

Not To Be Published:

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

WENDELL MALLET, T

Plaintiff,

vs.

NAPHCARE, INC., Birmingham,
Alabama, and NURSE "TERRY" at
Black Hawk County Jail,

Defendants.

No. C04-2009-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING
MAGISTRATE'S REPORT AND
RECOMMENDATION
CONCERNING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

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I. INTRODUCTION AND BACKGROUND

A. Pertinent Factual Background¹

Plaintiff Wendell Mallett (“Mallett”) was incarcerated at Black Hawk County Jail for the second time on approximately November 3, 2003. At that time, Mallett signed a form consenting to medical treatment by defendant NaphCare, Inc. (“NaphCare”). Prior to his incarceration, Mallett was diagnosed with high blood pressure and type II diabetes. Between November 4, 2003, and February 13, 2004, health care personnel at Black Hawk County Jail checked Mallett’s blood pressure on at least 35 days. The submitted medical records reveal that Kelly Schmidt, M.D., placed Mallett on high blood pressure medication on November 7, 2003, and reassessed his medical needs in this regard on November 13, and 14, and December 4, and 8, 2003. Additionally, John Duffy, M.D., placed Mallett on a special diet for diabetics in December 2003, following blood glucose testing on December 6, 7, and 8, 2003.

On the morning of December 11, 2003, Mallett went to the nurse’s office at Black Hawk County Jail to take his medication. He told Nurse “Terry”² his name, and she gave

¹Magistrate Judge Paul A. Zoss’s Report and Recommendation on Motion for Summary Judgment (“Report and Recommendation”), Doc. No. 35, gave a thorough and complete account of the material facts in the record. Report and Recommendation at 6-20. Here, the court adopts the material facts found by Judge Zoss and recaps only those basic facts necessary to form an understanding of the issues presented in this case.

²Nurse “Terry”’s last name is unknown at this time, therefore the court will refer
(continued...)

him what he believed to be his prescribed medication—but what was, in fact, another inmate’s medication. Mallett took the medication Nurse Terry gave him. A few minutes later Nurse Terry realized her error, informed Mallett of the error, and asked him if he wanted to take his prescribed medication. Mallett declined to take his prescribed medication based on his fear of adverse chemical interaction with the incorrect prescription drug he had already taken. Nurse Terry told Mallett she would look into whether taking his prescribed medication, at this point, would cause an adverse reaction. Approximately twenty minutes after taking the wrong medication, Mallett developed a rash over most of his body and began to feel dizzy and nauseous. Mallett reported these symptoms to a nearby officer, who escorted him to the nurse’s office—where Mallett was cared for by a nurse other than Nurse Terry. Mallett was first treated by rubbing witch hazel over his body. Dr. Schmidt saw Mallett and prescribed him Benadryl and Zantac. Mallett’s feelings of nausea continued throughout the day, and he vomited that afternoon.

On December 12, 2003, Mallett returned to the nurse’s office, lodging the following complaints according to the nurse’s notes:

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

Defendants’ Appendix, Doc. No. 12, Exhibit part 3 of 11. Consistent with the nurse’s notes, Dr. Schmidt ordered health care personnel to obtain a urine sample for analysis. The results of this testing were placed in Mallett’s chart.

On December 13, 2003, Mallett completed an inmate request asking for a copy of

²(...continued)

to her simply as Nurse Terry, without quotations, for the remainder of the opinion.

the incident report detailing his receipt of the incorrect medication on December 11, 2003, and the name of the nurse who gave him the incorrect medication. On December 16, 2003, Mallett completed and submitted a grievance form in which he specifically described the circumstances and details surrounding his receipt of the incorrect medication on December 11, 2003, his adverse reaction and his follow-up medical care. *See Report and Recommendation at 8-11.*

Dr. Schmidt reviewed Mallett's medical files on December 16, 2003, and started him on Enalapril. 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. Dr. Schmidt again reviewed Mallett's medical files on December 26, 30 and 31, 2003, and treated him.

Mallett completed and submitted a grievance form on December 30, 2003, indicating that he had not yet received a response to his previous request for the incident report concerning his receipt of the wrong medication on December 11, 2003. On January 5, 2004, Mallett submitted another grievance form, essentially restating his December 16, 2003, grievance.

On January 6, 2004, Mallett sent an inmate request in the form of a "kite"³ to the medical staff at the Black Hawk County Jail requesting to be taken off his special diabetic diet. This kite was referred to a physician. The physician reviewing the request instructed that Mallett remain on his special diet due to his blood glucose levels. A nurse informed Mallett that a physician had reviewed his request, and the outcome of that review.

