IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
U.S. Magistrate Judge S. Kato Crews

Civil Action No. 1:18-cv-02578-PAB-SKC

JASON BROOKS,

Plaintiff,

v.

COLORADO DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

RECOMMENDATION RE: DEFENDANTS' MOTION TO DISMISS [ECF. #29]

This Recommendation addresses Defendants' Colorado Department of Corrections ("CDOC") and Susan Tiona, M.D. ("Dr. Tiona") (collectively, "CDOC Defendants") Motion to Dismiss Plaintiff's Verified First Amended Complaint ("Motion"). [ECF. #29.] Plaintiff Jason Brooks ("Brooks") filed his Response [ECF. #32], which was followed by Defendants' Reply. [ECF. #33.] This matter was referred to the Magistrate Judge for a Recommendation. [ECF. #30.] The Court has considered the Motion, the related briefing, and the prevailing law. For the following reasons, the Court RECOMMENDS that the Motion be GRANTED IN PART and DENIED IN PART.

BACKGROUND

According to the allegations in the Amended Complaint, which the Court takes as true for purposes of this Recommendation, Brooks injured his right knee in October 2016. [ECF. #28 at ¶1.] After anti-inflammatories were unsuccessful, he submitted a request to see a doctor. [*Id*. at ¶3.] Dr. Tiona evaluated Brooks on December 12, 2016, and ordered

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

an x-ray. [*Id*. at ¶4.] During a follow-up appointment, Dr. Tiona noted that Brooks still had discomfort in his knee. [*Id*. at ¶7.] Despite indications of a meniscus injury, she did not order an MRI but instead treated Brooks with a steroid injection and rehabilitative exercises. [*Id*. at ¶¶8-9, 15.] The Amended Complaint alleges that Dr. Tiona failed to request an MRI because of a contract between the CDOC and Correctional Heath Partners ("CHP") that requires medical providers pursue "conservative therapy" before requesting an MRI. [*Id*. at ¶¶9-15.]

Dr. Tiona conducted a follow-up in February 2017 and noted that Brooks' issue had been resolved. [*Id*. at ¶19.] In April 2017, Brooks returned to Dr. Tiona for another evaluation complaining that his knee was causing significant problems and that his pain was constant. [*Id*. at ¶20.] Dr. Tiona then ordered an MRI. The MRI revealed a sprain of the ACL, a ligament tear, and degenerative arthritis. [*Id*. at ¶21.] Brooks had arthroscopic surgery in November 2017 to repair the tear; however, according to a medical specialist, he will ultimately need knee replacement surgery and his knee will never be the same. [*Id*. at ¶25.] In addition, Brooks can no longer play sports or exercise without significant pain in his knee. [*Id*. at ¶26.]

Brooks initiated this action on October 9, 2018, asserting claims against CDOC, Dr. Tiona, CHP, and a John Doe defendant. [ECF. #1.] CDOC and Dr. Tiona filed a Motion to Dismiss [ECF. #25], after which Brooks filed an Amended Complaint.[1] [ECF. #29.] CHP filed an answer to the Amended Complaint on behalf of itself and Jeff Archambeau.[2] [ECF.

[1] The Amended Complaint renders the original Motion to Dismiss moot.

[2] In his Amended Complaint, Brooks alleges that John Doe is the President and CEO of Correctional Health Partners. CHP admits that Jeff Archambeau is the President and CEO of Correctional Health Partners and should be substituted for John Doe.

#31.] Defendants CDOC and Dr. Tiona filed a renewed Motion to Dismiss requesting that the claims against them be dismissed in their entirety. [ECF. #23.]

