F. Supp. 2d 821, 828 (N.D. Iowa 2004) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); and *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996)).

The party seeking summary judgment must “‘inform[ ] the district court of the basis for [the] motion and identify[ ] those portions of the record which show lack of a genuine issue.’” *Webster Indus.*, 320 F. Supp. 2d at 829 (quoting *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992), in turn citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986)). A genuine issue of material fact is one with a real basis in the record. *Id.* (citing *Hartnagel*, 953 F.2d at 394, in turn citing *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1356). Once the moving party meets its initial burden under Rule 56 of showing there is no genuine issue of material fact, the nonmoving party, “by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); see *Webster Indus.*, 320 F. Supp. 2d at 829 (citing, *inter alia*, *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553; and *Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559, 562 (8th Cir. 1997)).

Addressing the quantum of proof necessary to successfully oppose a motion for summary judgment, the Supreme Court has explained that the nonmoving party must

produce sufficient evidence to permit “a reasonable jury [to] return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Furthermore, the Supreme Court has held the trial court must dispose of claims unsupported by fact and determine whether a genuine issue exists for trial, rather than weighing the evidence and determining the truth of the matter. See *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2510; *Celotex*, 477 U.S. at 323-24, 106 S. Ct. at 2552-53; *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1356.

The Eighth Circuit recognizes that “summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries.” *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990) (citing Fed. R. Civ. P. 56(c)). The Eighth Circuit, however, also follows the principle that “summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Id.* (quoting *Celotex*, 477 U.S. at 327, 106 S. Ct. at 2555); see also *Hartnagel*, 953 F.2d at 396.

Thus, the trial court must assess whether a nonmovant’s response would be sufficient to carry the burden of proof at trial. *Hartnagel*, 953 F.2d at 396 (citing *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552). If the nonmoving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, then the moving party is “entitled to judgment as a matter of law.” *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2552; *Woodsmith Pub. Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990). However, if the court can conclude that a reasonable jury could return a verdict for the nonmovant, then summary judgment should not be granted. *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *Burk v. Beene*, 948 F.2d 489, 492 (8th Cir. 1991); *Woodsmith*, 904 F.2d at 1247.

### ***III. MATERIAL FACTS<sup>2</sup>***

It appears Mallett became an inmate of the Black Hawk County Jail sometime in September of 1999. He was released, and then was reincarcerated in the Black Hawk County Jail on or about November 3, 2003. On that date, Mallett signed a form consenting to be treated by NaphCare. (See Doc. No. 12-11) Prior to being reincarcerated, Mallett was diagnosed with high blood pressure and type II diabetes. During the 103 days from November 4, 2003, to February 13, 2004, health officials checked Mallett's blood pressure on at least 35 days. (See Doc. No. 12-10) On November 7, 2003, Kelly Schmidt, M.D. reviewed Mallett's medical file, including his blood pressure history, and treated his high blood pressure. (See Doc. No. 12-2) Dr. Schmidt noted the following in Mallett's chart on November 7, 2003:

[Mallett's] blood pressure is 168/100, 180/108, and 172/100. He is presently not on any medications for this. I am going to start him on Diltiazem SR 240 mg p.o. q.d. and Maxzide 75/50 one p.o. q.d. and also get a BMP. We are going to do blood pressure checks daily and review them in five days. If he has any problems, I want to see him.

(Doc. No. 12-2) Mallett's medication administration records indicate he began receiving Diltiazem 240 mg. and Maxzide 75/50 mg. on November 8, 2003. (See Doc. No. 12-7)

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<sup>2</sup> When submitting their motion for summary judgment, the defendants relied on the facts as recited by Mallett in his initial Complaint. The defendants did not submit a separate statement of undisputed facts in support of their motion for summary judgment as required by Local Rule 56.1. Because the defendants did not submit such a statement, Mallett deemed it unnecessary to submit his own statement of undisputed facts. Consequently, the following facts were taken from the defendants' motion for summary judgment (Doc. No. 12-1), the defendants' attached exhibits (Doc. No. 12-2 through 12-11), Mallett's Amended Complaint (Doc. No. 16), Mallett's memorandum supporting his resistance to the motion for summary judgment (Doc. No. 26), Mallett's affidavit (Doc. No. 26), and a letter from Mallett's expert (Doc. No. 26).