On January 8, 2004, the Health Services Administrator responded to Mallett's

³A "kite," in a prison setting generally and as it is used here, refers to a communication written on a scrap of paper or other material, which is passed through one or more inmates to its intended destination.

December 16, 2003, grievance, as follows:

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

Action Taken: Medication error report filled and put in employee file.

Defendants' Appendix, Exh. Part 2 of 11.

On January 19, 2004, Mallett submitted a health services request form in which he, in part, indicated that the pain in the left side of his groin continued to persist. Mallett was seen by Dr. D. Cutler, D.O., on January 21, 2004, for complaints of pain in his lower left quadrant. The nurse's notes correlating to that visit indicate that a urine sample was obtained for purposes of a chem strip, and that Mallett was told that no causal relationship existed between his receipt of the wrong medication on December 11, 2003, and his groin pain.

On January 22, 2004, Mallett completed another health services request form requesting copies of the grievances he had filed, the name of the nurse that gave him the incorrect medication on December 11, 2003, and the name of the company with which the jail contracted to provide nurses at the jail. In this request, Mallett also stated: "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." Defendants' Appendix, Exh. Part 2 of 11.

On January 26, 2003, Mallett acknowledged receipt of the findings and action taken regarding the grievances he had submitted on December 16 and 30, 2003, and January 5, 2004.

On January 28, 2004, Mallett went to an off-site health care facility for a contrast

X-ray of the kidneys, ureters, and urinary bladder. The referral form indicated that the X-ray was necessitated by Mallett's complaints of left lower quadrant pain and history of left urethral stone surgery. Mallett's blood pressure was also reviewed that day.

Mallett saw Dr. Cutler on January 28 and February 2, 2004, and was prescribed ibuprofen for the pain in this side—which medical administration records indicate Mallett received. On February 5, 2004, Mallett submitted a health service request in the form of a kite, stating that he did not yet have the results from his x-rays and had not seen a doctor about the X-ray or the continued pain in his side despite taking ibuprofen. In response to this kite, Dr. Cutler reviewed Mallett's medical records, informed Mallett that his x-rays were negative, and prescribed him Motrin—a brand of ibuprofen—for his pain.

On February 10, 2004, Mallett submitted another health services request form stating that he was still experiencing pain and that he believed this pain was related to the incident on December 11, 2003, in which he was given the wrong medication. Mallett further requested to be seen by another physician to determine what was causing his pain. Mallett submitted a kite to health services on February 11, 2004, relating the same general sentiment. On February 18, 2004, Dr. Cutler saw Mallett. Dr. Cutler's progress notes indicate that he could not identify a cause of Mallett's lower left quadrant pain and prescribed him Flagyl twice daily for ten days.

On April 14, 2004, Mallett completed and submitted a grievance form which stated:

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 a grievance according to procedure with no avail, as I have been told by 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 conditions in the jail which creates unsafe or unsanitary living conditions.

Defendants' Appendix, Exh. Part 2 of 11. Captain Johnson responded to the grievance on April 15, 2004:

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.

Id. Mallett acknowledged receipt of the findings and the action taken on April 15, 2004.

B. Procedural Background

On March 25, 2004, Mallett filed a complaint under 42 U.S.C. § 1983 against Black Hawk County Jail, NaphCare and Nurse Terry to redress an alleged deprivation of his rights under the Eighth Amendment. (Doc. No. 6). On April 26, 2004, NaphCare and Nurse Terry filed a combined motion for summary judgment in which each asserted separate grounds entitling them to summary judgment. (Doc. No. 12). Nurse Terry argued: (1) Mallett failed to state an Eighth Amendment claim for which relief could be granted because there was no evidence that she purposefully gave him the wrong medication or intentionally failed to respond after realizing her mistake; (2) the Eleventh Amendment bars suits against state officials, such as herself, acting in their official capacities; and (3) as there was no violation of a clearly established constitutional right, she is entitled to qualified immunity. NaphCare asserted that Mallett failed to state a cognizable Eighth Amendment claim because he did not allege a violation of his constitutional rights through the adoption of an official policy, practice, or custom, and further that Mallett cannot rely on a *respondeat superior* theory to support his Eighth Amendment claim. *See id.* On May 12, 2004, Mallett filed an amended complaint. (Doc.

