

1. As a result from the Manual Prostate Biopsy, Plaintiff has sustained the cost of the ability to obtain an erection, urinary function improper and at times. Plaintiff has problems up in his rectum, and also the result of two surgeries, which result into cost part of his prostate.
12. Counsel for Dr. Razdan is asserting in His Motion for Summary Judgment on page 2, and paragraph 4. Stated that Johnson, "must establish he suffered from a serious medical need, that Dr. Razdan was deliberately indifferent to that need; and his purported injury was caused by Dr. Razdan's deliberate indifference.
13. When Plaintiff was transferred from Century Correctional Institution and arrived at Dade Correctional Institution there was not anything wrong with me until Dr. Razdan performed the manual prostate biopsy on ^{Plaintiff} which has caused me to undergo two surgery, cost the ability to obtain an erection and a part of my prostate taking out and suffered unbearable pain, and will suffer physical and mental the rest of my life. No one else was deliberate indifference toward my medical needs, but Dr. Razdan. He is the only one performed the medical procedure on me.

The Counsel for the defendant, does not have a command of the "facts" as is evident of his referencing a Plaintiff that has nothing to do with the instant case. Example in Counsel Memorandum in support of Dr. Razdan's Motion for Summary Judgment mention of another Plaintiff four times. page 3, 9, 17 and 19. That should prohibit.

It is a well settled principle within the medical community that before the defendant, Dr. Razdan could perform the Holmium laser ablation procedure a non-routine procedure. Informed consent must be obtain from Plaintiff.

Dr. Razdan Failure to give rise to the risks and potential treatment alternative treatment associated with the Holmium Ablation procedure deprived plaintiff of his Federal Constitutional rights of

1. Not to be inflicted with pain.
2. to be free from intrusion into my body and
3. the right to sufficient information for plaintiff to intelligently exercise these rights.

The consent to administration Anesthesia ^{plaintiff} did not signed it, either was there any thing explained to me about the risk involve with the Holmium laser Ablation procedure.

under "informed consent doctrine." a physician has an obligation to advise his patient of the material risk of undergoing a medical procedure. Its common when a physician is sued for some reckless acted. He will utilize the position that he has explain the risk to the patient and with the assistance of some co-worker paper works will appear orderly, but all unsigned by the patient that in itself under the informed consent doctrine is a violation of plaintiff right secured by the constitution.

Wherefore, based upon the foregoing facts presented in this case, and demonstrated to the best of the plaintiff's ability to clarify the fact that Dr. Razdan being reckless and disregarded Plaintiff as being a human-being although Plaintiff has spend most of his adult life in prison, Plaintiff has the right to refused without being victimized by pain, suffering unbearable, two surgery, lost part of his prostate, and the ability to erection.

Dr. Razdan created Plaintiff's health problems by his decision to take a less and easier procedure at his office without utilizing the hospital equipment, and by doing so, he has damage Plaintiff for the rest of his life.

Plaintiff asserts that he has demonstrated a genuine dispute and issue for trial.

Wherefore, Plaintiff requests that this Honorable Court to deny the Defendant's motion for summary judgment, memorandum in support motion for summary judgment, and statement of facts in support of motion for summary judgment.

And grant Plaintiff the right to proceed to trial. It is so prayed.

✓ *Elbert Johnson*
Elbert Johnson #013118

Proof of Service

I Hereby Certify that a true copy of the foregoing response motion to Summary Judgment and all exhibits A - E and F was placed in the hands of prison official for mailing to the following parties. UNITED STATES DISTRICT COURT office of the Clerk - Room 8209, 400 North Miami Avenue, Miami, Florida 33128-7716, and Patrick R. Dahl, 515 E. Las Olas Boulevard SunTrust Center, Suite 1400, P. O. Box 14460 Ft. Lauderdale, Florida 33302 this 23rd day of July 2012



J.C.

19) Albert Johnson
Albert Johnson #013118
Dade Correctional Institution
19000 S.W. 377 Street
Florida City, Florida 33034

I Hereby Certify under the penalty of perjury that the contents of this motion to response to the Summary Judgment is true and correct to the best of my knowledge.