The record indicates that on November 13 and 14, and December 4 and 8, 2003, Dr. Schmidt reviewed Mallett's medical records and treated his high blood pressure. On the same dates, a nurse noted what instructions the physician had given regarding Mallett's care. (See Doc. Nos. 12-2, 12-4) Records indicate Mallett's medication was changed on December 4, 2003, when he began receiving Diltiazem ER 360 mg. (Doc. Nos. 12-6, 12-7) In addition, John Duffy, M.D. placed Mallett on a special diet for diabetics because his blood glucose results from December 6, 7, and 8, 2003, indicated the special diet was necessary. (See Doc. No. 12-10)

On December 11, 2003, Mallett went to take his medication. He told Nurse Terry his name, and she gave him what he believed to be his prescribed medication. A few minutes later, Nurse Terry told Mallett he had been given the wrong medication, and she asked if he would like to take his prescribed medication. Fearing the combination of his prescribed medication and the wrong medication he had ingested could cause him to suffer some sort of side effect or reaction, Mallett told Nurse Terry that he did not want to take his prescribed medication. Nurse Terry told him she would find out whether taking his prescribed medication would cause any adverse effects. (See Doc. No. 26) About twenty minutes later, Mallett developed a rash over most of body and he began feeling dizzy and nauseous. (See Doc. Nos. 12-1, 12-4, 16 & 26) Mallett reported his rash to a nearby officer and he was taken to the nurse's office where he was cared for by another nurse and Nurse Terry. (*Id.*) They treated Mallett by applying witch hazel to his body and giving him Benadryl. Dr. Schmidt saw Mallett and prescribed Benadryl 50 mg. and Zantac 150 mg. (See Doc. No. 12-2) The nurse's notes for December 11, 2003 indicate:

To medical. Given wrong medication. [Complains of] itching. Noted multiple hives to back. Given Benadryl 50 mg. and Zantac 150 mg. . . . per physician's order.

(Doc. No. 12-4) Mallett's medication administration records confirm that he began receiving Zantac 150 mg. and Benadryl 50 mg. on December 11, 2003. (See Doc. No. 12-7) Mallett continued to feel dizzy and nauseous throughout the day and even vomited in the afternoon. (See Doc. No. 26)

On December 12, 2003, Mallett returned to medical. The nurse's notes indicate the following regarding his complaints:

Inmate [complains of left] side groin pain, describes as an ache -- not stabbing but constant. Denies exercising-pulling a muscle but does notice the pain more when urinates. Will obtain UA in a.m. for chem strip.

(Doc. No. 12-4)

On December 13, 2003, Dr. Schmidt ordered health officials to "obtain [a] UA for C & S, Dipstick . . . [because] inmate [complains of] pain [with] urination." (Doc. No. 12-2) The nurse's notes for December 13, 2003 indicate:

UA obtained for . . . C & S and Dipstick [Patient complains of] pain [with] urination. Dipstick results in chart for physician to review.

(Doc. No. 12-4)

On December 13, 2003, Mallett completed an inmate request form asking for "a copy of [the] incident report concerning me receiving the wrong medication, as well as the name of the nurse that gave me the medicine. I do not have enough on my books to pay for the copy if necessary." (Doc. No. 12-3)

On December 16, 2003, Mallett completed and submitted a grievance form. (Doc. No. 12-3) When asked to describe the specific circumstances and details of his grievance, Mallett stated as follows:

On 12-11-03 at approximately 9:10 a.m. I went to take my meds as I do every morning. The nurse asked my name. I said Mallett. She then proceeded to give me my meds. I took it with water and show[ed] her I had swallowed my meds by opening my mouth and lifting my tongue. I went back to sit down for 2-3 minutes and was called back to the front. As I approached the [front], I heard the nurse say "well he took it and didn't say anything" and there was another inmate named Matlock standing at the counter as [if] to be receiving meds, and he said she gave you my meds. This is when I found out that she had given me the wrong medication. [When I asked her what medication I received,] she replied "Resparidal" [sic] and if anything it will just calm you down and relax you a bit and then she asked me if I wanted to take my high blood pressure meds. I told her I'm not going to mix these pills. I don't even know what the "hell" you just gave me. She then said she was going to finish passing out meds and that when she made it back downstairs she would check to see if the two meds can be taken together and she would call me downstairs and she left for 20 or more minutes. Later at about 9:30 a.m., I started feeling a burning sensation on my neck. I felt my neck and it had bumps and welts on it. I asked another inmate that was sitting at the same table [. . .] if he could see anything on my neck and he said yes, I see bumps and your neck is real red, that burning sensation spread to my back, sides, arms and between my inner thighs. I reported this to [an officer] and asked that he call the nurse and notify them [of what] was happening. He did and they said to send me downstairs. The [officer] locked down the unit and walked me to the elevator. When I made it to the nurse's office, I was greeted by the regular nurse . . . . She led me to the exam room, where I took off my shirt for her to see me and

