United States District [illegible]
D. Kansas.
James Earl LINDSEY, [illegible]
v.
Scott BOWLIN, M.D., [illegible]
Civil Action No. 07-306[illegible]

June 6, 2008.

Background: Federal prisoner [illegible] operated in private prison brought *Bivens* action against physician alleging violation of Fifth, [illegible] and Fourteenth Amendment rights. Physic[illegible] moved to dismiss.

Holding: The District Court, Ka[illegible] Vratil, J., held that no state law negligence [illegible] of action was shown.

Motion denied.

West Headnotes

[1] Prisons 310 ⚷192

310 Prisons
310II Prisoners and Inmates
310II(D) Health and Medica[illegible]
310k19[illegible] Particular Co[illegible] and Treatments
310k192 k. In Gen[illegible] Most Cited
(Formerly 310k17(2))

United States 393 ⚷50.10(3)

393 United States
393I Government in General
393k50 Liabilities of Offi[illegible] Agents for Negligence or Misconduct
393k50.10 Particular Acts or Claims
393k50.10(3) k. Criminal Law Enforcement and Investigation: Prisoners' Claims. Most Cited Cases
(Formerly 310k17(2))
No state law negligence action was shown for federal prisoner's injuries arising out of physician's failure to diagnose Hepatitis C and methicillin-resistant Staphylococcus aureus (MRSA), as would preclude federal prisoner's *Bivens* action against physician at private prison, alleging that failure to diagnose violated prisoner's Fifth, Eighth, and Fourteenth Amendment rights. U.S.C.A. Const.Amends. 5, 8, 14.

[2] United States 393 ⚷50.10(3)

393 United States
393I Government in General
393k50 Liabilities of Officers or Agents for Negligence or Misconduct
393k50.10 Particular Acts or Claims
393k50.10(3) k. Criminal Law Enforcement and Investigation: Prisoners' Claims. Most Cited Cases
A federal prisoner has no implied right of damages against an employee of a privately operated prison under *Bivens*, when state or federal law affords an alternate cause of action for the alleged injury.

[3] Civil Rights 78 ⚷1326(4)

78 Civil Rights
78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases and Contexts
78k1326(3) Private Persons or Corporations in General
78k1326(3) k. In General. Most Cited Cases

Civil Rights 78 ⚷1326(5)

78 Civil Rights
78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases and Contexts
78k1326(3) Private Persons or Corporations in General

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78k1326(5) k. [illegible] with State Actor. Most Cited Cases

Civil Rights 78 ⚷1326(7)

78 Civil Rights
78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases [illegible]
78k1326(7) k. Public Service, License, or Regulation: Utilities and [illegible]. Most Cited Cases
Under § 1983, conduct is "fairly [illegible] to the state if (1) the deprivation is caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state, and (2) the private party acted together with or obtained significant aid from state officials or [illegible] in conduct otherwise chargeable to the state. 42 U.S.C.A. § 1983.

[4] Civil Rights 78 ⚷1326(3)

78 Civil Rights
78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases [illegible]
78k1326(3) k. Police [illegible] Officers: Prisons. Most Cited Cases
Federal prisoner bringing § 1983 [illegible] against physician at private contract prison [illegible] physician's receipt of license to practice medicine in state, claiming prisoner was injured [illegible] physician's failure to diagnose and treat Hepatitis C and methicillin-resistant Staphylococcus [illegible] (MRSA), was required to allege that state [illegible] of conduct created deprivation or that physician acted in concert with state officials or engaged in conduct otherwise chargeable to the state. 42 U.S.C.A. § 1983.
***1226** James Earl Lindsey, Tabas [illegible], pro se.

Mark V. Lynch, [illegible] Jackson & Gilbert, Harrisburg, PA, Overland Park, KS, for [illegible].

MEMORANDUM AND ORDER

KATHRYN H. VRATIL, District Judge.

James E. Lindsey brings suit *pro se* against Scott Bowlin, M.D., for violation of constitutional rights under the Eighth, Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff's claims arise from his incarceration in Leavenworth Detention Center, a private prison run by the Corrections Corporation of America ("CCA").[N1] Specifically, plaintiff claims that during said incarceration defendant, a physician for CCA, concealed or failed to take reasonable steps to prevent the spread of methicillin-resistant Staphylococcus aureus ("MRSA") and Hepatitis C within the prison population, and failed to treat plaintiff for such diseases. This matter comes before the Court on defendant's *Motion To Dismiss* (Doc. # [illegible]) filed March 21, 2007.[N2] Defendant asserts that plaintiff cannot bring an action for constitutional violations under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), against an employee of a privately operated prison. For reasons stated below, the Court overrules defendant's motion.

[N1] CCA is a private Maryland corporation which houses and detains federal pretrial arrainees and prisoners under contract with the United States Marshal's Service. *[illegible] v. CCA, Det. Ctr.*, [illegible] KFV, 2004 WL 74317, at *1 ([illegible] 15, 2004) ("*Peoples I*"), *rev'd en banc, Peoples v. CCA Det. Ctrs. ("Peoples [illegible]")*, [illegible] F.3d 1097 (10th Cir.), *cert. denied*, [illegible] U.S. 1036, 127 S.Ct. 664, 166 [illegible] 821 (2006).