EXHIBIT A

Exhibit A

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS
CONSULTATION REQUEST/CONSULTANT'S REPORT

TO Institution: <u>Orange</u>	FROM Institution: <u>Dch</u>	DATE OF REQUEST: <u>4-28-09</u>
Reason(s) for consultation: Evaluate and recommend <u>diagnostic plan</u> Evaluate and recommend <u>treatment plan</u> Other (specify): _____	Type of consultation: Emergency _____ <u>Urgent</u> _____ Routine _____ Follow-up _____	DATE APPOINTMENT MADE: _____ Staff Signature: _____
Follow-up consults require justification		APPOINTMENT DATE: _____

Condition is (check one): Acute Trauma Acute Illness Chronic
History of present illness (include onset, presentation, progress, therapy):

1/0 Pruritate Ca

Physical findings:
Initial Urgent consult was refused by J/m

Diagnostic findings (explain laboratory, x-ray, or other test findings):
Please consider Pruritate Bz ~~Asap!!!~~

Other pertinent information:

Provisional diagnosis:

Health Care Provider Signature/Stamp: Julio Poveda, MD

CHO/Designee Approval Signature/Stamp:

AUTHORIZATION FOR SPECIALITY EVALUATION:

I, the undersigned, have had explained to me and understand that I require _____ which cannot be accomplished at _____.
I also understand that should hospitalization and/or surgery be necessary, a separate consent form will be signed prior to such hospitalization and/or surgery. I therefore consent to be referred to a reception and medical center, or such other health care facility as may be appropriate for the reason(s) stated, and consent to undergo health care services as may be necessary to evaluate my health status.

Signature of Patient: _____ Date: _____

Signature of Witness: _____ Date: _____

IT IS ABSOLUTELY NECESSARY THAT INMATES ARE NOT MADE AWARE OF ANY INFORMATION PENDING ANY APPOINTMENT OUTSIDE THE INSTITUTION

Inmate Name: Johnson, Benny
DC# 013118 - Race/Sex: B/M
Date of Birth: 10-23-42
EOS DATE: _____

RECEIVED
MAY 01 2009

EXHIBIT B

CONSULTANT'S REPORT

EXHIBIT B

NO PROCEDURE(S) MAY BE PERFORMED WITHOUT PRIOR APPROVAL BY THE REGIONAL MEDICAL EXECUTIVE DIRECTOR, DEPARTMENT OF CORRECTIONS

Additional History: -64 year old male
-Elevated PSA 27.5 ng/ml [12/28/07]
-Minimal LUTS → Nocturia, Hesitancy

Findings:

PATIENT REFUSED
BIOPSY

Recommendations:

Consultant Signature/Stamp:

Date:

6/15/09

IT IS ABSOLUTELY NECESSARY THAT INMATES ARE NOT MADE AWARE OF ANY INFORMATION PENDING ANY APPOINTMENT OUTSIDE THE INSTITUTION

Inmate Name Elbert Johnson
DC# 013113 Race/Sex B/M
Date of Birth 10/23/1942
Institution _____
EOS DATE: 06/15/09

USE ADDITIONAL SHEET(S) AS NECESSARY

EXHIBIT C

EXHIBIT 3

**STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS
CONSULTATION REQUEST/CONSULTANT'S REPORT**

TO Institution: <u>Urology</u>	FROM Institution: <u>DCI</u>	DATE OF REQUEST: <u>3-18-10</u>
Reason(s) for consultation: Evaluate and recommend diagnostic plan <input checked="" type="checkbox"/> Evaluate and recommend treatment plan <input checked="" type="checkbox"/> Other (specify): _____	Type of consultation: Emergency _____ <u>Urgent</u> <input checked="" type="checkbox"/> Routine _____ Follow-up _____	DATE APPOINTMENT MADE: <u>3-30-10</u>
Follow-up consults require justification		Staff Signature: <i>[Signature]</i>
		APPOINTMENT DATE: <u>5-17-10</u>

Condition is (check one): Acute Trauma Acute Illness Chronic

History of present illness (include onset, presentation, progress, therapy):
67 year old BM cT PSA. pt out to Urology on 3/17/10 & He requested Trus

Physical findings:
Prostate Bx ASAP!

Diagnostic findings (explain laboratory, x-ray, or other test findings):
* 2/22/10 - PSA 5.4 *
11/9/09 - PSA 6.9
7/10/09 - PSA 6.9
6/5/09 PSA 6.0
11/7/08 PSA 6.9
12/28/07 PSA 27.5 *

Other pertinent information:

Provisional diagnosis:
No Prostate CA

Health Care Provider Signature/Stamp: *[Signature]* **DWARDS A.R.N.P. DADEC**

CHO/Designee Approval Signature/Stamp:

AUTHORIZATION FOR SPECIALITY EVALUATION

I, the undersigned, have had explained to me and understand that I require _____ which cannot be accomplished at _____.