my back was covered with red bumps and welts as well as my sides, arms, chest, and legs. It was stinging, itching and burning real bad and when [the regular nurse saw] me she said you're having an allergic reaction to the meds you just took. She gave me some Benadryl for the irritation and proceeded to put witch hazel on my back and arms. Afterward, she left . . . the exam room and came back in with a gentleman, Dr. Schmidt, who looked at me and told the nurse to give me some Zantac for the allergic reaction which she did, and also continued to apply witch hazel to my body [because I had been given] the wrong meds. [She did this for a good 15 to 20 minutes. During this time, the nurse that gave me the wrong medication made it back to the nurse's office and I heard her say boy what a day, is this Monday or what? And she went on and said something about me or the incident and the other regular nurse said he's back here. She had just left . . . so that I could put the witch hazel on my inner thighs. Then both nurses entered the exam room.] The nurse that gave me the wrong meds said "boy, you sure are pretty red and bumpy aren't you," and she said to the [other regular nurse] why is it mainly on his back. She said it was all over even between his legs and she replied "oh" and then she started putting witch hazel on my body. After a period of time, the stinging and itching had calmed down, but now I was dizzy and nauseous and short of breath. I chose to put my clothes on and go back to the unit. I told [the regular nurse] that I was nauseous and short of breath, and she replied, Yes you were breathing rather hard when you came in, but you [will] be o.k. When I made it back to the unit, I sat down for a minute then went and laid down until lunch. [I ate my lunch and no sooner than I made it back to my cell], I threw up [and that strangely made me feel somewhat better]. I then laid down and went back to sleep until 2:30 p.m. or so. The remainder of that day and into the next, I felt drowsy, irritable and dizzy. This is about the best I can do to describe the circumstances and details. I'd further like to state that this whole incident could have been avoided had not the nurse

been negligent on her part. I feel the medical staff as a whole should be more concerned with the meds they are handing out as well as who they are giving them to. Just as they are sure to check the inmate's mouth to make sure he swallows it. I'm sure the reason for that is to protect other inmates from ingesting medications that are not proscribed to them, which could unwittingly cause them harm or even death. Nurses and Drs. alike have a protocol that they are bound by [and that professes to protect us from] incidents like this and it is evident that these procedures were not followed -- causing injury and or trauma. [This protocol evidently was not used or I would have never had to experience the trauma I did and because of her negligence I suffered an allergic reaction from drugs that were not prescribed to me, causing me welts and bumps on my body, nausea, dizziness, shortness of breath and vomiting. And I'm sure by not following procedures or protocols this could have very well been life threatening, or caused death. As a nurse or professional, she is bound by what is known as the 5 rights -- the right time, the right medicine, the right patient, the right dosage and I believe the right identification, in which in her case she didn't use any of them.] I do not know what long term effect this has caused me. [It caused] me bodily harm and very well could have caused my death. Therefore, I'm filing the grievance to [prevent this from happening] again and [so] that dispensing medications are [sic] done in a professional, competent, conscientious and responsible manner, which was [clearly not] demonstrated [in this case. . . .]

(Doc. No. 12-3)<sup>3</sup>

On December 16 and 19, 2003, Dr. Schmidt reviewed Mallett's medical files and treated him. (See Doc. No. 12-2) Mallett's medication administration records indicate

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<sup>3</sup> Although some portions of the December 16, 2003 grievance are illegible, Mallett submitted a nearly identical grievance on January 5, 2004. Consequently, those portions of the December 16, 2003, grievance which are illegible have been supplemented by excerpts from the January 5, 2004 grievance.

he began receiving Enalapril 5 mg. on December 16, 2003, and Enalapril 10 mg. on December 19, 2003. (See Doc. No. 12-6 and 12-7) The nurse's notes for December 16, 19, 29, and 30, 2003, indicate lab reports were received per a physician's request and Mallett's blood pressure continued to be monitored. (See Doc. No. 12-4) On December 26 and 30, 2003, Dr. Schmidt reviewed Mallett's medical files and treated him. (See Doc. No. 12-2)

On December 30, 2003, Mallett completed and submitted a grievance form. When asked to describe the specific circumstances and details of his grievance, Mallett stated:

On December 12, 2003, I Wendell Mallett filed a written grievance pertaining to me receiving the wrong medication. That grievance should be on file for specifics. To date, I have not received a response, verbal or written, on the matter. The grievance filed is in accordance, including but not limited to 1. An alleged violation of civil, constitutional or statutory rights, 2. An alleged criminal or prohibited act by a member of the jail staff. 3. To resolve an existing problem or condition in the jail which creates unsafe or unsanitary living conditions. It is my position there has [not been] a reasonable attempt to resolve this issue internally and until there is I will be seeking outside assistance in this matter to bring it to closure.