STANDARDS OF REVIEW

A. Fed. R. Civ. P. 12(b)(1)

As courts of limited jurisdiction, federal courts must have a specific legal basis for their jurisdiction. *See Morris v. City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994) (citing *Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994)). The determination of a court's subject matter jurisdiction is a question of law. *Madsen v. U.S. ex rel. U.S. Army, Corps of Eng'rs*, 841 F.2d 1011, 1012 (10th Cir. 1987). "A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.,* 495 F.2d 906, 909 (10th Cir. 1974). "The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction." *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

B. Fed. R. Civ. P. 12(b)(6)

In deciding a motion under Fed. R. Civ. P. 12(b)(6), the Court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124-25 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). The Court is not, however, "bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft*, 556 U.S. at 678 (internal quotation marks omitted). A claim is plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. This standard requires more than the mere possibility that a defendant has acted unlawfully. *Id*. Facts that are "merely consistent" with a defendant's liability are insufficient. *Id*. "[T]o state a claim in federal court, a complaint must explain what each defendant did to him or her; when the defendant did it; how the defendant's actions harmed him or her; and what specific legal right the plaintiff believes the defendant violated." *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007).

The Court's ultimate duty is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007). "Nevertheless, the standard remains a liberal one, and 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely.'" *Morgan v. Clements*, No. 12-cv-00936-REB-KMT, 2013 WL 1130624, at *1 (D. Colo. Mar. 18, 2013) (quoting *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009)).

C. *Pro Se* Parties

The Court acknowledges that Brooks is not an attorney. Consequently, his pleadings and other papers are construed liberally and held to a less stringent standard than formal pleadings drafted by a lawyer. *See Hall v. Bellmon*, 935 F.2d 1106, 1110

(10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). "[I]f the court can reasonably read the pleadings to state a claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper authority, his confusion of legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Id*. But this Court cannot act as a *pro se* litigant's advocate. *Id*. It is the responsibility of the *pro se* plaintiff to provide a simple and concise statement of his claims and the specific conduct that gives rise to each asserted claim. *See Willis v. MCI Telecomms.*, 3 F. Supp. 2d 673, 675 (E.D.N.C. 1998).

The Court may not "supply additional factual allegations to round out a plaintiff's complaint." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997). Nor may a plaintiff defeat a motion to dismiss by alluding to facts that have not been alleged, or by suggesting violations that have not been pleaded. *Associated Gen. Contractors of Cal. Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). *Pro se* plaintiffs must "follow the same rules of procedure that govern other litigants." *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

ANALYSIS

In his Amended Complaint, Brooks alleges that the CDOC Defendants were deliberately indifferent to his serious medical need in violation of the Eighth Amendment. [ECF. #28 at ¶¶27-39.] He further alleges that their conduct violates the Fourteenth Amendment guarantee of substantive due process, that they engaged in a civil conspiracy to violate his constitutional rights, and that Colorado's law requiring a Certificate of Review in cases asserting professional negligence is unconstitutional.

A. Eleventh Amendment Immunity

The CDOC argues that Brooks' claims against it must be dismissed because the claims are barred by the Eleventh Amendment, and therefore, this Court lacks jurisdiction. [ECF. #29 at p.4.] Although he does not concede the issue, Brooks did not offer any arguments in response to this contention.[3] [ECF. #32.] The Court finds that the Eleventh Amendment does bar the claims against the CDOC.

The Eleventh Amendment bars suits in federal court against a state by its own citizens. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). The immunity conferred by the Eleventh Amendment extends to a state and its instrumentalities, including state agencies such as CDOC. *N. Ins. Co. of N.Y. v. Chatham Cty., Ga.*, 547 U.S. 189, 193 (2006); *see also Hughes v. Colo. Dept. of Corrections*, 594 F. Supp. 2d 1226, 1233 (D. Colo. 2009).

Although this immunity is subject to exceptions, it is undisputed that Colorado has not waived its Eleventh Amendment immunity. *See Griess v. Colorado*, 841 F.2d 1042, 1044-45 (10th Cir. 1988) (holding that Colorado Governmental Immunity Act, Colo. Rev. Stat. § 24-10-101, *et seq.*, does not waive the State's Constitutional immunity; affirming dismissal of claims against the State and its Department of Corrections). It is also undisputed that 42 U.S.C. § 1983 does not abrogate a state's Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 345 (1979). Accordingly, Brooks' claims against CDOC are barred as a matter of law and should be dismissed without prejudice. *See Colby v. Herrick*, 849 F.3d 1273, 1278 (10th Cir. 2017) (dismissal based upon Eleventh Amendment immunity should be a dismissal without prejudice).