I also understand that should hospitalization and/or surgery be necessary, a separate consent form will be signed prior to such hospitalization and/or surgery. I therefore consent to be referred to a reception and medical center, or such other health care facility as may be appropriate for the reason(s) stated, and consent to undergo health care services as may be necessary to evaluate my health status.

Signature of Patient: *[Signature]* Date: _____

Signature of Witness: _____ Date: _____

IT IS ABSOLUTELY NECESSARY THAT INMATES ARE NOT MADE AWARE OF ANY INFORMATION PENDING ANY APPOINTMENT OUTSIDE THE INSTITUTION

Inmate Name Johnson, Elbert
DC# 03118 Race/Sex BM
Date of Birth 10-23-42
EOS DATE: _____

L. INSUA
CONSULT COORDINATOR
DADEC

RECEIVED
MAR 24 2010

EXHIBIT C

FLORIDA DEPARTMENT OF CORRECTION
Chronological Record of Health Care

Allergies:

MLCD

DATE/TIME

6/23/10/9A

- (1) ⊕ pain, pull my Foley, I want to go
- (2) older B/M, appears comfortable, NAT
- Supine
- ATox3
- NECK: soft ⊕ JVD FROM
- HEENT: NCAT / Sclera nonicteric
- CV: S1S2 RRR ⊕ MTRM
- LUNGS: CTA BILAT
- ABD: ⊕ abd now dist / rigid
- GU: ⊕ Hematuria, of note: 240 cc irrigated yesterday afternoon (.95L) → total output since = approx 200. IE: No UA output since this irrigation yesterday per nursing report.
- (3) S/P Trus BK (i neg BK results per case discussion) ? urinary retention / Hematuria / BPH? / P/V RF?? renal insufficiency
- (4) Call placed again to Dr. Razdan's office awaiting return call. Will get CMP + EBC and send this AM
- (5) Reportable S/Sx, B'S

~~R. RUEL RN
DADE CI~~
No call
6/23/10
0515

COMP/

6/23/10/9 20

~~R. RUEL RN
DADE CI~~
No call
6/23/10
0530

- Call again to Dr. Razdan's office answering service, message left —
- 2^o abd dist, limited UA output since irrigation and hematuria
- Case now discussed: A. Purovito who requests direct admit to Kamec DUC floor.

C. Lwares
ARNP/INP
Date CI

C. Dwares
ARNP/INP
Date CI

COMP/

Inmate Name Johnson, Elbert
DC# 013118 Race/Sex B/M
Date of Birth 10/25/42
Institution DADE CI

S- Subjective Data
O- Objective Data
A- Assessment of S and O Data
P- Plan
E- Education

EXHIBIT F

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

Mail Number: 6
Team Number: _____
Institution: _____

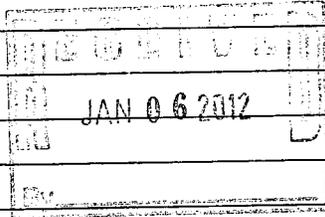
INMATE REQUEST

TO: Warden Classification Medical Dental
(Check One) Asst. Warden Security Mental Health Other _____

FROM:	Inmate Name <u>Johnson, Elbert</u>	DC Number <u>013118</u>	Quarters <u>H-12141</u>	Job Assignment <u>H/M</u>	Date <u>1-4-12</u>
-------	---------------------------------------	----------------------------	----------------------------	------------------------------	-----------------------

REQUEST Mr. Williams Check here if this is an informal grievance

Sir, I will appreciate it very much if you will provide me with the date, month and year that I arrived here at Dade C. I.



*Thank you
Johnson, Elbert*

All requests will be handled in one of the following ways: 1) Written Information or 2) Personal Interview. All informal grievances will be responded to in writing.

DO NOT WRITE BELOW THIS LINE

RESPONSE

DATE RECEIVED: _____

*You were received at Dade C. I. ~~1/13/12~~
9/23/2008*

[The following pertains to informal grievances only:
Based on the above information, your grievance is _____ (Returned, Denied, or Approved). If your informal grievance is denied, you have the right to submit a formal grievance in accordance with Chapter 33-103.006, F.A.C.]