(Doc. No. 12-4) In the grievance findings portion of the form, it was noted that Mallett had submitted a "repeat grievance." (*Id.*)

On December 31, 2003, Dr. Schmidt reviewed Mallett's medical files and treated him. (See Doc. No. 12-2)

On January 5, 2004, Mallett completed and submitted a grievance form. (See Doc. No. 12-4) When asked to describe the specific circumstances and details of his grievance, Mallett essentially restated the facts included in his December 16, 2004,

grievance. In the grievance findings portion of the form, it was noted that Captain Johnson received the grievance and the Sheriff reviewed the grievance. (*Id.*)

On January 6, 2004, Mallett submitted a kite or inmate request form in which he requested to be taken off his special diabetic diet. The nurse's notes for January 6, 2004, indicate Mallett's kite or inmate request form was referred to a physician. (*See Doc. No. 12-4*) On January 7, 2004, Dr. Cutler reviewed Mallett's kite or inmate request form and instructed that Mallett remain on his special diet based on his blood glucose levels. A nurse informed Mallett that the review had occurred. (*Id.*)

On January 8, 2004, Mallett went to medical for a fourteen-day physical exam. (*See Doc. No. 12-4*) On the same day, the Health Services Administrator responded to Mallett's December 16, 2003, grievance. With regard to the grievance findings, the Health Services Administrator wrote:

Spoke with Mr. Mallett in regards to his grievance.  
Explained protocols to him. Assured him that 5 rights would  
be reemphasized with all staff members who pass meds.

(*Doc. No. 12-3*) With regard to the action taken, the Health Services Administrator wrote: "Medication error report filled [out] and put in employee's file." (*Id.*)

On January 14, 2004, Mallett's lab reports were reviewed by a medical doctor. (*See Doc. No. 12-4*)<sup>4</sup> On January 19, 2004, Mallett completed a health services request form in which he stated as follows:

[On] January 08, 2004 I had a physical exam. I also talked to  
you about my grievances as well as the pain in my left side.  
You told me I would be seeing the Dr. about my side pains.

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<sup>4</sup> At least nine samples were collected from Mallett for testing between November 11, 2003, and January 13, 2004, and the laboratory results were reported between November 12, 2003, and January 28, 2004. (*See Doc. Nos. 12-7, 12-8, 12-9*) As each laboratory report was received, it was reviewed by either Dr. Schmidt or Dr. Darron Cutler, D.O. (*Id.*)

To date, I have not, and I am still experiencing pain on my left side as I told you and the other nurses. You also told me that you would call me down to sign the grievance responses January 09, 2004, and to date you haven't.

(Doc. No. 12-3)

On January 21, 2004, Mallett saw Dr. Cutler with complaints of pain in his lower left quadrant. Dr. Cutler's progress notes indicate:

HPI: Lt lower quad. Pain. Present for a month w/hx of left ureteral stone requiring surgical retrieval

POS: NP-Fever, Bowel Changes, Dysuria, Blood in Stool  
P-Lt Pelvis Pain, Lt Testicular Discomfort . . .

Skin: . . . No Rash

Abd: Obese, tender in LL quad, no H/S megally No Masses

GU: Circ, Testicles ↓↓, No hernia, No epididymitis

UA: Normal

A) Lt Flank/Pelvis/Abd pain

P) IVP GR Prep

(Doc. No. 12-2) The nurse's notes for January 21, 2004, indicate a physician saw Mallett and a urine sample was obtained for purposes of a chem strip. (See Doc. No. 12-4) Mallett was told the wrong medication he had taken was not source of the pain he was experiencing. (See Doc. No. 16)

On January 22, 2004, Mallett completed a health services request form on which he requested the following:

[C]opies of the grievances that I've filed, as well as the name of the nurse that gave me the wrong medicine, the company name that contracts the nurse as well as the name of the medicine that was given to me. I have the right to this information, as well as the response to the grievances. After

seeing the doctor yesterday, I have reason to believe that this incident is the direct cause of the pain in my side, in which I in fact reported to you Dec. 13, 2003.

(Doc. No. 12-3)

On January 26, 2004, an appointment was scheduled with radiology for Mallett to undergo an IVP (a contrast X-ray of the kidneys, ureters, and urinary bladder). (See Doc. No. 12-4) On the same day, Mallett acknowledged receipt of the findings and the action taken regarding the grievances he had submitted on December 16 and 30, 2003, and January 5, 2004. (See Doc. Nos. 16 & 12-3)

On January 28, 2004, Mallett went to his scheduled radiology appointment. (See Doc. No. 12-4) The off-site healthcare/emergency room referral form indicates X-rays were taken because Mallett complained of left lower quad pain and he had a history of left ureteral stone surgery. (See Doc. No. 12-9) Later that day, a physician reviewed Mallett's blood pressure readings. (See Doc. No. 12-4)

On January 28 and February 2, 2004, Dr. Cutler saw Mallett and prescribed Ibuprofen 400 mg. for the pain in his side. (See Doc. No. 12-2; Doc. No. 16) Mallett's medication administration records indicate he received Ibuprofen 400 mg. on January 28 and February 2, 2004. (See Doc. No. 12-6) On February 4, 2004, a call was placed to Radiology to request Mallett's IVP results. (See Doc. No. 12-4) On February 5, 2004, Mallett submitted a kite or health services request form in which he stated:

On 01-28-2004, I had x-rays/tests done at Allen Hospital for pains in my left side. To date, I have not heard or seen the Dr. about this pain or the x-ray and I still have pain in my side. I have been given Ibuprofen 2 times daily for a 3 day period and a 2 day period. What was the purpose of even having these tests or X-rays [if nothing is being] done about the pain in my side.