[3] The Court observes that Brooks has requested the Motion be denied in its entirety. [*See* ECF. #32 at p.18.]

B. Eighth Amendment (Claim One)

The CDOC Defendants contend that Brooks' allegations against Dr. Tiona fail to establish an Eighth Amendment claim for deliberate indifference to a serious medical need. They argue the Amended Complaint fails to meet either prong of the Eighth Amendment analysis. Although the question is close, the Court concludes that Brooks has stated a claim against Dr. Tiona.

"The Eighth Amendment's prohibition of cruel and unusual punishment imposes a duty on prison officials to provide humane conditions of confinement, including adequate . . . medical care, and reasonable safety from bodily harm." *Tafoya v. Salazar*, 516 F.3d 912, 916 (10th Cir. 2008) (citation omitted). The Eighth Amendment also prohibits "unnecessary and wanton infliction of pain," including "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble,* 429 U.S. 97, 104 (1976). Prison officials may be liable for an Eighth Amendment violation for "indifference . . . manifested . . . in their response to the prisoner's needs or by . . . intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed." *Estate of Booker v. Gomez*, 745 F.3d 405, 429 (10th Cir. 2014) (quoting *Estelle*).

Like other claims under the Eighth Amendment, a claim for deliberate indifference involves both an objective and a subjective component. *Mata v. Saiz,* 427 F.3d 745, 751 (10th Cir. 2005). First, under the objective component, the prisoner must "produce objective evidence that the deprivation at issue was in fact 'sufficiently serious.'" *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). "[A] medical need is sufficiently serious if it is one that has been diagnosed by a physician as mandating treatment or one

that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Mata*, 427 F.3d at 751 (even a physician's grossly negligent medical judgment is not subject to scrutiny if the prisoner's need for medical treatment was not obvious) (internal quotations and citation omitted). Furthermore, a delay in medical care "only constitutes an Eighth Amendment violation where the plaintiff can show the delay resulted in substantial harm." *Oxendine v. Kaplan,* 241 F.3d 1272, 1276 (10th Cir. 2001) (quotations and citation omitted). The substantial harm requirement "may be satisfied by lifelong handicap, permanent loss, or considerable pain." *Garrett v. Stratman,* 254 F.3d 946, 950 (10th Cir. 2001) (citation omitted).

Second, the subjective component requires a state of mind "akin to recklessness in the criminal law, where, to act recklessly, a person must consciously disregard a substantial risk of serious harm." *Self v. Crum*, 439 F.3d 1227, 1231 (10th Cir. 2006) (quoting *Farmer*, 511 U.S. at 837) (internal quotations and citation omitted). Under this standard, "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." *Farmer*, 511 U.S. at 837. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Self*, 439 F.3d at 1231 (internal quotations omitted). Further, the plaintiff must allege that the defendants personally participated in the Eighth Amendment violation. *See Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996).

Under the subjective element, the prisoner must establish deliberate indifference to his serious medical needs by "present[ing] evidence of the prison official's culpable state of mind." *Mata*, 427 F.3d at 751. "Deliberate indifference to serious medical needs

of prisoners constitutes unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 104 (internal quotation and citation omitted). Relevant here, the Tenth Circuit recognizes claims for deliberate indifference when a medical professional fails to properly treat a serious medical condition. Under this type of deliberate indifference, an assertion of negligence or medical malpractice does not give rise to a constitutional violation. *Perkins v. Kan. Dept. of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999). *See also Martinez v. Beggs,* 563 F.3d 1082, 1088 (10th Cir. 2009) ("'an inadvertent failure to provide adequate medical care' does not rise to a constitutional violation," quoting *Estelle,* 429 U.S. at 105–06). A prisoner's disagreement with medical personnel over the course of his treatment also does not state a claim. *Perkins*, 165 F.3d at 811.