[N2] Because defendant has already filed an answer, it should normally make its motion under Rule 12(c), for judgment on the pleadings. *See Jacobsen v. Deseret Book [illegible]*, [illegible] F.3d 936, 941 n. 2 (10th Cir. [illegible]). The same standard applies for Rule 12(b)(6) and 12(c) motions, however, so in keeping with defendant's designation,

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the Court [illegible] to the motion to dismiss. *See id.* [illegible] 12(b)(6) [illegible]

[illegible] A Standard

In ruling on a motion to dismiss [illegible] to state a claim under Fed. R. Civ. P. 12(b)(6) [illegible] Court assumes as true all well-pleaded facts in the complaint and views [illegible] in a light most favorable to plaintiff. *See Zinermon v. Burch*, [illegible] S. 113, 118, 110 S.Ct. 975, [illegible] L.Ed.2d [illegible]; *Swierkiewicz v. Sorema N.A.*, [illegible] 53, 119 Cir.1984; Fed. R. Civ. P. 12(b)(6) does [illegible] detailed factual allegations, but the complaint must set forth the grounds of plaintiff's entitlement to relief through more than [illegible] conclusory statements, or a formulaic*1227 recitation of the elements of a cause of action. *See Bell Atl. Corp. v. Twombly*, [illegible] 550 U.S. 544, 127 S.Ct. [illegible] 1965(b)(2), [illegible] L.Ed.2d [illegible] (2007). In other words, plaintiff must allege facts sufficient to state a claim which is plausible-rather than merely conceivable-on its face. *See id.* Plaintiff bears the burden to file a complaint with enough factual matter (taken as true) to suggest that he is entitled to relief. *Id.* 1965. The Court makes all reasonable inferences in favor of plaintiff. *See Jones v. Bock*, [illegible] 549 U.S. 199, 204, 127 S.Ct. 910, 975; *see also Gomez v. Toledo*, [illegible] *Alpharma, Inc. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, [illegible] (11th Cir.2003). The Court, however, need not accept [illegible] conclusory allegations which state the legal effect. *See Fed. Deposit Ins. Corp. v. Bates*, [illegible] 11th Cir.1990). In reviewing the sufficiency of a complaint, the issue is not whether plaintiff will prevail but whether he is entitled to offer evidence to support his claim. *See Scheuer v. Rhodes*, [illegible] 416 U.S. 232, [illegible] 94 S.Ct. [illegible] (1974), *overruled in [illegible] grounds by Harlow v. Fitzgerald*, [illegible] U.S. [illegible] S.Ct. [illegible] L.Ed.2d [illegible] (1982). Although plaintiff need not necessarily state each element of his claims, he must allege minimum factual allegations on each material element that suffices to recover. *See id.* [illegible] at 14[illegible] Because plaintiff proceeds *pro se*, the Court construes his complaint liberally and holds it to a less [illegible] standard than formal pleadings drafted by lawyers. *See id.* The Court, however, does not assume the role of advocate for a *pro se* litigant. *See id.*

Facts

Plaintiff alleges the following facts, which the Court accepts as true for purposes of ruling on defendant's motion:

Plaintiff is an inmate at Federal Correctional Institution [illegible] Alabama. *Complaint* (Doc. # 1) [illegible] 3, 3-07 at 1-3. From November of 2004 [illegible] January 16, 2005, plaintiff was incarcerated in Leavenworth Detention Center ("LDC"), a prison run by CCA.[3] *Id.* at 1-3. Defendant is a physician who works for CCA. *Id.* at 1.

[illegible] the complaint contains inconsistent [illegible] numbering. For purposes of this order, [illegible] Court refers to page numbers designated by the electronic court filing system.

[illegible] the complaint does not allege when plaintiff began his incarceration at LDC, it appears that he was incarcerated there from at least November of 2004.

On [illegible] November 29, 2004, defendant examined plaintiff [illegible] nausea, fever and an extremely painful [illegible] on his right upper scrotum. *Id.* at 2. Defendant [illegible] that plaintiff had an ingrown hair, prescribed Doxycycline and asked him to return in [illegible] *Id.* During the following week, plaintiff [illegible] he would himself without bandaging [illegible]

On [illegible] 2004, medical staff performed a [illegible] of Plaintiff's wound. *Id.* Plaintiff told the doctor that he had never seen a two-inch bump for [illegible] which caused nausea and fever and [illegible] much pus. *Id.* The doctor assured [illegible] ingrown hair. *Id.* During [illegible] plaintiff knew several inmates

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who had similar abscesses on their bodies. *Id.* CCA [illegible] that the abscesses were caused by [illegible] or insect bites. *Id.*

> FN5. Plaintiff does not [illegible] saw defendant or another [illegible]

On December [illegible] CCA [illegible] received culture results [illegible] plaintiff's wound was not an ingrown hair [illegible] potentially deadly disease [illegible] ication.[illegible] 1228 [illegible] plaintiff [illegible] that he had MRSA [illegible] MRSA. *Id.* Defendant did not [illegible] plaintiff that MRSA has a capacity [illegible] sorbed in the [illegible] seek immediate medical attention [illegible] rence. *Id.* Because defendant did [illegible] plaintiff for MRSA, plaintiff [illegible] carrier [illegible] disease. *Id.* at 2. [illegible] a result, [illegible] ted to a substantial [illegible] ciated infection [illegible] which plaintiff suffered [illegible] tal organ failure [illegible] at 3.

> FN6. [illegible] Defendant [illegible] Department [illegible] court [illegible] with [illegible] excessive [illegible] decision.

On January [illegible] 2005, medical [illegible] informed plaintiff that he had [illegible] prior [illegible] performed and [illegible] CCA. *Id.* [illegible]

[illegible] barber equipment and weightlifting [illegible] were used by inmates with sus- [illegible] and spider bites who had Hepatitis C. *Id.* Defendant [illegible] did not treat plaintiff for Hepatitis C. [illegible] plaintiff has suffered irreparable liver [illegible] a shorter life expectancy and a substantial [illegible] of sudden death. *Id.* at 5. Also, [illegible] reduce and must abstain from sexual [illegible]

[illegible] On July 23, 2004, plaintiff was medically cleared to work in the kitchen at [illegible] at 5.