(Doc. No. 12-12)

On February 6, 2004, a nurse referred Mallett to a physician based on his health services request. (See Doc. No. 12-4) On February 6, 2004, Dr. Cutler reviewed Mallett's medical files, informed him that his IVP was negative and prescribed Motrin 800 mg. for his pain. (See Doc. No. 12-2) Mallett's medication administration records indicate he received Ibuprofen 400 mg. on February 6, 2004, and Motrin 800 mg. on February 8, 2004. (See Doc. No. 12-6) With respect to Mallett's IVP with nephrotomography, Wayne Ventling, D.O. from Radiology/Imaging Services at Allen Hospital indicated in his report: "renal cortical 6 mm calculus mid right lateral pole, no evidence of collecting system calculi." (See Doc. No. 12-9)

On February 10, 2004, Mallett submitted a health services request form in which he stated:

On February 6, 2004, I was told my IVP was negative. Therefore, the pain that I'm experiencing in my left side and sometimes in my testicles [is] not related to kidney stones. However, I am still experiencing this pain as I've told you for some time now, since early December when I was given the wrong medication. I feel the pain I've been experiencing is related to that incident. I've had this pain for almost 2 months and if it's not kidney stones, it is most definitely something else, that can't be treated with the Ibuprofen I've been given for two weeks. I'd like to request a 2nd opinion or be seen by a physician to explore what is causing all of my discomfort.

(Doc. No. 12-12) Pursuant to his request, Mallett was referred to a physician. (See *id.*)

On February 11, 2004, Mallett submitted a kite and a nurse referred him to a physician. (See Doc. No. 12-4) On February 18, 2004, Dr. Cutler saw Mallett. His progress notes indicate he did not identify a cause for Mallett's left lower quadrant pain.

He prescribed a course of Flagyl 500 mg. twice daily for ten days. (See Doc. No. 12-2) Mallett's medication administration records indicate he began receiving Flagyl 500 mg. on February 18, 2004. (See Doc. No. 12-6)

On April 14, 2004, Mallett completed and submitted a grievance form in which he stated the following:

On 3-2-2004, I filed [a] grievance with health services being that once again I had been given the wrong meds (see grievance) it has now been more than 40 days and I haven't received a response written or verbal. I've filed the grievance according to the grievance procedure with no avail, as I have been told the Black Hawk County Jail does not have anything to do with Health Services issues. I wish to forward this situation to "Captain Johnson" to receive a response written and or verbal, to resolve an existing problem or condition in the jail which creates unsafe or unsanitary living conditions.

(Doc. No. 12-3) On April 15, 2004, Captain Johnson responded to Mallett's April 14, 2004, grievance, stating:

Mr. Mallett, you did not take the wrong meds on 3/2/04. Your statement is not correct. Additionally, any further correspondence [regarding] a previous matter should go through your attorney due to pending litigation.

(Doc. No. 12-3) On the same day, Mallett acknowledged receipt of the findings and the action taken. (See *id.*)

On April 22, 2004, Johnny Bates, M.D. completed an affidavit in which he stated, in relevant part, as follows:

1. . . . I am presently a duly licensed physician in the State of Alabama and have been licensed to practice medicine in the State of Alabama continuously since 1985. I am presently employed as the Corporate Medical Director of NaphCare, Inc. . . .

2. I have personal knowledge of the facts asserted herein and am competent to testify to those facts. I also have the appropriate knowledge, experience, and training to offer the opinions stated herein. I submit this affidavit in connection with this lawsuit.

3. I have reviewed the complaint filed by Wendell Mallett on January 29, 2004 and have reviewed all of Mr. Mallett's medical records provided by the Black Hawk County Jail.

4. Based on my review of the medical records and based on my education, training and experience, Wendell Mallett's complaints were evaluated in a timely fashion.

5. It appears that Mr. Mallett may have been given the wrong medication, however, receiving the medication he allegedly received in error would not have lead to any of the problems he complains of.

6. Based upon my education, training, experience, and my review of Mr. Mallett's medical records, I can state with a reasonable degree of medical certainty that nothing the defendants did, or did not do, in the course of their care and treatment of Wendell Mallett caused him any injury.