Official (Signature): *[Signature]* Date: 1/13/12

Original: Inmate (plus one copy)
CC: Retained by official responding or if the response is to an informal grievance then forward to be placed in inmate's file

This form is also used to file informal grievances in accordance with Rule 33-103.005, Florida Administrative Code.
Informal Grievances and Inmate Requests will be responded to within 10 days, following receipt by the appropriate person.
You may obtain further administrative review of your complaint by obtaining form DC1-303, Request for Administrative Remedy or Appeal, completing the form as required by Rule 33-103.006, F.A.C., attaching a copy of your informal grievance and response, and forwarding your complaint to the warden or assistant warden no later than 15 days after the grievance is responded to. If the 15th day falls on a weekend or holiday, the due date shall be the next regular work day.
DC6-236 (Effective)

EXHIBIT F

EXHIBIT E

mm



PATIENT INFORMATION
JOHNSON, ELBERT
Sex: M
Age: 64, 10/23/1942
SSN/Hospital ID: NONE GIVEN
Patient ID: 013118

PHYSICIAN INFORMATION COS NFRJX
NORTH FLORIDA RECEPTION CNT
DR. ABRAMSON
7765 SOUTH COUNTY RD 231
LAKE BUTLER, FL 32054

SPECIMEN INFORMATION
Collected: 05/14/2007 at 01:00 PM ET
Received: 05/15/2007 at ET
Reported: 05/18/2007 at 08:00 AM ET
Accession #: MLJX-OH-1597-07

SURGICAL PATHOLOGY IMAGE
IMAGE



CLINICAL INFORMATION

HISTORY/PREOP DX:
NONE GIVEN
YB01

POST-OPERATIVE DIAGNOSIS:
NONE GIVEN

RESULTS

DIAGNOSIS:

- 1. LEFT SIDE OF PROSTATE, BIOPSY:
BENIGN PROSTATIC GLANDS AND STROMA.
- 2. RIGHT SIDE OF PROSTATE, BIOPSY:
BENIGN PROSTATIC GLANDS AND STROMA WITH AREAS OF GLANDULAR ATROPHY.

PATHOLOGIST: ROBERT BARNES, MD, ELECTRONIC SIGNATURE

SPECIMEN DATA

GROSS DESCRIPTION:

1. 'L' (LEFT PROSTATE PER REQ). FOUR CORES OF WHITE TAN TISSUE MEASURING FROM 1.1 CM TO 1.5 CM. TS.

2. 'R' (RIGHT PROSTATE PER REQ). FIVE FRIABLE CORES OF WHITE TAN TISSUE MEASURING FROM 0.8 CM TO 1.6 CM. TS LABELED '2A' AND '2B'.

MICROSCOPIC EXAMINATION:

A MICROSCOPIC EXAMINATION WAS PERFORMED TO ARRIVE AT THE DIAGNOSTIC CONCLUSION REPORTED.

Sign Out Location: AmeriPath Northeast Florida 3599 University Blvd South Suite 1700 Jacksonville, FL 32216

Technical Services Performed At: AmeriPath Central Florida 8100 Chancellor Dr. Suite 130 Orlando, FL 32809

As per your request, a copy of this report has been sent to: SHARON BRADY

Handwritten signature and notes
32225

RECEIVED IN AT
MAY 18 2007
RMC MEDICAL RECORDS

CPT CODES: 88305X2

Microscopic image is a symbolic representation of the key findings of your specific report. The image is not intended to replace a complete review and reading of the final diagnostic report provided.
AmeriPath Northeast Florida, 3599 University Blvd South, Suite 1700, Jacksonville, FL 32216 (800)561-0391

*** FINAL REPORT ***

Page: 1 of 1

RECEIVED
MAY 21 2007
MEDICAL RECORDS
RECEPTION AND MEDICAL CENTER-WJ

32475

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 11cv21118 FAM

**The attached hand-written
document
has been scanned and is
also available in the
SUPPLEMENTAL
PAPER FILE**

UNITED STATES DISTRICT COURT

Southern District of Florida

FILED by _____ D.C.
JUL 25 2012
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. - MIAMI

Elbert Johnson
Plaintiff,

vs.

Case No: 1:11-CV-21118-FAM

Sanjay Razdan
Defendant,

AFFIDAVIT

County of Miami-Dade
STATE of Florida

I, ESPIÑA Gabriel, do hereby swear that the following statement is true and correct and made of my own free will, from my own personal knowledge:

1. My name is ESPIÑA Gabriel, my I.D. Number is 0-130416.
2. I am an inmate in the Department of Corrections who is housed at Dade Correctional Institution.
3. I have never been found guilty of fraud or perjury in any jurisdiction.
4. I have went to see Dr. Razdan for my enlarge prostate in the past.
5. While at Dr. Razdan's office, Dr. Razdan nor any medical assistance explained the (Holeup) procedure to me in

detail including the risks, needed for the treatment as well as the available treatment alternatives, see exhibit A.