[illegible] 2005, plaintiff left CCA. *Id.* at 3. [illegible] plaintiff believed that the bump on his [illegible] an ingrown hair. *Id.* Plaintiff did not [illegible] MRSA. *Id.*

[illegible] 2005, while in the transfer center in [illegible] plaintiff noticed an abscess on his right knee. *Id.* [illegible] plaintiff initially ignored it, thinking that it was a [illegible] ingrown hair. *Id.* Plaintiff eventually [illegible] medical attention, however, due to swelling [illegible] pain. *Id.* A culture revealed that it [illegible]

[illegible] plaintiff contracted MRSA, defendant [illegible] knew or should have known that a MRSA epidemic and [illegible] existed throughout the LDC inmate population. *Id.* at 5. As plaintiff's healthcare provider, [illegible] had a duty to conform to a reasonable [illegible] of care to assure plaintiff's health and safety. *Id.* Defendant breached that duty by concealing the outbreak. *Id.* Defendant could have prevented [illegible] transmission of MRSA by [illegible] precautionary measures such as isolating [illegible] inmates and/or posting warnings regarding transmission, risk factors, prevention [illegible] of MRSA. *Id.* Defendant should have [illegible] regarding disinfection and decontamination [illegible] potentially contaminated surfaces, [illegible] clothing. *Id.* Such measures would [illegible] plaintiff a full and fair opportunity to [illegible] chances of contracting the disease. Defendant did not exercise reason-

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able care to stop [illegible] A Pe[illegible] inmate portrait [illegible] and suffered [illegible] excruciating pain [illegible] scars on his scrotum [illegible] thighs. *Id.*

***1229** Deter[illegible] carried [illegible] should [illegible] inmates among non-affected [illegible] ally, defendant [illegible] charge, [illegible] tained [illegible] ultaneously [illegible] diseases. *Id.* Defendant failed [illegible] able care [illegible] spreading with [illegible] ately caused plaintiff [illegible] disease. [illegible]

their [illegible] his [illegible] caused [illegible] embarrassing [illegible] back [illegible] at [illegible] in [illegible] specifics [illegible] ally [illegible] 25 [illegible] all [illegible] with [illegible] reason [illegible] A [illegible] ptom [illegible] ith [illegible]

Analysis

Plaintiff [illegible] for [illegible] tional rights [illegible] and [illegible] failing to prevent [illegible] spread of [illegible] is [illegible] the [illegible] treat plaintiff [illegible] dismiss, [illegible] action against [illegible] employee of [illegible] prison.

In *People* [illegible] 2004 [illegible] 2004 [illegible] would [illegible] CCA [illegible] remedy available [illegible] **6-7 [illegible] ity against. Finding [illegible] state [illegible] does not [illegible] *vens* [illegible] a private [illegible] prison. [illegible]

[illegible] *Peoples III* [illegible] 422 F.3d 1090, [illegible] Cir.2005). [illegible] On rehearing en [illegible] the Tenth Circuit equally divided on [illegible] to actions against employ- [illegible] operated prison. *See Peoples* [illegible] *Peoples II* [illegible] 449 F.3d 1097, [illegible] 2006). [illegible] On this issue, the en [illegible] ed the panel opinion and remanded [illegible] further proceedings. On remand of [illegible] Court issued an order to show cause [illegible] not dismiss the case for failure to [illegible] Rule 12(b)(6). *See Order To* [illegible] 41) filed October 5, 2006 in [illegible] 129. Plaintiff did not respond and the [illegible] *See Order* (Doc. # 42) [illegible] 30, 2006 in Case No. 03-3129. [illegible] upon [illegible]

[illegible] *Peoples I*, this Court concluded [illegible] lacked subject matter jurisdiction [illegible] claims. *See* [illegible] at *7. In a related [illegible] a judge of this Court found that [illegible] subject matter jurisdiction, but that [illegible] no state claim upon which [illegible] be granted. *See Peoples* [illegible] *Peoples II* [illegible] 2004 [illegible] 02-2298-[illegible] March 26, [illegible] In dicta, that case noted that it was [illegible] plaintiff could maintain a *Bi-* [illegible] against individual CCA employ- [illegible] especially when alternative state rem- [illegible] available, but it did not decide [illegible] it assumed the availabil- [illegible] *Bivens* action and held that plaintiff [illegible] alleged sufficient facts to support [illegible] allegations. *See* [illegible] at **4-7.

The panel majority concluded that [illegible] have jurisdiction over such [illegible] but that plaintiff did not state a [illegible] such relief could be granted. *See* [illegible]

[illegible] unanimously [illegible] district courts have subject [illegible] jurisdiction over such claims. [illegible]

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[illegible]

Although [illegible] sue, two circuit [illegible] *Bivens* liability [illegible] operated prison [illegible] remedies. For [illegible] *See Alba* [illegible] (11th Cir. [illegible] 295-97 [illegible] S.Ct. [illegible] cases, the courts [illegible] plaintiff [illegible] available, the [illegible] *Bivens* liability [illegible] prison [illegible] 295-96. [illegible] 1971 to 1980. [illegible] implied cause [illegible] directly under the [illegible] U.S. [illegible] eral officers [illegible] Amendment [illegible] 228, 99 S.Ct. [illegible] action against [illegible] violation [illegible] 1468. [illegible] federal [illegible] ation [illegible] refused to [illegible] money [illegible] tion. [illegible]

[illegible]

In *Corr.* [illegible] 534 [illegible] (2001) [illegible] tion to imply [illegible] cumstances. [illegible] Correctional [illegible] private [illegible]

[illegible] the Bureau of Prisons, for [illegible] violations. The Supreme Court [illegible] extended *Bivens* to claims against private [illegible] 60, 122 S.Ct. 515.[illegible] In so [illegible] Supreme Court noted that it has con- [illegible] to extend *Bivens* except "to [illegible] otherwise nonexistent cause of action [illegible] *federal officers* alleged to have acted un- [illegible] to provide a cause of action for [illegible] individual officer's unconstitu- [illegible] *See id.* at 70, 122 S.Ct. 515 [illegible] The Supreme Court emphas- [illegible] plaintiff had alternative remedies [illegible] and that the Supreme Court's three [illegible] toward extending *Bivens* in [illegible] foreclosed an extension in that [illegible] S.Ct. 515.