(Doc. No. 12-12)

At some point prior to June 7, 2004, Mallett consulted Jason Ekwena, M.D. for an expert medical opinion regarding Mallett's claim that the defendants were deliberately indifferent to his serious medical need. In a letter dated June 7, 2004, Dr. Ekwena stated, in relevant part, as follows:

#### BACKGROUND

Mr. Mallett, an inmate at the Black Hawk County Jail, alleges that he was given some wrong medication at about 9 to 10 am on 12-11-03. According to his complaint, he thought he was negligently given Risperdal which was not officially prescribed for him. About twenty minutes later, he complained of dermatological eruption in the form of

erythema, hives and pruritus. He also complained of nausea, vomiting, dyspnea, and dizziness. This incident was briefly reported in the nurse's notes of 12-11-03 at 9:30 am.

Mr. Mallett, according to his own written report, was subsequently examined and treated for the above enumerated symptoms. As reflected in his medical records on 12-11-03, he was treated with Benadryl, Zantac and witch hazel.

Since this incident, he has complained of pain in his side, drowsiness and back pain which he attributes to the above incident.

#### A. MR. MALLETT ALLEGES

1) That he has residual symptoms of side pain, drowsiness and back ache as sequela from taking the wrong medication.

2) That Black Hawk County Jail and its staff were deliberately indifferent and negligent by giving him the wrong medication.

#### B. EVIDENCE RELIED ON

My opinions in this case are generated from:

1) Mr. Mallett's numerous complaints

2) Mr. Mallett's medical records provided by the Black Hawk County Jail

3) Mr. Mallett's hand written account of the incident

#### C. ISSUES PRESENTED, ALLEGATIONS

1) That on 12-11-03 Mr. Mallett was given a wrong medication and that this constituted deliberate indifference. My opinion is that he was probably given the wrong medication which could have triggered his mild allergic reaction. This reaction as extrapolated from his own account and his medical records was promptly and adequately managed. Although there is a pertinent issue of possible negligence if the wrong medication was given, I do not think it could be characterized as deliberate indifference. As soon

as the reaction was reported, he promptly saw a physician, Dr. Schmidt, and appropriate actions were taken.

2) That he has persisting symptoms. After reviewing his records, it is my opinion that his subsequent complaint of aches, pain and drowsiness are unrelated to the medication he allegedly received. This would not be a typical after effect from a single dose of medication. It is my medical opinion, that to a reasonable degree of medical certainty, it is unlikely that there is any pathophysiologic mechanism to engender the sequela he attributes to this incident.

(Doc. No. 26)

#### **IV. ANALYSIS**

##### **A. Mallett's Eighth Amendment Claims**

###### **1. Applicable Law**

The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const., amend. VIII. Accordingly, the treatment a prisoner receives in prison and the conditions of his confinement are subject to scrutiny under the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 831-32, 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811 (1994); *Helling v. McKinney*, 509 U.S. 25, 31-32, 113 S. Ct. 2475, 2480, 125 L. Ed. 2d 22 (1993). In its prohibition of cruel and unusual punishments, the Eighth Amendment places a duty on jail and prison officials to provide inmates with necessary medical attention. *Wilson v. Seiter*, 501 U.S. 294, 303, 111 S. Ct. 2321, 2326-27, 115 L. Ed. 2d 271 (1991); *Weaver v. Clark*, 45 F.3d 1253, 1255 (8th Cir. 1995). In this context, a prison official violates the Eighth Amendment by being deliberately indifferent either to a prisoner’s existing serious medical needs or to conditions posing a substantial risk of serious future harm. *Weaver*, 45 F.3d at 1255 (comparing *Estelle v.*

*Gamble*, 429 U.S. 97, 104-105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976) (existing medical needs) with *Helling*, 509 U.S. at 33-34, 113 S. Ct. at 2480-81 (risk of future harm to health)). An Eighth Amendment violation occurs only when two requirements are met: (1) “the deprivation alleged must be, objectively, ‘sufficiently serious’”; and (2) the “prison official must be, as a subjective state of mind, deliberately indifferent to the prisoner’s health or safety.” *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995) (citations omitted). See also *Helling*, 509 U.S. at 32, 113 S. Ct. at 2480; *Estelle*, 429 U.S. at 106, 97 S. Ct. at 292; *Jolly v. Knudson*, 205 F.3d 1094, 1096 (8th Cir. 2000); *Williams v. Delo*, 49 F.3d 442, 445-47 (8th Cir. 1995). In the context of a prisoner’s claim of inadequate medical care, society does not expect that prisoners will have unqualified access to health care. *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156 (1992). Consequently, “deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’” *Id.* (citing *Estelle*, 429 U.S. at 103-04, 97 S. Ct. at 290). See also *Wilson*, 501 U.S. at 298, 111 S. Ct. at 2324.