Here, the Court concludes the allegations in the Amended Complaint sufficiently plead a substantial harm to a serious medical need. Brooks alleges his injury was exacerbated by the delayed MRI and conservative treatment, and he ultimately suffered a torn meniscus that required surgery, and his knee will need to be replaced. [ECF. #28 at ¶25.] He further alleges that he still suffers significant pain in his knee when exercising, and that this pain will persist for the rest of his life. [*Id*. at ¶26.] Taking these facts in combination and construing them in the light most favorable to Brooks, he has sufficiently pled a substantial harm to a serious medical need, and thus, the objective component. *See Garrett*, 254 F.3d 950 ("[S]ubstantial harm requirement may be satisfied by . . . considerable pain.").

The closer question is whether the allegations establish the subjective prong of the Eighth Amendment inquiry. The Court is guided in this analysis by the decision in *Swan v. Physician Health Partners Inc.*, 212 F. Supp.3d 1000 (D. Colo. 2016). There, Judge

Martinez (evaluating allegations like those here) concluded that when a doctor denies a necessary "MRI test without making an actual medical decision and in complete disregard to Plaintiff's medical condition, then the subjective prong of the deliberate indifference test would be satisfied." *Id*. at 1008. In *Swan*, the defendant doctor was advised by another physician that the plaintiff required an MRI for proper diagnosis. *Id*. at 1007. This allegation was enough to establish that the defendant doctor knew the plaintiff faced a substantial risk of harm if the doctor failed to order an MRI. *Id*.

Here, Brooks has not alleged that another doctor told Dr. Tiona that Brooks needed an MRI. Rather, he alleges "Tiona subjectively understands that an MRI was necessary to properly diagnose Plaintiff's injury after a positive McMurray test." [ECF. #28 at ¶9.] This statement alone would be conclusory and insufficient to establish the requisite knowledge for the subjective component. But Brooks buttresses this allegation by further alleging that "pursuant to community standards of care" a "positive McMurry test on its own necessitates an MRI to diagnose a meniscus injury." [*Id*. at ¶ 8.] Although the connection is tenuous, under a liberal construction, the Court concludes that Brooks' allegations are sufficient to plausibly establish that Dr. Tiona, as a medical doctor and by virtue of her medical training, knew there was a risk of harm by failing to order an MRI after Brooks' positive McMurry test.[4]

In their Motion, the CDOC Defendants argue that Dr. Tiona's decision to pursue conservative therapies was a medical judgment that, at most, could constitute medical malpractice. However, Brooks has alleged that Dr. Tiona, as the CDOC's Chief Medical

[4] The Court notes that the CDOC Defendants have not challenged the subjective prong regarding Dr. Tiona's lack of knowledge of a substantial risk. Rather, their arguments are confined to whether she disregarded the risk. [ECF. #29 at pp.7-9.]

Officer, was aware of the policy requiring conservative therapies before requesting MRIs. [ECF. #28 at ¶15.] He further alleges that, like the defendant doctor in *Swan*, Dr. Tiona failed to request an MRI because she was following the cost-saving policy. [*Id*.] Taking this as true, as it must, Brooks has plausibly alleged that Dr. Tiona's failure to request an MRI was independent of, and contrary to, any reasonable medical judgment because her decision was instead based upon company policy. *Swan*, 212 F. Supp.3d at 1008. These allegations further establish the subjective component. *Id.* (when a doctor denies a necessary "MRI test without making an actual medical decision and in complete disregard to Plaintiff's medical condition, then the subjective prong of the deliberate indifference test would be satisfied.") Consequently, the Amended Complaint sufficiently pleads an Eighth Amendment claim against Dr. Tiona on the theory that Dr. Tiona was deliberately indifferent to Brooks' serious medical needs by acting pursuant to the cost-saving policy in disregard of Brooks' medical condition.

C. Fourteenth Amendment (Claim Two)

Claim two asserts a Fourteenth Amendment substantive due process claim against all Defendants. As the Court understands his allegations, the CDOC Defendants violated Brooks' due process rights by entering into a contract with CHP that requires medical providers pursue "conservative therapy options" even when MRIs or other medical procedures would be more appropriate, if not required by industry standards. [ECF. #28 ¶¶40-53.] Dr. Tiona contends that this claim should be dismissed because it is more appropriately addressed under the Eighth Amendment. The Court agrees.