[illegible] *Malesko* did not address whether [illegible] could bring a *Bivens* claim against [illegible] employee of CSC.

[illegible] *Malesko*, *Alba* and *Holly*, and for reas- [illegible] the majority opinion, this [illegible] federal prisoner has no implied [illegible] against an employee of a privately [illegible] state or federal law affords an [illegible] for the alleged injury. *See* [illegible] 1996-103. Thus, to de- [illegible] plaintiff has stated a claim upon [illegible] granted, the Court must de- [illegible] provides an alternative [illegible] alleged injuries.[illegible] *See id.*

[illegible] Court [illegible] that if plaintiff [illegible] state a claim for violation of his [illegible] rights, he could not proceed [illegible] and it would be immaterial [illegible] law affords an alternate rem- [illegible] motion does not address [illegible] plaintiff has sufficiently stated a [illegible] constitutional deprivation. At [illegible] it appears that plaintiff may [illegible] violation of the Eighth

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[illegible]

***1231** [illegible] state [illegible] *andum* [illegible] 35) filed [illegible] analysis [illegible] ant has [illegible] law [illegible] ies, the Court will [illegible] this time [illegible]

[illegible]

[illegible] with or obtained significant aid [illegible] officials or engaged in conduct [illegible] chargeable to the state. *See id.* [illegible] plaintiff does not allege that state [illegible] conduct created the deprivation or [illegible] defendant acted in concert with state [illegible] or engaged in conduct otherwise [illegible] to the state. Accordingly, his [illegible] do not state a claim for relief [illegible] section 1983. *Cf. Comiskey v. JFTJ* [illegible] F.2d 1007, 1010-11 (8th [illegible]) (bar not state actor merely be- [illegible] state issued it liquor license); *Tunca* [illegible] *en Hos.* [illegible] F.2d 411, 413 [illegible] 28) (hospital not state actor [illegible] because regulated by state); *Willis* [illegible] *Township*, No. 1:07-[illegible]-0949, [illegible] 1762 [illegible] M.D. Pa. March 5, [illegible] attorney not state actor merely be- [illegible] by state).

IT IS [illegible] **ORDERED** that defendant's [illegible] (Doc. # 34) filed March 21, [illegible] hereby is **OVERRULED.**

[illegible]

[illegible]

[illegible] West. No Cl[illegible] Gov. Works.

Only the Westlaw citation is curre[illegible] a[illegible]ble.

United States District [illegible]
D. Kansas.
Junior Clayton MENTEER, [illegible]
v.
Stacey APPLEBEE, et al., [illegible]
No. 04-3054-ML

June 27, 2008

David A. Rameden, Zach Chaffe[illegible], Shook, Hardy & Bacon L. P., Kansa[illegible] MO, for Plaintiff.

Joshua D. Mast, Michael P. Cro[illegible]w, Clothier & Associates, Leavenworth, KS, [illegible]ants.

MEMORANDUM AN[illegible]

JAMES P. O'HARA, U.S. Magist[illegible]

I. Introduction

***1** This is a prisoner [illegible]ivil rights [illegible] plaintiff Junior Clayton Menteer, asserts [illegible]elated to his treatment while he was incarc[illegible] at the Corrections Corporation of Americ[illegible]") Detention Center in Leavenworth, [illegible]pecifically, plaintiff alleges he [illegible] of the neglect and indifferen[illegible] of CCA [illegible]mployees, defendants Stacey Applebee, Dr. [illegible]lin, Fredrick Lawrence, Rhonda Allen [illegible]ty Davis (collectively, the "individual [illegible]ndants"). The case is now before the cour[illegible] individual CCA defendants' supplemental [illegible] to dismiss **(doc. 45)** and CCA's motion to [illegible] plaintiff's amended complaint (doc. 79). [illegible] 2008, by consent of all parties, the two [illegible] currently before the court were assigned f[illegible]ation from Hon. Monti L. Belot, U.S. Distr[illegible] Judge, to the undersigned U.S. Magistra[illegible] James P. O'Hara [illegible] doc. 87). As discussed below, these motions [illegible]ve been fully briefed, and the court is ready to [illegible]

II. Background

A detailed review of this case's complex procedural history [illegible] necessary to understand the legal issues currently before the court. On February 13, 2004, plaintiff [illegible]led this case pro se against the United States of America, the United States Marshal for the Distr[illegible] of Kansas, and the United States Attorney Gen[illegible]al (collectively, the "federal defendants"), a[illegible] also against CCA and the individual CCA de[illegible]dants (doc. 1). In his complaint, plaintiff asserted [illegible] claim under *Bivens v. Six Unknown Named [illegible]ents of Federal of Federal Bureau of Narcotic[illegible]* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (19[illegible]) for violations of his Fifth Amendment right to [illegible] process and his Eighth Amendment right to [illegible] free of cruel and unusual punishment, along wi[illegible] a claim under the Federal Tort Claims Act, 28 [illegible].S.C. §§ 1346(b), 2671-2680, and a [illegible] contract claim pursuant to the Tucker Act, 28 [illegible] § 1346(a)(2).

On Aug[illegible] 4, 2004, CCA and the individual CCA defendan[illegible] filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted (doc. 21). On Sep[illegible]ber 30, 2004, the federal defendants [illegible] motion to dismiss for lack of subject matter jurisdiction and failure to state a claim [illegible] which relief can be granted or, in the alternative, for [illegible]ary judgment (doc. 28).