To constitute an objectively serious medical need or a deprivation of that need, the need or the deprivation either must be supported by medical evidence or must be so obvious that a layperson would recognize the need for a doctor’s attention. *Aswegan v. Henry*, 49 F.3d 461, 464 (8th Cir. 1995); *Johnson v. Busby*, 953 F.2d 349, 351 (8th Cir. 1991). See, e.g., *Beyerbach*, 49 F.3d at 1326-27 (insufficient evidence of objective seriousness when there is no medical evidence that delay in treatment produced any harm); *Kayser v. Caspari*, 16 F.3d 280, 281 (8th Cir. 1994) (insufficient evidence of serious medical need when the medical need claimed is based on bare assertion of inmate). The objective portion of the deliberate indifference standard requires a showing of verifiable medical evidence that the defendants ignored an acute or escalating situation,

or that delays adversely affected the prognosis given the type of medical condition present in the case. See *Dulany v. Carnahan*, 132 F.3d 1234, 1243 (8th Cir. 1997) (citing *Crowley v. Hedgepeth*, 109 F.3d 500, 502 (8th Cir. 1997), and *Beyerbach*, 49 F.3d at 1326). See also *O'Neil v. White*, 221 F.3d 1343, 1343 (8th Cir. 2000) (citing *Crowley*, 109 F.3d at 502).

To meet the second requirement, the “subjective” component of an Eighth Amendment claim, a prison or jail official must have a “sufficiently culpable state of mind.” *Wilson*, 501 U.S. at 297-303, 111 S. Ct. at 2323-26; *Hudson*, 503 U.S. at 8, 112 S. Ct. at 999. In a medical needs claim, that state of mind is one of “deliberate indifference” to inmate health. *Farmer*, 511 U.S. at 838-39, 114 S. Ct. at 1979-80; *Helling*, 509 U.S. at 32, 113 S. Ct. at 2480; *Wilson*, 501 U.S. at 302-303, 111 S. Ct. at 2326; *Estelle*, 429 U.S. at 106, 97 S. Ct. at 292. Regarding the meaning of the term “deliberate indifference,” the United States Supreme Court has explained:

[A] prison official cannot be held liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. . . . The Eighth Amendment does not outlaw cruel and unusual “conditions”; it outlaws cruel and unusual “punishments.”

*Farmer*, 511 U.S. at 837, 114 S. Ct. at 1979. Thus, to establish the second requirement, “deliberate indifference,” a plaintiff must assert facts showing the defendant actually knew of and disregarded a substantial risk of serious harm to the plaintiff’s health or safety. *Id.*, 511 U.S. at 840-47, 114 S. Ct. at 1980-84; *Helling*, 509 U.S. at 32, 113 S. Ct. at 2480.

Medical treatment that displays “deliberate indifference” violates the Eighth Amendment “whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.” *Estelle*, 429 U.S. at 104-05, 97 S. Ct. at 291. *See also Foulks v. Cole County*, 991 F.2d 454, 456-57 (8th Cir. 1993). Negligent acts by prison officials, however, are not actionable under 42 U.S.C. § 1983. *See Davidson v. Cannon*, 474 U.S. 344, 347-48, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677 (1986); *Daniels v. Williams*, 474 U.S. 327, 333-34, 106 S. Ct. 662, 666, 88 L. Ed. 2d 662 (1986); *Estelle*, 429 U.S. at 106, 97 S. Ct. at 292; *Taylor v. Bowers*, 966 F.2d 417, 421 (8th Cir. 1992). Further, an inmate’s disagreement or displeasure with his course of medical treatment is not actionable under 42 U.S.C. § 1983. *Dulany*, 132 F.3d at 1239-44 (8th Cir. 1997); *Bellecourt v. United States*, 994 F.2d 427, 431 (8th Cir. 1993); *Davis v. Hall*, 992 F.2d 151, 153 (8th Cir. 1993) (per curiam); *Warren v. Fanning*, 950 F.2d 1370, 1373 (8th Cir. 1991); *Smith v. Marcantonio*, 910 F.2d 500, 502 (8th Cir. 1990); *Givens v. Jones*, 900 F.2d 1229, 1233 (8th Cir. 1990).

## **2. Nurse Terry**

Mallett complains Nurse Terry was negligent in distributing the wrong medication to him on December 11, 2003, and he disapproves of the subsequent medical treatment he received. These complaints are insufficient because negligence is not actionable under 42 U.S.C. § 1983. *See Davidson*, 474 U.S. at 347-48, 106 S. Ct. at 670; *Daniels*, 474 U.S. at 333-34, 106 S. Ct. at 666; *Estelle*, 429 U.S. at 106, 97 S. Ct. at 292; *Taylor*, 966 F.2d at 421. Further, mere dissatisfaction with the course of his medical treatment does not give rise to a viable Eighth Amendment claim. *See Jolly*, 205 F.3d at 1096

("[M]ere disagreement with treatment decisions does not rise to the level of a constitutional violation.'").