No. 16). Black Hawk County Jail filed a motion for summary judgment on May 26, 2004. (Doc. No. 18). On June 11, 2005, Mallett filed both a resistance to NaphCare and Nurse Terry's motion for summary judgment (Doc. No. 26), and a Motion to Dismiss Black Hawk County Jail as a defendant. (Doc. No. 27). Mallett's motion to dismiss Black Hawk County Jail was granted and Black Hawk County Jail's motion for summary judgment was denied without prejudice. (Doc. Nos. 31 & 32).

NaphCare and Nurse Terry's motion for summary judgment was referred to United States Magistrate Judge Paul A. Zoss pursuant to 28 U.S.C. § 636(b)(1)(B). On February 9, 2005, Judge Zoss filed his Report and Recommendation on Motion for Summary Judgment ("Report and Recommendation"), which recommended that the motion for summary judgment be granted. (Doc. No. 35). On February 15, 2005, Mallett filed his Objections to the Report and Recommendation for Summary Judgment ("Objections"). (Doc. No. 31). The matter is now fully submitted and the court will now undertake the necessary review of Judge Zoss's Report and Recommendation.

II. ANALYSIS

A. Standard Of Review

Pursuant to statute, this court's standard of review for a magistrate judge's Report and Recommendation is as follows:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's Report and Recommendation on dispositive motions and

prisoner petitions, where objections are made, as follows:

The district judge to whom the case is assigned shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Goose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1), *cert. denied*, 519 U.S. 860 (1996)); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). Because objections have been filed in this case, the court must conduct a *de novo* review. With these standards in mind, the court turns first to a brief consideration of the summary judgment standards, and then to Judge Zoss's Report and Recommendation and Mallett's objections thereto, followed by an analysis of those objections.

B. Summary Judgment Standards

Summary judgment is appropriate when the court after viewing all of the facts, and inferences drawn from those facts, in the light most favorable to the non-moving party, and giving that party the benefit of all reasonable inferences that can be drawn from the facts, concludes there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *See Dropinski v. Douglas County*,

Neb., 298 F.3d 704, 706 (8th Cir. 2002); *P.H. v. Sch. Dist. of Kansas City, Mo.*, 265 F.3d 653, 658 (8th Cir. 2001) (nonmoving party, “is entitled to all reasonable inferences—those that can be drawn from the evidence without resort to speculation.”) (quoting *Sprenger v. Federal Home Loan Bank of Des Moines*, 253 F.3d 1106, 1110 (8th Cir. 2001) (internal quotations omitted); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The court’s function at the summary judgment stage of the proceedings is not to “to weigh evidence in the summary judgment record to determine the truth of any factual issue; we merely determine whether there is evidence creating a genuine issue for trial.” *Bell v. Conopco, Inc.*, 186 F.3d 1099, 1101 (8th Cir. 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

According to Rule 56(e), once the moving party files a properly supported motion for summary judgment, the burden shifts to the nonmoving party to point out genuine issues of material fact that would preclude judgment as a matter of law for the moving party. See FED. R. CIV. P. 56(e); *Bennett v. Dr Pepper/Seven Umbrella Policy, Inc.*, 295 F.3d 805, 808-09 (8th Cir. 2002); *Naucke v. City of Park Hills*, 284 F.3d 923, 927 (8th Cir. 2002) (explaining, “a nonmovant must present more than a scintilla of evidence and must advance specific facts to create a genuine issue of material fact for trial.”) (citing *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997), quoting *Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)); *Bailey v. U.S. Postal Serv.*, 208 F.3d 652, 654 (8th Cir. 2000) (nonmoving party “may not rest upon ‘mere allegations or denials’ contained in its pleadings, but must, by sworn affidavits and other evidence, ‘set forth specific facts showing that there is a genuine issue for trial.’”) (quoting FED. R. CIV. P. 56(e)); *Mathews v. Trilogy Communications, Inc.*, 143 F.3d 1160, 1164 (8th Cir. 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91

L. Ed. 2d 265 (1986). Moreover, the party opposing summary judgment “must make a sufficient showing on every essential element of its claim on which it bears the burden of proof.” *P.H.*, 265 F.3d at 658 (quoting *Buettner v. Arch Coal Sales Co.*, 216 F.3d 707, 718 (8th Cir. 2000), *cert. denied*, 531 U.S. 1077, 121 S. Ct. 773, 148 L. Ed. 2d 672 (2001)). The consequence of a nonmoving party’s failure of proof concerning an essential element of the case “renders all other facts immaterial,” and in such a case, no genuine issue of fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The court looks to the substantive law to determine if an element is ‘essential’ to the underlying case. *Id.* Therefore, the movant is entitled to summary judgment where the factual dispute does not affect the outcome of the case under the governing law. See *Jackson v. Arkansas Dept. of Educ., Vocational & Tech. Educ. Div.*, 272 F.3d 1020, 1025 (8th Cir. 2001), *cert. denied*, 536 U.S. 908, 122 S. Ct. 2366, 153 L. Ed. 2d 186 (2002) (citing *Anderson*, 477 U.S. at 248, 106 S. Ct. 2505. Furthermore, “where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate.” *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1315 (8th Cir. 1996) (quoting *Crain v. Board of Police Comm’rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990)).