On December 16, 2004, Judge Belot granted both of the [illegible]ove-referenced dispositive motions, dismissing [illegible] complaint in its entirety (doc. 30). Judgment was entered accordingly (doc. 31). Plaintiff, [illegible]ill proceeding pro se, appealed (doc. 32). On Aug[illegible] 10, 2006, the United States Court of Appeals for [illegible] Tenth Circuit affirmed the dismissal of

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the claims against the federal de[illegible] and CCA, but reversed the dismissal of [illegible] claim against the individual CCA def[illegible] for lack of subject matter jurisdiction, rema[illegible] the case for further proceedings only on the [illegible] claim (see doc. 48).

***2** As earlier indicated, the indivi[illegible] CCA defendants' original motion to dismiss [illegible] bases: lack of subject matter jurisdiction a[illegible] to state a claim upon which relief can be [illegible] The Tenth Circuit found that Judge Belot [illegible] motion on the basis of lack of subject [illegible] jurisdiction and held this was improper becau[illegible] appropriate basis for dismissing a *Bivens* [illegible] failure to state a claim upon which relief ca[illegible] [illegible]ted.

On August 29, 2006, after this [illegible] been remanded, Judge Belot determi[illegible] individual CCA defendants should be allow[illegible] a supplemental motion to dismiss for [illegible] claim or upon any other appropriate [illegible] (doc. 42). He also set briefing deadlines rela[illegible] motion.

The individual CCA defendants [illegible] supplemental motion to dismiss and [illegible] in support (doc. 46). On September 13, [illegible] receiving a letter from plaintiff stating [illegible] not file a response by the previously set [illegible] the court gave plaintiff an extension of [illegible] September 3, 2006 to respond to the individu[illegible] defendants' motion (see doc. 47). The court [illegible] that because the individual CCA defend[illegible] [illegible] some of plaintiff's medica[illegible] [illegible] in support of their motion, he [illegible] convert the motion to one for summary [illegible] the issue of whether plaintiff was give[illegible] [illegible]. The court stated plaintiff [illegible] evidence on the issue.

The court received another [illegible] plaintiff requesting an extension [illegible] individual CCA defendants' [illegible] (doc. 50). On October [illegible] 2006 [illegible] response [illegible] CCA [illegible] motion to dismiss, which plaintiff [illegible] [illegible] had converted to a motion for summary judgment on the [illegible] of whether plaintiff was given pain medicati[illegible] (doc. 51). The court then allowed the individual CCA defendants to supplement their motion to [illegible] plain whether administrative remedies were or are available at the Leavenworth Detention Center and, if so, what the remedies were or are (see doc. 52). The court's order included a footnote stating the individual CCA defendants' "motion may be converted to summary judgment."

The individual CCA defendants timely filed a supplement to their motion to dismiss addressing the availability of administrative remedies and whether plaintiff exhausted those remedies (doc. 53). The individual CCA defendants attached to their supplement an affidavit of defendant Fredrick Lawrence, Chapter [illegible] of the CCA Corporate and Facility Policy and the CCA Inmate Handbook for the Leavenworth Detention Center. The court then noted the evidence presented by the individual CCA defendants was contrary to plaintiff's statement in [illegible] complaint that he was told there were no administrative remedies available at the Leavenworth Detention Center (see doc. 54). The court converted the individual CCA defendants' motion to dismiss to one for summary judgment pursuant to [illegible] 12(c) and gave plaintiff an opportunity to respond to the individual CCA defendants' supplement to their motion. In an abundance of caution, the court sent plaintiff its previous order allowing the individual CCA defendants to supplement their motion regarding administrative remedies and the individual CCA defendants' supplement to the motion to which he was recently moved. Plaintiff then sent Judge Belot an illegible letter [illegible] letter requesting an extension of time [illegible] the individual CCA defendants' supplement to their motion (docs. 55 & 56).

[illegible] On [illegible] 2007, Judge Belot provisionally appointed [illegible] A. Kameden as counsel to represent plaintiff (doc. 57). On February 6, 2008, plaintiff, [illegible], filed a motion for leave to amend [illegible] to properly identify the previously

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unknown or [illegible] individual CCA defendants [illegible] claims against CCA and the [illegible] fendants (doc. 70). CCA opposes [illegible] guing plaintiff undue delayed [illegible] motion to amend (doc. 7[illegible]). CCA further [illegible] because it had not been a defendant [illegible] plaintiff's proposed [illegible] undue prejudice. [illegible] defendants did not [illegible] proposed amendments.

On February 2[illegible] brief in support of his motion to amend [illegible] filed a motion for leave to file [illegible] his misstatement that CCA has [illegible] pleading (doc. 76). In his stipulation [illegible] argued his opportunity to amend [illegible] ended and therefore the court [illegible] arguments raised by plaintiff's [illegible] the subsequent [illegible] same day, [illegible] complaint (doc. 77) and withdrew his motion for leave to amend and motion for leave to file [illegible] 78). CCA [illegible] amended complaint [illegible] (doc. 8[illegible]). [illegible] CCA and the individual CCA [illegible] answer to plaintiff's amended [illegible] sequently amended his answer [illegible]

Meanwhile, plaintiff [illegible] tensions of [illegible] defendants [illegible] (*see* docs. [illegible] 74) and this pa[illegible] ing discovery [illegible] response to the individual [illegible] memorandum [illegible] dividual CCA defendants' motion [illegible] reply brief regarding their supplemental motion to dismiss.

> FN1. When [illegible] defendants [illegible] defendant [illegible]

[illegible] motion to dismiss addressing the [illegible] of administrative remedies at [illegible] Leavenworth Detention Center. [illegible] already had filed a pro se response [illegible] individual CCA defendants' motion [illegible] 54). Plaintiff was to file his response [illegible] individual CCA defendants' supplemental [illegible] by March 16, 2007 (*see* doc. 54). [illegible] sent Judge Belot a letter dated [illegible] 5, 2007 requesting an extension of [illegible] to file his response (doc. 56). This request, which the court construed as a motion, was never ruled, but as mentioned [illegible] the court appointed counsel for [illegible] June 28, 2007.