The Supreme Court has recognized that the same facts may give rise to both an Eighth Amendment cruel and unusual punishment claim, and a substantive due process

claim under the Fourteenth Amendment. *Whitley v. Albers*, 475 U.S. 312, 326-27 (1986). However, when government conduct is constrained by "an explicit textual source of constitutional protection . . . that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham v. Connor*, 490 U.S. 386, 395 (1989). The Supreme Court, in *Graham*, reasoned that "[a]ny protection that 'substantive due process' affords convicted prisoners against excessive force is . . . at best redundant of that provided by the Eighth Amendment." *Id*. at 395 n.10.

"[T]he Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners . . . ." *Whitley*, 475 U.S. at 327. "Every circuit that has considered the question has concluded that the Eighth Amendment is the primary source of substantive rights of prisoners and that, with regard to the rights of convicted prisoners, the legal standards under the Eighth and Fourteenth Amendments generally are congruous." *Berry v. City of Muskogee, Okl.*, 900 F.2d 1489, 1494 n. 6 (10th Cir. 1990) (citations omitted).

Here, there are no differentiating facts between Brooks' Eighth Amendment claim and his Fourteenth Amendment claim. Both claims rely on Dr. Tiona's alleged failure to order an MRI due to the "cost-saving" contract between CDOC and CHP. Thus, the Fourteenth Amendment claim is duplicative of the Eighth Amendment claim and should be dismissed on that ground. *See Climo v. Rustin*, No. 11-1339, 2012 WL 3779178, at *5 (W.D. Pa. Aug. 31, 2012) (dismissing inmate's Fourteenth Amendment claim arising out of a sexual assault because the Eighth Amendment applied); *Fogleman v. Cty. of Los Angeles*, No. CV 10-6793 GAF (SHx), 2011 WL 13217479, at *4 (C.D. Cal. April 22, 2011)

(same); *Fleetwood v. Werholtz*, No. 10-2480-RDR, 2011 WL 1527261, at *9 (D. Kan. April 20, 2011) (same).

In his Amended Complaint and his Response, Brooks attempts to distinguish the two claims based on the "special relationship" doctrine. [ECF. #28 at ¶¶40-53; ECF. #32 at pp.9-14.] He contends that the CDOC Defendants have a duty to protect him from the violence of a third party. [*Id*.] The special relationship doctrine, however, is inapplicable to the circumstances alleged in the Amended Complaint.

The Fourteenth Amendment does not impose on a state an affirmative obligation to ensure that its citizens are not deprived of life, liberty, or property. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). There are, however, two exceptions to this general rule: the "special relationship" doctrine and the "danger creation" theory. *See Christiansen v. City of Tulsa*, 332 F.3d 1270, 1279-80 (10th Cir. 2003) (providing an overview of the special relationship doctrine and danger creation theory). Although Brooks has titled his claim under the "special relationship" exception, he alleges throughout the claim that Defendants "created the danger or increased Brooks' vulnerability to the danger." [*See* ECF. #28 at ¶44.] Regardless of his characterizations, neither exception applies.

The danger creation theory "applies only when a state actor affirmatively acts to create, or increases a plaintiff's vulnerability to, or danger from private violence." *Robbins v. Okla.*, 519 F.3d 1242, 1251 (10th Cir. 2008) (internal quotation marks omitted) (citing *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001)). Similarly, the special relationship doctrine applies only to "private act[s] of violence by a third party." *Moore v. Guthrie*, 438 F.3d 1036, 1042 (10th Cir. 2006). Brooks has not alleged any "private" acts of violence

perpetrated against him. Rather, according to the Amended Complaint, Brooks injury was caused by Dr. Tiona, a state actor, when she failed to order an MRI. Thus, these exceptions are not applicable. *Id*. (the exception "does not apply when the injury occurs due to the action of another state actor"). Furthermore, although he has alleged an injury, the Court concludes that Brooks has failed to allege an act of violence as contemplated by these exceptions. *See Hilliard v. City & Cty. of Denver*, 930 F.2d 1516, 1518 (10th Cir. 1991) (allegations of robbery and sexual assault); *Schwartz v. Booker*, 829 F.Supp.2d 1080 (D. Colo. 2011) (allegations of physical abuse). Consequently, the Court recommends that Brooks' claim under the Fourteenth Amendment be dismissed in its entirety.