6. When I was at the Hospital. Hospital personnel presented to me several forms for me to signed without the benefit of reading them.
7. I learned later that the forms that the Hospital rushed me into signed: prior to the (Ho2eap) procedure that certain procedures had not been explained to me, including (1) the risks, benefits alternative treatment options and potential complication of the Ho2eap procedure, was in fact not explained to me.

no further

I declare under penalty of perjury that the following foregoing Affidavit is true and correct.

Executed on: 23.....
151 Espinal Gabriel.....

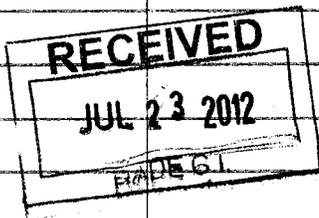
problems.

5. While I was at DR. RAZDAN'S office, before my surgery, no-one not DR. RAZDAN nor any of his assistances had explained to me anything in detail including the risks or other available treatments.

6. When I was at the hospital, hospital personal presented to me several forms for me to sign without the benefit of reading them, or having someone read them to me, if I could not read, them myself.

7. I learned later that the forms that the hospital personal rushed me into signing prior to my surgery procedure that certain procedure's had been explained to me including (1) the risks, benefits, alternative treatment options and potential complications of my surgical procedure, was in fact, not explained to me.

I Declare under penalty of perjury that the foregoing affidavit is true and correct.



C. E.

Executed on July 23 2012
W/ Candice Newton



Urology Center Of Excellence of South Florida

HOLMIUM LASER ABLATION OF PROSTATE

Mr. _____ returned to our office today for an extensive discussion on the different modes of treatment available for his enlarged prostate and the associated symptoms of bladder outlet obstruction.

- 1 Watchful waiting
- 2 Alpha blockade
- 3 Proscar
- 4 Microwave Therapy
- 5 Balloon Dilation
- 6 Laser Vaporization
- 7 Transurethral Resection

We went over the different risks and benefits of each of the above listed approaches. He is aware that the risks of HOLAP might include all or some to the following:

- 1 Incontinence
- 2 Persistent Voiding Symptoms
- 3 Bladder Injury
- 4 Rectal Injury
- 5 Bleeding and clot formation
- 6 Electrolyte imbalances
- 7 Sepsis
- 8 Thromboembolic Phenomenon
- 9 Cerebrovascular accident
- 10 Retrograde ejaculation
- 11 Stricture formation

The patient understands the above mentioned risks and consents to have the procedure performed We will schedule Mr. _____ for an elective HOLAP of the prostate.

By signing below, I acknowledge that I have read and understood the information given to me and accept the risks of the procedure.

(Patient)

(Witness)

(Date)

(12)

~~_____ (12)~~

(12)

69181-7

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:11-CV-21118-FAM
Magistrate Judge: Patrick White

ELBERT JOHNSON,

Plaintiff,

vs.

SANJAY RAZDAN, M.D.,

Defendant.

**REPLY MEMORANDUM IN FURTHER SUPPORT OF
DR. RAZDAN'S MOTION FOR SUMMARY JUDGMENT**

Defendant, Sanjay Razdan, M.D. ("Dr. Razdan"), moved for summary judgment (the "Motion"; DE 46), because there are no disputed questions of fact and he is entitled to summary judgment as a matter of law with respect to the claims asserted by plaintiff, Elbert Johnson's ("Johnson"), in his present Complaint (DE 9). On July 25, 2012, Johnson filed his response to that Motion ("Response"). (DE 54.) But, nothing within the response or the separately filed 'affidavits' (DE 55) create any issue that would warrant the denial of Dr. Razdan's Motion.

Johnson, relying solely upon his "verified" response (DE 54), and the affidavit of another inmate, Espinal Gabriel (DE 55), believes that his unsupported conclusory assertions coupled with his presentation of a new legal theory are sufficient to defeat the Motion. But, neither Johnson's unsupported conclusory assertions nor his new legal theory are sufficient.

CASE NO. 1:11-CV-21118-FAM

PRELIMINARY STATEMENT

Although Johnson has filed a Response (DE 54) and submitted two separate affidavits (DE 55) for consideration by this Court¹, he has not responded the Dr. Razdan's Statement of Facts. As such, it is difficult, if not impossible, to discern what purported facts Johnson contends are disputed, or what additional "facts" Johnson has presented that give rise to an allegedly disputed factual issue. This fact, standing alone, constitutes sufficient grounds to deem all facts set forth in Dr. Razdan's statement of facts admitted. L.R. 56.1(b).