[illegible] court, however, will consider [illegible] plaintiff's response filed through counsel [illegible] entirety. The court finds that plaintiff, who now has the benefit of counsel, should not be limited to the arguments and exhibits he presented in his pro se response. Further, plaintiff's motions for extensions of time to file his response and the court's orders granting [illegible] motions were not extremely precise as to what plaintiff was being given an extension of time to file (*see* docs. [illegible] 59 & 73-74).

[illegible] Individual CCA Defendants' Supplemental Motion to Dismiss

[illegible] Procedural standards

The [illegible] CCA defendants' supplemental motion [illegible] asserted pursuant to Fed.R.Civ.P. [illegible] issue of plaintiff's *Bivens* claim for failure to state a claim upon which relief can be granted [illegible] the individual CCA defendants attached [illegible] of plaintiff's medical records to their supporting memorandum. Judge Belot stated he would [illegible] the motion to be for summary judgment on the issue of whether plaintiff was given [illegible] notice. Judge Belot gave plaintiff an opportunity [illegible] contrary evidence on the issue.

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The individual defendants [illegible] their motion [illegible] trative remedies [illegible] outside the pleadings. After pro motion may be converted [illegible] "the court will consider [illegible] miss to the [illegible] noted the court [illegible] found [illegible] because [illegible] be on [illegible] his response [illegible] court should [illegible] fendants [illegible] should [illegible] ings.

[illegible] Rule 12 [illegible] haves is [illegible]

[illegible]

***4** [illegible] presented [illegible] a motion [illegible] which [illegible]

If, on [illegible] ters [illegible] excluded [illegible] as [illegible] parties [illegible] present [illegible] motion [illegible]

[illegible] discretion to accept or reject docu- [illegible] motion to dismiss pursuant to [illegible] The court, however, [illegible] the parties notice and an opportunity to [illegible] evidence before converting a mo- [illegible] to a motion for summary judg- [illegible] required notice may be actual or [illegible] in some circumstances, courts [illegible] that the submission of evidentiary [illegible] by movants, the nonmovant, or both of [illegible] sufficient notice.[illegible]

[illegible] *Meadows of Dunwoody* [illegible] *Bank v. Hunter*, 232 F.3d 1334, [illegible] (11th Cir.2000).

[illegible] *City and County of Denver*, [illegible] 1352 (10th Cir.1996).

[illegible]

[illegible] the court should not treat the mo- [illegible] summary judgment because the indi- [illegible] defendants failed to comply with D. [illegible] which requires parties moving for [illegible] to summarize the facts and spe- [illegible] the supporting portions of the re- [illegible] whether a movant complies with [illegible] when filing a motion it intended [illegible] for failure to state a claim does [illegible] that the court can exercise its dis- [illegible] the motion.

[illegible] 262 F. Supp.2d [illegible] (D.Colo. 2003) (declining to ex- [illegible] discretion to treat motion to dismiss [illegible] summary judgment for several [illegible] including that the motion did not [illegible] a concise statement of material [illegible] as required by D.C.COLO.LCivR 56.1).

[illegible] that if the court [illegible] motion is use for summary [illegible] the court should deny sum- [illegible] judgment because the individual

[illegible] 52, ex. 7.

[illegible] *Massarri* v. *Lappin*, No. [illegible] 2005, No. [illegible] 8599, at *8 (D.Kan. [illegible] 2005) (finding that a motion for [illegible] judgment was premature when [illegible] had not engaged in discovery).

[illegible] argues the court should not convert [illegible] for summary judgment because [illegible] notified the parties it will use the [illegible] standard. Such an argument ig- [illegible] previous orders in the case. The [illegible] plaintiff's counsel was appointed [illegible] with a complicated proced- [illegible] plaintiff's counsel, however, filed [illegible] over eight months after being [illegible] should have been sufficient time [illegible] history. Regardless, [illegible] the parties the motion may be [illegible] held the motion would be con- [illegible] for summary judgment, clearly giving [illegible] of such a conversion.[illegible] Given [illegible] order converting the motion [illegible] the undersigned [illegible] consider the matters outside [illegible] in and attached to the indi- [illegible] memorandum in support of [illegible] supplement, and plaintiff's re- [illegible] the motion as one [illegible]

[illegible] 54, [illegible] Judge Belot previ- [illegible] motion would be converted [illegible] summary judgment on the issue [illegible] plaintiff was given paid medie- [illegible] 17 at 7. His subsequent order, [illegible] the motion as a whole [illegible]

[illegible] of the moving [illegible] issue as to [illegible] to judgment as [illegible] In applying this standard, the [illegible] evidence and reasonable infer- [illegible] the [illegible] favorable to the

Plaintiff [illegible] the motion to [illegible] the parties [illegible] summary judgment [illegible] discovery. As [illegible] tion to [illegible] and therefore [illegible] ment. [illegible] sion is [illegible]

[illegible]

The [illegible] to effective [illegible] One [illegible] sion [illegible] motion [illegible] ants' [illegible] extension [illegible] the [illegible] CCA [illegible] before [illegible] atories [illegible] sponse [illegible] the parties [illegible] motion [illegible] this stage [illegible]

[illegible]

nonmov[illegible] this initial burden the the applic[illegible] the nonmoving party to "set forth proper [illegible] that there is a genuine issue fact is [illegible] nonmoving party may not each side [illegible] its pleadings to satisfy its solve [illegible] the [illegible] party must "set [illegible] that would be admissible in [illegible] of trial from which a rational [illegible] could find for the [illegible] accomplish this, the facts [illegible] by reference to affidavits, depos- [illegible] specific exhibits incorporated

[illegible] at 256; see [illegible] (concerning [illegible] on summary judgment)

[illegible] 477 [illegible] 256.

[illegible] 671 (internal [illegible] omitted).