D. Civil Conspiracy

In his third claim, Brooks alleges that the Defendants engaged in a civil conspiracy to prevent CDOC inmates from being provided with adequate medical care. Dr. Tiona contends that this claim should be dismissed because Brooks has failed to allege a plausible constitutional violation. [ECF. #29 at p.12.] The Court rejects this argument, but nevertheless recommends that this claim be dismissed against Dr. Tiona because the allegations do not plausibly establish the requisite state of mind.[5]

To establish a civil conspiracy under Colorado law, a party must show: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as to the proximate result." *Powell Prods. Inc. v. Marks*, 948 F. Supp. 1469, 1480 (D. Colo. 1996) (quoting *Nelson v.*

[5] Defendant CHP filed an Answer to Brooks' Amended Complaint. [ECF. #31.] Therefore, the Court does not address the propriety of this claim against CHP and Jeff Archambeau.

Elway, 908 P.2d 102, 106 (Colo. 1995)). "The purpose of the conspiracy must either be unlawful or lawful and accomplished by unlawful means." *Id*. (citing *Contract Maintenance Co. v. Local No. 105, Bldg. Servs. Emps. Int'l Union,* 415 P.2d 855, 856 (Colo. 1966)). Further, when considering a civil conspiracy claim,

> [an individual's] mere presence at the commission of the wrong, or failure to object to it, is not enough to charge one with responsibility. It is [ ] essential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously, which is to say with the intent requisite to committing a tort, or with negligence. One who innocently, and carefully, does an act which happens to further the tortious purpose of another is not acting in concert with the other.

Resolution Trust Corp. v. Heiserman, 898 P.2d 1049, 1057 (Colo. 1995) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 46, at 323–24 (5th ed. 1984) (footnotes omitted)); *see also Powell*, 948 F. Supp. at 1480 ("plaintiff cannot succeed on its claims for civil conspiracy without showing that each defendant agreed to do something in furtherance of the conspiracy, *knowing of its improper purpose*") (emphasis added).

In his Amended Complaint, Brooks alleges that the Defendants "agreed, by words and conduct, to accomplish an unlawful goal or accomplish a goal through unlawful means." [ECF. #28 at ¶54.] Without more, this statement is conclusory and does not establish any meeting of the minds. With respect to Dr. Tiona, the Amended Complaint does not contain any allegations to suggest that she agreed or otherwise participated in an agreement with the other Defendants to commit some unlawful goal or knowing that she would be furthering a conspiracy to deprive Brooks and other inmates of appropriate medical care. At best, the allegations establish that Dr. Tiona was aware of, and complied with, a policy—which she apparently was not involved in developing—requiring her to

exhaust conservative therapies before seeking an MRI. [ECF. #28 at ¶9.] However, the mere agreement to do something that happens to aid in the commission of a wrong does not constitute a civil conspiracy. *Powell*, 948 F. Supp. at 1480. Therefore, the Court recommends that Brooks' civil conspiracy claim against Dr. Tiona be dismissed.

E. Colo. Rev. Stat. § 13-20-602

Colorado Revised Statute section 13-20-602 provides: "[i]n every action for damages or indemnity based upon the alleged professional negligence of . . . a licensed professional, the plaintiff's or complainant's attorney shall file with the court a certificate of review" declaring "[t]hat the attorney has consulted a person who has expertise in the area of the alleged negligent conduct" and "[t]hat the professional who has been consulted . . . has concluded that the filing of the claim, counterclaim, or cross claim does not lack substantial justification within the meaning of section 13-17-102(4)." Colo. Rev. Stat. § 13-20-602(1)(a), (3)(a)(I)-(II). Although the statutory language refers to "plaintiff's attorney," the requirements of Colo. Rev. Stat. § 13-20-602 apply equally "to civil actions alleging negligence of licensed professionals filed by nonattorney pro se plaintiffs." *Yadon v. Southward*, 64 P.3d 909, 912 (Colo. App. 2002); *see also Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1118 (10th Cir. 2004) (the Colorado "certificate of review requirement applies whether or not the plaintiff is represented by counsel").