Additionally, in reviewing the Response, it is almost impossible to decipher the chronology

ARGUMENT

A. JOHNSON HAS FAILED TO PRODUCE ANY COMPETENT OR ADMISSIBLE EVIDENCE TO REFUTE THE SUMMARY JUDGMENT EVIDENCE OFFERED BY DR. RAZDAN

1. Johnson Cannot Use Hearsay to Create a Factual Issue

In his 'response,' Johnson makes repeated references to statements and documents purportedly made by Dade C.I. personnel at various unidentified times concerning a variety of subjects. (DE 54, pp. 3-5.) But, these 'statements' are nothing more than hearsay², hearsay which cannot and should not be considered in resolving summary judgment issues. Hearsay evidence, generally, cannot be used to oppose a motion for summary judgment. *Macuba v. DeBoer*, 193 F.3d 1316, 1322 (11th Cir.

¹ There is a fundamental question concerning the propriety and relevancy of the affidavits that were submitted. Those issues will be addressed, below.

² For example, the statements at page 5 purportedly made by the nurse identified as "Shela" are presumably being offered for their truth – i.e. that she attempted to call Dr. Razdan at some unspecified time.

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1999). Although hearsay can be considered if reduced to an admissible form at trial, there is simply no suggestion that out-of-court statements reflected in Johnson's Response can or ever will be reduced to an admissible form at trial.

2. The Affidavits of Two Separate Inmates are neither Relevant nor Create a Disputed Factual Issue

In addition to inadmissible hearsay, Johnson has tendered the affidavits of two separate inmates, Andrew Hutchinson and Espinal Gabriel, presumably to create the inference that simply because Dr. Razdan allegedly failed to obtain what those unqualified inmates consider to be 'informed consent,' Dr. Razdan failed to do so in this case. (DE 55.) Neither affidavit has any bearing on the present motion. As addressed in detail, below, the informed consent theory is was not previously raised in Johnson's pleadings and cannot be asserted, for the first time, to defeat summary judgment. In addition, those affidavits do nothing more than assert that at some unidentified time, the inmates were treated by Dr. Razdan and that they was not advised of certain purported risks and complications associated with the HoLEAP procedure.³ Such statements, even if true, do not create a factual issue concerning whether Dr. Razdan obtained adequate consent before treating Johnson. See Fed.R.Evid. 404(b)(1) (prohibiting prior act evidence to show that on a particular occasion a particular person acted in a particular way). As such, the affidavits are totally irrelevant to the resolution of the present motion.

³ Hutchinson is also currently a plaintiff in a separate action against Dr. Razdan which is pending in the United States District Court for the Southern District of Florida. See Johnson v. Razdan, 11-cv-20159 (S.D.Fla).

CASE NO. 1:11-CV-21118-FAM

3. Johnson Cannot Create a Purported Factual Dispute with Unqualified Conclusory Assertions

Johnson has attempted to create a factual issue by submitting his verified “Response” in which he implies or opines: (i) implies that the biopsy was improperly performed (DE 54, ¶6); (ii) the biopsy caused his subsequent urinary dysfunction (DE 54, ¶6); (iii) all of the medical issues Johnson currently experiences are the result of biopsy (DE 54, ¶10); (iv) sets forth the purported requirements for obtaining informed consent (DE 54, p.7); (v) Dr. Razdan created Johnson’s health problems by taking ‘a less and easier procedure at his office without utilizing the hospital equipment’ (DE 54, p. 8). Johnson, however, is neither qualified nor competent to render such opinions.

Rule 56(c)(4) provides that an affidavit or declaration used to oppose a motion for summary judgment must be made on personal knowledge, and set out facts that would be admissible in evidence. Fed.R.Civ.P. 56(c)(4) (emphasis added). Rule 702 governs the admissibility of expert opinion testimony and provides that “a witness who is qualified by knowledge, experience, training, or education may testify in the form of an opinion...” Fed.R.Evid. 702 (emphasis added). Johnson has no such qualifications. He is not a doctor, has never performed the procedure, and there is nothing about his background or training that would otherwise qualify him to render such opinions. Put simply, the assertions contained within the affidavit are nothing more than unqualified and unsupported assertions that cannot be considered in ruling upon a motion for summary judgment. See Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1217 (11th Cir. 2000) (holding that conclusory assertions without supporting facts have no probative value);

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Gordon v. Terry, 684 F.2d 736, 744 (11th Cir. 1982); *Evers v. General Motors Corp.*, 770 F.2d 984 (11th Cir. 1985).