C. Report And Recommendation

After reviewing the law, in general, governing Eighth Amendment claims, Judge Zoss concluded that NaphCare and Nurse Terry’s motion for summary judgment should be granted. Specifically, regarding Nurse Terry, Judge Zoss noted that Mallett’s claims that she was *negligent* in giving him the wrong medication are claims that are not actionable under § 1983, as § 1983 requires a heightened showing of deliberate indifference. Judge Zoss also noted that mere dissatisfaction with the course of medical

treatment does not give rise to an Eighth Amendment claim. Additionally, Judge Zoss found that there were no allegations that Nurse Terry cared for Mallett in any way following the December 11, 2003, distribution of the incorrect medication, and therefore could not be liable for being deliberately indifferent to Mallett's needs for treatment following the December 11, 2003, incident. In sum, Judge Zoss found that even in the light most favorable to Mallett, the evidence failed as a matter of law to demonstrate the deliberate indifference required to establish a violation of the Eighth Amendment.

Turning to NaphCare, Judge Zoss first noted that liability under § 1983 could not be grounded in a *respondeat superior* theory. Judge Zoss found that though Mallett argued to the contrary, he asserted a supervisor theory of liability against NaphCare due to it providing health services at the Black Hawk County Jail. As there was no evidence in the record showing a violation occurred as the result of an unconstitutional custom, practice or policy, Judge Zoss concluded that Mallett's Eighth Amendment claim against NaphCare failed. Further, setting this infirmity aside, Judge Zoss noted that as Nurse Terry did not violate Mallett's constitutional rights, no liability could attach to NaphCare as a result of Nurse Terry's actions.

Having concluded that Mallett's Eighth Amendment claims failed as a matter of law, Judge Zoss did not perceive it necessary to address the other grounds asserted by NaphCare and Nurse Terry as entitling them to summary judgment.

D. Mallett's Objections

In his objections, Mallett reasserts his contention that the defendants acted with deliberate indifference to his serious medical needs by failing to instruct, supervise or train their employees in a manner that insured the proper disbursement of medication. Mallett objects to Judge Zoss's conclusion that his claims do not meet the requirements of

establishing an Eighth Amendment violation—which are (1) that the deprivation, viewed objectively, is sufficiently serious, and (2) that the prison official, subjectively, was deliberately indifferent to the prisoner’s health and safety. Objections at 1 (citing Report and Recommendation at 20-21).

Turning to the first requirement, Mallett asserts that his condition was so obvious that a lay person would have recognized the need for medical attention, and that he was reliant upon prison officials to provide him adequate medical care. Mallett also relies on *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), for the principle that failure of prison officials to provide medical care, which in turn results in pain and suffering that serves no penological purpose, gives rise to an Eighth Amendment claim—which is exactly what Mallett claimed happened to him when he developed a severe allergic reaction to being given the incorrect medication. Further, Mallett acknowledges that while 42 U.S.C. § 1997e(e) bars an inmate’s claim when the injury is de minimus in nature, injuries such as bruises, cuts, scrapes, swelling, loosened teeth, and cracked dental plates have been held not to be de minimus. In this light, Mallett claims that his injuries are clearly not de minimus and thus fall outside of § 1997e(e)’s bar.

Addressing the second requirement of an Eighth Amendment claim, Mallett claims that by giving him the wrong medication the defendants disregarded a substantial risk of serious harm to his health and safety. Mallett further contends that the defendants, having taken responsibility of the health and safety of all prisoners at Black Hawk County Jail, should have perceived this obvious risk.