In addition, Nurse Terry could not be held liable for being deliberately indifferent to Mallett's serious medical needs for any of the medical treatment Mallett received after December 11, 2003, because such treatment was prescribed by either Dr. Schmidt or Dr. Cutler. *Cf. Meloy v. Bachmeier*, 302 F.3d 845, 849 (8th Cir. 2002) ("Prison officials cannot substitute their judgment for a medical professional's prescription.") (citing *Zentmyer v. Kendall County*, 220 F.3d 805, 812 (7th Cir. 2000)). Stated differently, although he complains of receiving ineffective medical treatment after December 11, 2003, Mallett does not allege Nurse Terry treated him.

In sum, after drawing all reasonable inferences in favor of Mallett, the court concludes the evidence fails, as a matter of law, to demonstrate the type of deliberate indifference necessary to establish a violation of the Eighth Amendment. Because the evidence fails to establish deliberate indifference by Nurse Terry, it is appropriate to grant her motion for summary judgment.

### **3. *NaphCare, Inc.***

Liability under 42 U.S.C. § 1983 may not be grounded upon a *respondeat superior* theory. *Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 1203, 103 L. Ed. 2d 412 (1989); *Oklahoma City v. Tuttle*, 471 U.S. 808, 810, 105 S. Ct. 2427, 2429, 85 L. Ed. 2d 791 (1985); *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 691-95, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978); *Liebe v. Norton*, 157 F.3d 574, 579 (8th Cir. 1998); *White v. Holmes*, 21 F.3d 277, 280 (8th Cir. 1994); *Choate v. Lockhart*, 7 F.3d 1370, 1376 (8th Cir. 1993); *Bolin v. Black*, 875 F.2d 1343, 1347 (8th Cir. 1989). That

is, one cannot be held liable for another's act simply because he or she has supervisory authority over one who deprived a plaintiff of a constitutional right. *Id.*

In his Amended Complaint, and in the memorandum supporting his resistance to the motion for summary judgment, Mallett, although he contends otherwise, asserts a supervisor theory of liability NaphCare because it provided health services at the Black Hawk County Jail. Such assertion, no matter how it is described, fails because Mallett puts forth no evidence which suggests a violation occurred as a result of an unconstitutional custom, practice, or policy. *See Clay v. Conlee*, 815 F.2d 1164, 1171 (8th Cir. 1987) (“[E]ntity’s official ‘policy or custom’ must have ‘caused the constitutional violation; there must be an ‘affirmative link’ or a ‘causal connection’ between the policy and the particular constitutional violation alleged.”) (citing *City of Oklahoma City*, 471 U.S. at 823-24, 105 S. Ct. at 2436). Even if a claim based on *respondeat superior* were viable, because the court has found that Nurse Terry did not violate Mallett’s constitutional rights, no liability could attach to NaphCare as a result of Nurse Terry’s actions. *Jolly*, 205 F.3d at 1098. Because Mallett’s claim against NaphCare is based on an indisputably meritless legal theory, it is appropriate to grant NaphCare’s motion for summary judgment.

### ***B. Other Grounds or Arguments Regarding Summary Judgment***

Having concluded Mallett’s Eighth Amendment claims fail as a matter of law, the court does not need to address Nurse Terry’s assertions that the Eleventh Amendment bars the instant action,<sup>5</sup> or that she is entitled to qualified immunity. Similarly, the court declines to review Mallett’s assertion that his Eighth Amendment claim is not barred by

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<sup>5</sup> The court notes the Amended Complaint, which was filed after the defendants filed their motion for summary judgment, appears to overcome Nurse Terry’s Eleventh Amendment argument.

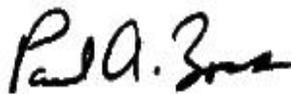
42 U.S.C. § 1997e(e); that is, his argument that his action for mental and emotional injuries is permissible because he suffered an actual physical injury.

**V. CONCLUSION**

For the foregoing reasons, **IT IS RECOMMENDED**, unless any party files objections<sup>6</sup> to the report and recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b) within ten (10) days of the service of a copy of this report and recommendation, that the defendants' motion for summary judgment be granted, and judgment be entered in favor of the defendants and against Mallett.

**IT IS SO ORDERED.**

**DATED** this 9th day of February, 2005.



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PAUL A. ZOSS  
MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT

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<sup>6</sup> The parties must specify the parts of the report and recommendation to which objections are made. In addition, the parties must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356, 357-58 (8th Cir. 1990).