B. WHEN THE IRRELEVANT AND INADMISSABLE MATERIAL IS REMOVED, THERE SIMPLY IS NO FACTUAL QUESTION CONCERNING THE ISSUE OF DR. RAZDAN'S CONDUCT

Without citing to a single case or other piece of authority, Johnson contends that he has presented a sufficient factual record to withstand summary judgment. But, when the irrelevant and inadmissible assertions are removed from the response, the result is substantially different from that suggested by Johnson. In fact, Johnson has not refuted the conclusions of either Dr. Kaplan or Dr. Razdan. Johnson has not presented competing affidavits or opinions from qualified individuals concerning the need, timeliness, or manner in which the treatment was provided. As such, there is simply no issue to try. See *Wingster v. Head*, 318 Fed.Appx. 809, 815 (11th Cir. 2009) (recognizing that a party could not create a triable issue of fact by disregarding the uncontradicted and unimpeached testimony of an expert witness, a witness whose testimony bears on technical medical questions.) The undisputed and uncontradicted expert opinions submitted by Dr. Razdan establish, at a minimum, that Dr. Razdan was not 'deliberately indifferent' to Johnson's condition because there is simply no evidence to suggest that he disregarded a risk or engaged in conduct that was "more than gross negligence." See

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C. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE THE PURPORTED EVIDENCE OFFERED BY JOHNSON IS INSUFFICIENT TO CAUSALLY LINK HIS PURPORTED INJURY TO DR. RAZDAN'S CONDUCT

According to Johnson, summary judgment is inappropriate because he “did not have any medical issues until and after Dr. Razdan performed the manual prostate biopsy.” (DE 54, ¶10.) But, this is simply not enough to preclude summary judgment. As noted by several courts, the mere fact that an injury occurred, without more, is not sufficient evidence of deliberate indifference. See *Roberso v. Goodman*, 296 F.Supp.2d 1051 (D.N.D. 2003); citing *Rellergert by Rellergert v. Cape Girardeau County Mo.*, 925 F.2d 794, 796 (8th Cir. 1991). As such, something more is required.

In the present action, this causal element must be established by expert testimony. Johnson is attempting to correlate his prostate biopsy (performed through the rectum) with subsequently developing urinary dysfunction. (DE 9.) This is the precise type of technical medical causation issue for which expert testimony is required. See *Wingster v. Head*, 318 F. App'x 809, 815 (11th Cir. 2009) (expert medical testimony required to causally link trauma to aneurysm); *Stanfill v. Talton*, 5:10-CV-255 MTT, 2012 WL 1035385 (M.D. Ga. Mar. 29, 2012) (expert medical testimony required to causally link dehydration and cardiac event). As no such testimony has been produced, Johnson's claim cannot withstand scrutiny.

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D. JOHNSON CANNOT DEFEAT SUMMARY JUDGMENT BY ATTEMPTING TO TRANSFORM THE PRESENT ACTION INTO ONE PREDICATED UPON A PURPORTED LACK OF INFORMED CONSENT⁴

1. Johnson Cannot Defeat Summary Judgment by Attempting to Create a Factual Issue Pertaining to an Un-Plead Legal Theory

Nowhere within Johnson's complaint is there any suggestion that he is or would be proceeding under what is, essentially, an "informed consent" theory in connection with this case. (DE 9.) In fact, his complaint is devoid of any allegations or inferences to suggest that such a theory would even be placed at issue in this action. As such, the new "informed consent" theory raised by Johnson cannot be raised, for the first time, at the summary judgment stage to defeat the present motion. *See Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004); *citing Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("a plaintiff may not amend her complaint through argument in a brief opposing summary judgment."); *see also Edwards v. Niles Sales & Service, Inc.*, 439 F.Supp.2d 1202, 1208-09 (S.D.Fla. 2006) (citations omitted.). Therefore, to the extent that Johnson failed to assert such a claim in any prior pleading, the un-pled theory cannot and should not be utilized to defeat the present Motion.

2. Johnson's "Informed Consent" Theory is a Species of Negligence and Mere Negligence Will not Support a §1983 Claim

In 1976, the United States Supreme Court declared that

... a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a

⁴ As the 'informed consent' theory was not presented in Johnson's pleadings, Dr. Razdan did not address the theory in his Motion or in his Statement of Facts submitted with the Motion. To the extent that the court is inclined to entertain this new theory in connection with the Motion for Summary Judgment, Dr. Razdan would request the opportunity to present additional facts to support summary judgment concerning this previously unplead theory.

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valid claim of medical mistreatment under the Eight Amendment.