The [illegible] demons[illegible] terial [illegible] of law [illegible] movant [illegible] notes summary judgment is not a persuas[illegible] [illegible] rather, it is an im- claim [illegible] designed to secure the just, the cou[illegible] [illegible] determination of every ac- an es[illegible] the oth[illegible] proof [illegible] 477 [illegible] 327 (quoting judgm[illegible] [illegible]). facts [illegible] fense.

[illegible] of course construes the [illegible] right most favorable to plaintiff [illegible] party, as required by [illegible] material facts and [illegible] properly supported by the record [illegible] When necessary, additional [illegible] in the analysis section of [illegible] order.

[illegible] original complaint was sworn to

[illegible] st. No Cl[illegible] Works.

under [illegible] defendants produced two facility fidavit [illegible] of which were effective facts [illegible] at the Leavenworth Detention filing [illegible] Lawrence states plaintiff did ted co[illegible] while at the Leavenworth De- on his [illegible] produced multiple grievances unverified [illegible] medical care original [illegible] allegations [illegible] sider [illegible] fidavit [illegible] amend[illegible]

[illegible] his amended complaint well after [illegible] defendants filed their motion to [illegible] Because plaintiff's [illegible] superseded the original com- [illegible] the individual CCA [illegible] allegations and [illegible] amended [illegible] his amended [illegible] his original complaint as to his [illegible] the underlying allegations and [illegible] claim against the individual [illegible] CCA.

[illegible] (2001).

[illegible] remedies

[illegible] defendants argue plaintiff [illegible] remedies and there- [illegible] dismiss. The Prison Litiga- [illegible] PLRA) requires prisoners ex- [illegible] administrative remedies before [illegible] prison conditions under [illegible] mandatory and [illegible] brought in [illegible] individual [illegible] required to ex- [illegible]

Initiali[illegible] parties [illegible] of plai[illegible] ceived [illegible] immate[illegible] tion to [illegible] Leaven[illegible] til at [illegible] Lawrence [illegible] tion [illegible] plaintiff [illegible] with [illegible]

[illegible] 199, 127

[illegible] st. No C[illegible]

http://we[illegible] rs WL [illegible] 3/19/2009

[illegible] Dr. Ch[illegible] Parker [illegible] (10th Cir 2008) [illegible] subrogated [illegible] 1.3d 1.81 (10th [illegible] Bureau of [illegible] (2003); [illegible] Apo's 737, [illegible]

[illegible] 184 F.3d 1236, [illegible] Cir 2007); see Parker II, 263 F. [illegible]

[illegible] Apo's at 736.

Several [illegible] of fact may exist regarding administ[illegible] policy was in effect at the time the ind[illegible] and the substance of the andum [illegible] another more important factual is- 2006 [illegible] plaintiff did Novem[illegible] while he was an inmate at CCA opment [illegible] medical treatment or injuries he al- counse[illegible] while detained at this fendants [illegible] individual CCA defendants con- recent [illegible] that plaintiff's case should be dis- [illegible] provided several griev- The [illegible] including complaints related to his "that [illegible] filed and which contain the der the [illegible] special [illegible] complaints [illegible] among [illegible] Tenth [illegible] requ[illegible] defen[illegible] [illegible] exists regarding whether al [illegible] while at the Leavenworth settled [illegible] a material fact regarding burden [illegible] available administrative [illegible] istrati[illegible] [illegible] precludes summary defen[illegible] [illegible] administrat- were [illegible] the [illegible] denies the indi- these [illegible] request to dismiss [illegible]

[illegible] assert numerous ways he [illegible] his obligation to exhaust adminis- [illegible] But given the finding of a

[illegible] No C[illegible]

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[illegible] plaintiff, it was held by U.S. Dis- [illegible] Murguia also of the District of [illegible] assuming a *Bivens* action against [illegible] was available, the plaintiff [illegible] claim upon which relief could

2. The [illegible] *Bivens*

The in[illegible] der *Biv*[illegible] employe[illegible] *vens* give[illegible] tutional [illegible] ants. Al[illegible] attach [illegible] the law [illegible] *ployees* [illegible] Court [illegible] the L[illegible]

[illegible] 3129, 2004 WL 74317, at *7 [illegible] 15 (2004), *aff'd*, 422 F.3d [illegible] Cir.2005), *rev'd en banc*, 449 [illegible] (10th Cir.2006), *cert. denied*, -- [illegible] 1 Fe.2d 521

[illegible] 2004 WL [illegible] 2004), [illegible] Cir.2005), *aff'd* [illegible] *divided court en banc*, 449 F.3d [illegible] *cert. denied*, --- [illegible] 534 (2006).

[illegible] Circuit panel held a *Bivens* cause [illegible] implied [illegible] prisoner held in [illegible] which we conclude that [illegible] cause of action arising [illegible] federal law against the indi- [illegible] the harm erected by the consti- [illegible] sitting en banc in 2005, [illegible] was evenly divided on the [illegible] *Bivens* action is available against [illegible] operated prison. [illegible] majority of the en banc panel [illegible] affirmed the ruling in *Peoples II* [illegible] the position of *Peoples III* [illegible] precedential

[illegible]

In 20[illegible] (*Peopl*[illegible] of the [illegible] has a [illegible] be [illegible] CCA. [illegible]

[illegible] 449 [illegible] 1 Fe.2d [illegible]

[illegible] st. No C[illegible] Works.

[illegible] 1168, 64 [illegible] 15 (1980) [illegible] prison officials for [illegible] violation). Since 1980, [illegible] Supreme Court has refused to re- [illegible] use of action for money dam- [illegible] directly from the Constitution. *See* [illegible]

[illegible] 2008 W[illegible] 2331175, at *4.

