

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>CHRIS CARTY,</b>	)	
Plaintiff	)	Civil Action No.: 7:13cv00533
	)	
v.	)	
	)	
<b>V. PHIPPS, et al.,</b>	)	<b><u>REPORT AND RECOMMENDATION</u></b>
Defendants	)	By: PAMELA MEADE SARGENT
	)	United States Magistrate Judge

The pro se plaintiff, Chris Carty, is a Virginia Department of Corrections, (“VDOC”), inmate currently housed at Red Onion State Prison, (“ROSP”). The undersigned now submits the following report recommending that this action be dismissed pursuant to 28 U.S.C. § 1915A(b)(1) because it fails to state a claim upon which relief may be granted.

*I. Facts*

Carty, a frequent filer in this court, brings this civil rights action for injunctive relief and damages pursuant to 42 U.S.C. § 1983 against V. Phipps, ROSP medical administrator, and H. Smith, ROSP physician. Carty claims that these defendants have refused to provide him with the proper medically prescribed diet. On the face of his Complaint, Carty admits that Smith ordered the discontinuation of the “cardiac” diet he was receiving on October 24, 2013. He further admits that Smith ordered a diet with no eggs, cheese, dairy products or pasta. Carty admits that he is receiving this diet.

## *II. Analysis*

Federal Rules of Civil Procedure Rule 12(b)(6) provides for dismissal of a complaint for “failure to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). Title 28 U.S.C. § 1915A(b)(1) provides that the court shall conduct a sua sponte review of every prisoner claim filed and dismiss any complaint, in part or in whole, that fails to state a claim upon which relief may be granted. 28 U.S.C.A. § 1915A(b)(1) (West 2006).

The Eighth Amendment of the United States Constitution prohibits the infliction of cruel and unusual punishment on convicted prisoners. *See* U.S. CONST. amend. VIII. To demonstrate cruel and unusual punishment, a plaintiff must establish that the defendants acted with "deliberate indifference" and he experienced an extreme deprivation of a basic human need or serious or significant pain or injury. *Wilson v. Seiter*, 501 U.S. 294, 299-303 (1991). In order to state a claim for violation of the Eighth Amendment right to be free from cruel and unusual punishment based on medical care, an inmate must show deliberate indifference to a prisoner’s serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

Mere negligence in rendering medical care to a prisoner, however, does not rise to the level of a claim cognizable under § 1983. *See Goode v. Hartman*, 388 F. Supp. 541, 542 (E.D. Va. 1975); *Bishop v. Cox*, 320 F. Supp. 1031, 1032 (W.D. Va. 1970). “Allegations of improper or insufficient medical treatment do not state a Constitutional claim.” *Bishop*, 320 F. Supp. at 1032 (quoting *Hopkins v. County*

of *Cook*, 305 F. Supp. 1011, 1012 (N.D. Ill. 1969)). Moreover, a prisoner's disagreement with medical personnel over the course of his medical treatment fails to state a claim "unless exceptional circumstances are alleged." *Wright v. Collins*, 766 F.2d 841, 849 (4<sup>th</sup> Cir. 1985) (mere disagreement between inmate and physician concerning proper treatment insufficient under § 1983).

Here, Carty admits on the face of his Complaint that he is receiving the diet ordered by Smith, the RO SP physician. While Carty argues that Smith has ordered the wrong diet for him, Carty's disagreement with the medical diet he has been prescribed does not rise to the level of a constitutional claim cognizable under § 1983.

### **PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Carty's Complaint fails to state a claim upon which relief may be granted against the defendants; and
2. Carty's Complaint should be dismissed.

### **RECOMMENDED DISPOSITION**

Based on the above-stated reasons, I recommend that the court dismiss Carty's Complaint in its entirety.

### **Notice to Parties**

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation 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. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable Samuel G. Wilson, United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record and unrepresented parties.

DATED: This 30<sup>th</sup> day of December, 2013.

/s/ Pamela Meade Sargent  
UNITED STATES MAGISTRATE JUDGE