Brooks' fourth claim seeks a declaration that § 13-20-602 is "unconstitutionally discriminatory and deprives *pro se*, incarcerated, indigent inmates the ability to seek legal redress for medical malpractice and/or negligence claims against licensed professionals in the state of Colorado." He alleges the state law violates his First and Fourteenth Amendment rights as an indigent prisoner to access the courts. [ECF. #28 at ¶¶59-65.]

However, because the Court concludes that Brooks has failed to establish standing, the Court recommends that this claim be dismissed without prejudice.

Article III of the United States Constitution restricts the jurisdiction of federal courts to the adjudication of "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. To establish a case or controversy, a plaintiff bears the burden of demonstrating "three elements: an injury-in-fact, causation, and redressability." *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). In this case, the Court need only consider the causation prong of the analysis.

The principle of causation for constitutional standing requires a plaintiff's injury to be "fairly traceable to the challenged *action of the defendant*, and not the result of the independent action of some third party not before the court." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005) (internal quotation marks omitted and emphasis added) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "It is well-established that when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Bronson*, 500 F.3d at 1110. *See also Okpalobi v. Foster*, 244 F.3d 405, 426–28 (5th Cir. 2001) (en banc) (abortion providers lack standing to sue Louisiana Governor and Attorney General for declaratory and injunctive relief based upon unconstitutionality of Louisiana state tort statute authorizing private cause of action because defendants lack authority to enforce statute).

Here, even assuming *arguendo* that Brooks has alleged an injury, he has failed to allege a causal connection between that injury and any of these Defendants. There is no allegation that any of these Defendants has the authority to enforce this statutory provision. Furthermore, Brooks' allegation that the Defendants rely on the existence of this statute to provide negligent medical care is wholly conclusory and speculative. [*See* ECF. #28 at ¶62.]

Although these Defendants could raise this statutory provision as an affirmative defense in this case, so too can a defendant in any case of alleged professional negligence. If the fact that a defendant could avail itself of the statute as an affirmative defense was enough to convey standing to challenge the constitutionality of the statute, then anyone who could potentially raise this defense "could be summoned preemptively before the federal courts to defend the constitutionality of that statute." *Nova Health Sys.*, 416 F.3d at 1157. Article III does not contemplate standing under such circumstances. *Id*.

Because a judgment against these Defendants on the fourth claim would not be likely to redress Brooks' alleged injury, the Court recommends that this claim be dismissed without prejudice in its entirety.

CONCLUSION

For the foregoing reasons, the Court RECOMMENDS that Defendants' Motion to Dismiss Plaintiff's Verified First Amended Complaint be GRANTED IN PART and DENIED IN PART. [ECF. #29.]

Specifically, the Court RECOMMENDS that Brooks' claims against the Colorado Department of Corrections be DISMISSED WITHOUT PREJUDICE for lack of jurisdiction;

The Court FURTHER RECOMMENDS that Brooks' second and fourth claims be DISMISSED in their entirety;

The Court FURTHER RECOMMENDS that Brooks' claim of civil conspiracy against Dr. Tiona be DISMISSED; and,

The Court FURTHER RECOMMENDS the Motion be DENIED with respect to the Eighth Amendment claim against Dr. Tiona.

DATED: August 6, 2019.

BY THE COURT:

S. Kato Crews
United States Magistrate Judge

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objection s to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives de novo review of the recommendation by the District Judge and waives appellate review of both factual and legal questions. *Thomas v. Arn*, 474 U.S. 140, 148–53 (1985); *Makin v. Colorado Dep't of Corrs.*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412–13 (10th Cir. 1996).