E. Analysis

1. Eighth Amendment claims

The Eighth Amendment places a duty on prison officials to provide humane conditions of confinement. *Weaver v. Clarke*, 45 F.3d 1253 (8th Cir. 1995) (citing *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811 (1994)). Adequate medical attention is one of the conditions of confinement to which a prisoner is subjected, and 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.” *Id.* (comparing *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976) (existing medical needs), with *Helling v. McKinney*, 509 U.S. 25, 113 S. Ct. 2475, 2480, 125 L. Ed. 2d 22 (1993) (risk of future harm to health)); see *Bender v. Regier*, 385 F.3d 1133, 1137 (8th Cir. 2004) (noting that “[p]rison doctors and guards violate the Eighth Amendment when they act with ‘deliberate indifference to [an inmate’s] serious medical needs.’”) (quoting *Estelle*, 429 U.S. at 104). The Eighth Circuit Court of Appeals has stated:

Our court has interpreted [the deliberate indifference] standard as including both an objective and a subjective component: “The [plaintiff] must demonstrate (1) that [he] suffered [from] objectively serious medical needs and (2) that the prison officials actual knew of but deliberately disregarded those needs.” *Dulany v. Carnahan*, 132 F.3d 1234, 1239 (8th Cir. 1997). “The prisoner must show more than negligence, more than even gross negligence, and mere disagreement with treatment decisions does not rise to the level of a constitutional violation.” *Estate of Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir. 1995).

Jolly v. Knudsen, 205 F.3d 1094, 1096 (8th Cir. 2000); see *Hott v. Hennepin County, Minnesota*, 260 F.3d 901, 905 (8th Cir. 2001) (citing elements of an Eighth Amendment

claim); *Moore v. Duffy*, 255 F.3d 543, 545 (8th Cir. 2001) (discussing elements and noting that deliberate indifference required “something more than negligence but less than actual intent to harm; it requires proof of a reckless disregard of the known risk”) (quotation and citation omitted).

2. *Nurse Terry*

As Judge Zoss noted in his Report and Recommendation, aside from the December 11, 2003, incident in dispensing the wrong medication to Mallett, Nurse Terry did not thereafter care for or provide any health services to Mallett. Therefore, in analyzing a claim against Nurse Terry, the court is looking only at her act in dispensing the wrong medication to Mallett on December 11, 2003—which ultimately resulted in Mallett experiencing an allergic reaction which included nausea, a rash and vomiting, and according to Mallett, severe side and back pain. Mallett additionally alleges that the side pain continued until January 2004. Mallett at no point alleges that Nurse Terry *knew* that she was giving him the incorrect medication, let alone that giving him this medication would result in Mallett experiencing an allergic reaction. At the *very most*, Mallett’s allegations raise claims of gross negligence on the part of Nurse Terry in distributing the wrong medication to Mallett on December 11, 2003—but, even gross negligence does not rise to the level of deliberate indifference necessary to sustain an Eighth Amendment claim. *See, e.g., Estate of Rosenberg*, 56 F.3d at 37. Other courts construing similar factual situations have reached this same conclusion. *See Williams v. Snyder*, 2002 WL 32332192 at *2 (D. Del. Sept. 30, 2002) (concluding that “the act of giving the wrong medication does not rise to the level of indifference” nor does knowledge that nurse was giving wrong medications “constitute deliberate indifference to Plaintiff’s serious medical condition sufficient to sustain a constitutional violation.”); *Crowley v. Meyers*, 2002 WL 31180743 at *2 (N.D. Ill. Sept. 30, 2002) (holding that plaintiff’s allegation that nurse

“administered another inmate’s medication to him on one occasion does not meet the level of deliberate indifference” where there was no allegation that nurse intentionally gave inmate the wrong medication. Fact that plaintiff questioned the medication, and was assured by nurse that it was his though it later turned out to be another inmate’s, “at most amounts to negligence.”); *Callaway v. Smith County, et al.*, 991 F. Supp. 801, 809 (E.D. Tex. 1998) (finding that inmate’s allegations that he was mistakenly given wrong dosage of prescribed medication by jail medical personnel on a number of occasions, but admitted that this was done ‘mistakenly,’ amounted at most to negligence, but not deliberate indifference); *Herndon v. Whitworth*, 924 F. Supp. 1171, 1173-74 (N.D. Ga. 1995) (viewing facts in light most favorable to the plaintiff, court found summary judgment on Eighth Amendment claim appropriate in case where plaintiff alleged he was given the wrong medication for three to four days resulting in him suffering several epileptic episodes and that on one occasion he was given a generic substitute for his prescribed medication that was less effective and resulted in him sustaining a seizure); *but see Lair v. Oglesby*, 859 F.2d 605, 606-07 (8th Cir. 1988) (finding genuine issue of material fact as to deliberate indifference had been raised where prison psychiatrist, after being informed of plaintiff’s allergic reaction to particular medication, continued prescribing plaintiff that medication). In this instance, this court agrees with the United States District Court for the District of Delaware in its conclusion in *Williams v. Snyder*, 2002 WL 32332192 (D. Del. Sept. 30, 2002) that “[a] mistake in administering medication is more appropriately recoverable in negligence rather than a § 1983 action.” *Id.* at *2. Even viewing the facts in the light most favorable to Mallett, the record does not establish deliberate indifference on the part of Nurse Terry. Therefore summary judgment as to Mallett’s claims against Nurse Terry is appropriate.