[illegible] Supreme Court declined to extend a [illegible] action in a new circumstance. Spe- [illegible] Court declined to imply a *Bi-* [illegible] a private corporation which [illegible] house for allegedly violating a [illegible] Eighth Amendment [illegible] Supreme Court noted it has only [illegible] to provide an otherwise [illegible] of action against *individual of-* [illegible] acted unconstitutionally or to [illegible] action for a plaintiff who lacked [illegible] *remedy* for harms caused by an in- [illegible] officer's unconstitutional [illegible] Supreme Court emphasized the [illegible] alternative remedies and fol- [illegible] against extending [illegible]

[illegible] citing *Malesko* [illegible] 66 [illegible]

[illegible] 70

[illegible] 74.

[illegible] judge finds Judge Vrat- [illegible] *Bi-* [illegible] persuasive and [illegible] the similar [illegible] Circuits [illegible] respectively. As Judge Vratil stated [illegible] federal prisoner has no implied [illegible] against an employee of a privately [illegible] when state or federal law affords an [illegible] the alleged injury." "There- [illegible] must determine whether state [illegible] alternative remedy for plaintiff's al-

Based [illegible] Vratil [illegible] cuits have [illegible] dividual [illegible] inmate [illegible] leged [illegible] plaintiff to [illegible] *vens* [illegible] prison [illegible] Supre[illegible] actions [illegible]

On three [illegible] Court [illegible] for [illegible] Cons[illegible] 1999, [illegible] eral [illegible] Amen[illegible] U.S. [illegible] (impl[illegible] Amen[illegible]

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argues his negligence claim
equally effective remedy to one
to *Bivens*. The court disagrees
negligence claim is an alternat-
his claim brought pursuant to

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Court in *Correctional Services*
noted the heightened deliberate
of Eighth Amendment liabil-
difficult for a plaintiff to
pursuant to *Bivens* than
ordinary negligence." The Su-
that the plaintiff in
state tort remedies available
Jaleskov were not inconsistent or
remedy inferred from the Fourth
Indeed, the alternative remedy
plaintiff in *Bivens* of resisting the
have amounted to a crime
remedy pursuant to a negligence
would constitute a crime or rise to
that the plaintiff in *Bivens*

Plaintiff
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Cir. 15, 151
(2007) (citing *Ethyl*
Cir. 785,
(1976) (*Farmer*
U.S. 83, 1[illegible] S.Ct.
d 811 (1991)).

Cir. 3[illegible]).

Supreme Court's decision in
proposition that his negli-
equally effective as a claim
noted *Propes*
(decided in
discuss the law laid out in
tension between
the Fourth Circuit panel noted
Court's *Clark*
did not address the

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complaint that under Kan-
al CCA defendants owed him a
Plaintiff sented under the in-
ndants' interpretation of *Bivens*,
lowed, they must either concede
law negligence claim or con-
claim exists. Although the indi-
nts certainly have not conceded
a viable state law negligence
to the motion to dismiss
claim.

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nts. The court disagrees and
CCA defendants are entitled to
of law on plaintiff's claim
Bivens. Plaintiff did not discuss
this case in the section of his re-
availability in *Bivens* rem-
suggest. Let us see forth specific
here was a genuine dispute of a
ing to this issue. The court finds
determining whether *Bivens*
CCA defendants,
presents solely
though courts are split on the
issue of law and it may present a
law so many judgment is still
court finds plaintiff has al-
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extend *Bivens*
and CCA defendants. The in-
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a plaintiff's right to amend as
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to amend as of course termin-
dismiss is granted

780 F 27,
1975) 6 WRIGHT ET AL. §
Rockwell
1131 (10th

§ 1483, at 587.

history is
of the
cited by the
the court granted
CCA defendants' motion to
defendants' motion to
the complaint in its
cordingly. Sub-
Circuit affirmed all of the dis-
explained earlier, the dismissal
claim against the individual
then stated that
the
affirmed in

R. at 7.

dis-
first move to
(dis)
for
disagree as to the
of the
individual
merely
the case and
court to amend.
the case has remained
was filed, he
he

[illegible] filed a responsive pleading, the [illegible] the plaintiff's right to amend as a [illegible] as to defendant King remained un- [illegible] before the district court should [illegible] plaintiff's opposition as an amend- [illegible] consideration in ruling on de- [illegible] motion to dismiss and subsequently [illegible]

The Tenth Circuit [illegible] miss is treated [illegible] nal judgment [illegible] amended [illegible] cludes [illegible] right [illegible] amend [illegible] claims [illegible] had not [illegible]

[illegible] 2d [illegible] Cir 1983).

[illegible] 746-47

[illegible] 747-48

[illegible] proposition that [illegible] have brought defendant King [illegible] without leave of court. Such [illegible] The Tenth Circuit held the [illegible] right to amend before the dis- [illegible] the motion to dismiss and therefore [illegible] should never have been dismissed. [illegible] cites *Bradbury* [illegible] District of Kansas case which [illegible] regards to correctly naming a [illegible] the court in *Bradbury Co.* [illegible] amends could amend as a matter [illegible] against the coun- [illegible] who had not yet [illegible] did not involve [illegible] of right [illegible] defendant who [illegible] plaintiff suggests.

In *Brever* [illegible] Tenth [illegible] of all [illegible] because [illegible] fendants [illegible] plaintiff [illegible] a matter [illegible] reversed the [illegible] court [illegible] *Brever* [illegible] have sought [illegible] ously [illegible] ants [illegible]

[illegible] Supp. 2d [illegible] (Kan. 1965).

[illegible]

The [illegible] lies to [illegible] stant [illegible] had [illegible] defendants [illegible] plaintiff [illegible] plaintiff [illegible] and R[illegible] ted [illegible] Circuit not reversed the dis- [illegible] defendants' *Bivens* [illegible] right to amend would [illegible] to amend he would have had to [illegible] case [illegible] a motion for [illegible] however [illegible] the Tenth Cir- [illegible] defendants oth- [illegible] case remains pending. The Tenth

[illegible] est. No Claim [illegible] works.