Estelle v. Gamble, 429 U.S. 97, 106 (1976) (emphasis added.) The Supreme Court's pronouncement provided the foundation for the basic rule – that a prisoner's allegations of alleged medical negligence simply do not rise to the level necessary to state a claim for a constitutional violation. This rule is neither new nor novel. Rather, it has been recognized by each and every court within the Eleventh Circuit and within this district. See *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (“mere incidents of negligence or malpractice do not rise to the level of constitutional violations”); *Pintado v. Dora*, 2011 WL 794607, at 10 (S.D.Fla. 2011) (“it is well settled that a showing of mere negligence, neglect, or medical malpractice is insufficient to recover on a §1983 claim).

As Magistrate Judge White noted:

Thus, it is well settled that a showing of mere negligence, neglect, or medical malpractice is insufficient to recover on a §1983 claim. (citations omitted.) In fact, once an inmate has received medical care, courts are hesitant to find that a constitutional violation has occurred.

Thomas, 2010 WL 3119623, at 15.

Apparently ignored by Johnson is the fact that the purported lack of informed consent has been recognized as being nothing more than a species of negligence, legally insufficient to support a §1983 claim. For example, in *Rochell v. Correctional Medical Services*, 4:05CV268-P-A, 2006 WL 1422988 (N.D. Miss. Apr. 10, 2006) report and recommendation adopted, 4:05CV268-P-A, 2006 WL 1423189 (N.D. Miss. May 16, 2006), an inmate attempted to assert a claim predicated upon a purported lack of informed consent in connection with a tooth extraction. As part of the pre-suit screening

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process, the court evaluated the allegations and concluded that plaintiff failed to state a claim. In particular, the court determined, as a matter of law, that

Finally, a claim regarding lack of informed consent is one of medical negligence, not deliberate indifference, and negligent conduct by prison officials does not rise to the level of a constitutional violation.

Rochell, 2006 WL 1422988 at 3 (emphasis added).

A similar result was reached by another federal court in *Wright v. Fred Hutchinson Cancer Research Center*, 259 F.Supp. 2d 1286. In *Wright*, the plaintiff alleged a §1983 action against various physicians in which he claimed, in part, that the failure to obtain his “informed consent” rose to the level of a constitutional violation necessary to state a claim. The court rejected this position, holding

Keeping in mind the Supreme Court's admonition that courts should exercise judicial restraint when asked to expand the rights protected under the substantive due process clause (citation omitted), the Court finds that the type of wrongful conduct alleged in plaintiffs' Second Amended Complaint, namely defendants' failure to make disclosures necessary to the informed consent process in a therapeutic, experimental setting, does not implicate rights that are so rooted in the tradition and conscience of our people as to be ranked as fundamental. A doctor's tortious failure to obtain informed consent is not a threat to our citizens' enjoyment of ordered liberty, even when the doctor is employed by the state.

Wright v. Fred Hutchinson Cancer Research Ctr., 269 F. Supp. 2d 1286, 1296 (W.D. Wash. 2002) (emphasis added). Even in Florida, where facts giving rise to the present action occurred, as in countless other jurisdictions, the failure to obtain informed consent is a species of negligence. *Parham v. Florida Health Sciences Center, Inc.*, 35 So. 3d 920, 928 (Fla. 2nd DCA 2010) (emphasis added).

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Purported failures to disclose certain information in connection with obtaining “informed consent” have been recognized as being species of negligence for purposes of both tort law, generally, and section 1983, specifically. Multiple courts have held that the purported lack of informed consent did not rise to the level of a constitutional violation sufficient to sustain a §1983 claim. In the instant action, Johnson is not claiming that he was treated against his will. Rather, he contends only that certain information was not provided to him. As such, his claim amounts to nothing more than a mere negligence action, insufficient to defeat summary judgment.

CONCLUSION

When Johnson’s response is reduced to its core, it becomes apparent that he is seeking to oppose summary judgment with nothing more than his unsupported assertions, opinions, and legally deficient conclusory statements. He seeks to challenge the assertion in the motion with nothing more than unpled theories and irrelevant statements. He has not cited to a single case. He has not provided a single piece of competent evidence to support his claim. In contrast, Dr. Razdan has produced affidavits of qualified individuals who have opined that the care and treatment that was provided was appropriate.

Dr. Razdan has established that no factual issues exist that would preclude summary judgment. Nothing within Johnson’s has created a factual issue that would preclude summary judgment. Accordingly, Dr. Razdan would request that this court grant his motion and enter summary judgment in his favor and against the plaintiff, Elbert Johnson.

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I HEREBY CERTIFY that on August 1, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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