3. *NaphCare*

It is well established that liability under 42 U.S.C. § 1983 cannot be grounded upon a *respondeat superior* theory of recovery. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989); *Choate v. Lockhart*, 7 F.3d 1370, 1376 (8th Cir. 1993); *Oldham v. Chandler-Halford*, 877 F. Supp. 1340, 1356 (N.D. Iowa 1995). The Eighth Circuit has discussed the ways in which a supervisor *can* incur liability under § 1983 as follows:

A supervisor is liable “for an Eighth Amendment violation when the supervisor is personally involved in the violation or when the supervisor’s corrective inaction constitutes deliberate indifference toward the violation.” *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1995) (footnote omitted). “The supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye [to it].” *Id.* (internal quotation marks omitted). Likewise, other courts have stated supervisory officials are liable under § 1983 only if they fail promptly to provide an inmate with needed medical care, they deliberately interfere with the prison doctors’ performance, or they tacitly authorize or are indifferent to the prison doctors’ constitutional violations. *E.g.*, *Miltier v. Beorn*, 896 F.2d 848, 854 (4th Cir. 1990).

Meloy v. Bachmeier, 302 F.3d 845, 849 (8th Cir. 2002).

Mallett does not dispute Judge Zoss’s finding that his claims against NaphCare are grounded in supervisor liability on the basis that NaphCare was responsible for providing health services at Black Hawk County Jail. In this instance, there is no allegation that NaphCare was personally involved in any constitutional violation. *See Choate*, 7 F.3d at 1376. Likewise, there is no indication that NaphCare’s “corrective inaction amounts to ‘deliberate indifference’ to or ‘tacit authorization’ of the violative practices.” *Id.* (quoting *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989), in turn quoting *Williams v. Willits*,

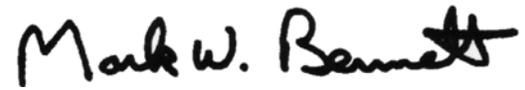
853 F.2d 586, 588 (8th Cir. 1988)). Even setting aside the fact that having found that Nurse Terry did not violate Mallett's constitutional rights, no liability for Nurse Terry's actions can attach to NaphCare, *see Jolly*, 205 F.3d at 1098, there is no inkling in the record that NaphCare was deliberately indifferent to the dispensing of incorrect medication to Mallett. In fact, quite to the contrary, the record indicates that when Mallett experienced an allergic reaction to the incorrect medication he was immediately seen by a physician and placed on anti-inflammatory medication. When the symptoms persisted the following day, Mallett was again attended to by health services personnel. Between the time of the incident and the end of January 2004 (which is when the complaint alleges Mallett received medication that alleviated his side pain), Mallett either personally saw a physician, or a physician reviewed Mallett's medical files and medication levels, on at least a half-dozen occasions. Further, with regard to Nurse Terry, the record indicates that NaphCare placed a "[m]edication error report" in her employee file. *See Defendants Appendix, Exh. Part 2 of 11*. The record, even in the light most favorable to Mallett, does not generate a genuine issue of material fact as to corrective inaction amounting to deliberate indifference on NaphCare's part. Further, as Judge Zoss noted, there is no evidence that any alleged violation of Mallett's constitutional rights occurred as a result of an unconstitutional custom, practice or policy employed by NaphCare. Report and Recommendation at 24-25 (citing *Clay v. Conlee*, 815 F.2d 1164, 1171 (8th Cir. 1987)). Summary judgment in favor of NaphCare is therefore appropriate on a number of grounds.

III. CONCLUSION

For the foregoing reasons, the court **overrules** Mallett's objections and **adopts** Judge Zoss's Report and Recommendation. The defendants' motion for summary judgment is **granted**.

IT IS SO ORDERED.

DATED this 19th day of April, 2005.

Handwritten signature of Mark W. Bennett in black ink.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA