**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**November 10, 2021**

**Christopher M. Wolpert**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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JABARI J. JOHNSON,

Plaintiff - Appellant,

v.

KATHLEEN BOYD; RYDER MAY; MICHAEL ALLEN; RICHARD HODGE; MEGGAN CASTILLO; NICOLE WILSON; GARY WARD,

Defendants - Appellees.

No. 21-1014
(D.C. No. 1:20-CV-00447-PAB-MEH)
(D. Colo.)

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**ORDER AND JUDGMENT***

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Before **HOLMES**, **PHILLIPS**, and **EID**, Circuit Judges.

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Jabari Johnson appeals the dismissal of his 42 U.S.C. § 1983 claims against several prison officials. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

## BACKGROUND

Mr. Johnson is an inmate at Colorado State Penitentiary in Cañon City, Colorado. Boyd, May, Allen, Hodge, Castillo, and Wilson are employees of the Colorado Department of Corrections (CDOC). Ward is a former CDOC employee. Mr. Johnson filed a one-count complaint in February 2020 alleging the defendants deprived him of adequate medical care (including surgery, physical therapy, and a walking boot) for his injured right foot. He alleged that Hodge scheduled physical therapy appointments for him, but Castillo cancelled them; that from April 6 to May 11, 2019, Boyd denied him chronic pain medication and refused to see him; that Boyd eventually provided medication, but the prison transferred him before a scheduled pain management appointment in June 2019; and that Allen discontinued his medication from June to November 2019. He also alleged that he suffered a heart attack in August 2019, but Hodge denied his requests to see a doctor.

Mr. Johnson's complaint sought relief under § 1983, alleging defendants violated his rights under the Eighth Amendment. All defendants except Ward, who no longer worked for CDOC by the time of the lawsuit, waived service and moved to dismiss. A magistrate judge recommended the district court grant the motion, and the district court adopted the recommendation over Mr. Johnson's objections.

The district court concluded it lacked subject-matter jurisdiction to hear Mr. Johnson's claims for money damages against the defendants in their official capacities because Eleventh Amendment immunity barred those claims. The court further concluded Colorado's two-year statute of limitations barred the portions of

Mr. Johnson's claims alleging harm before February 2018. The court then concluded qualified immunity barred Mr. Johnson's claims against the defendants in their individual capacities because he failed to plausibly plead a deliberate indifference Eighth Amendment claim.

The court ordered Mr. Johnson to show cause why it should not dismiss the claim against Ward for failure to effect service. When Mr. Johnson ultimately failed to serve Ward, the court entered final judgment.[1]

**DISCUSSION**

Because Mr. Johnson proceeds pro se, we construe his arguments liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). "Questions involving Eleventh Amendment immunity are questions of law that this court reviews de novo." *Cornforth v. Univ. of Okla. Bd. of Regents*, 263 F.3d 1129, 1131 (10th Cir. 2001) (italics omitted). "We review de novo a district court's decision on a Rule 12(b)(6) motion for dismissal for failure to state a claim. Under this standard, we must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most

[1] Mr. Johnson filed the notice of appeal in this case after the court dismissed the served defendants but before the court dismissed the unserved defendant. But his premature notice of appeal ripened when the court entered final judgment because the order he attacks had indicia of finality and was likely to remain unchanged during the subsequent proceedings. *See Fields v. Okla. State Penitentiary*, 511 F.3d 1109, 1111 (10th Cir. 2007) (concluding notice of appeal filed after dismissal of served defendants but before dismissal of unserved defendants was adequate to vest court with jurisdiction).

favorable to the plaintiff." *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019) (italics, citation, and internal quotation marks omitted). But, "in examining a complaint under Rule 12(b)(6), we will disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Id.* (internal quotation marks omitted).

Mr. Johnson first asserts the district court erred in dismissing his official-capacity claims against the defendants, all of whom are employees of the State of Colorado. We construe these as claims against the state itself, *see Hafer v. Melo*, 502 U.S. 21, 25 (1991), and states are immune from claims for money damages under the Eleventh Amendment, *see Duhne v. New Jersey*, 251 U.S. 311, 313 (1920) ("[I]t has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent."). Mr. Johnson does not argue Colorado consented to suit or otherwise waived its immunity, but instead notes he also sought money damages against the defendants in their individual capacities and injunctive relief against the defendants in their official capacities. But this argument does not undermine the basis for the district court's dismissal of his money-damages claim against the defendants in their official capacities, so we affirm that aspect of the court's order.

Mr. Johnson also challenges the district court's reliance, in part, on the two-year statute of limitations to dismiss the portion of his claim alleging defendants deprived him of a medical boot beginning in October 2017. The district court applied

Colorado's two-year statute of limitations for federal causes of action, *see* Colo. Rev. Stat. § 13-80-102(g), because § 1983 does not include a limitations period. *See Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 968 (10th Cir. 1994) ("Where Congress has not enacted an express statute of limitations for a particular cause of action, federal courts generally borrow and apply the most closely analogous state statute of limitations . . . ."). Claims for constitutional violations under § 1983 "accrue when the plaintiff knows or should know that his or her constitutional rights have been violated." *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1154 (10th Cir. 1998) (internal quotation marks omitted). And because Mr. Johnson knew of the constitutional violation in October 2017, these portions of his complaint, which he filed in February 2020, were time-barred.

Citing *Tiberi v. Cigna Corp.*, 89 F.3d 1423, 1430–31 (10th Cir. 1996), Mr. Johnson argues the district court should have applied the "continuing violation" doctrine, under which the limitations period does not begin to accrue until the date of the last injury or until the wrong is over, and that the constitutional violations he complains of are ongoing. But *Tiberi* is not a § 1983 case, and this court has never applied the continuing violation doctrine to § 1983 actions like Mr. Johnson's. *See Vasquez v. Davis*, 882 F.3d 1270, 1277 (10th Cir. 2018) ("The continuing violation doctrine was developed in the Title VII employment law context, and this court has not yet decided whether it should apply to § 1983 claims." (citation omitted)). Mr. Johnson does not advance any argument as to why it would be appropriate to apply

the continuing violation doctrine outside the employment law context in which it originated, so we decline to reverse the district court on that basis.

Mr. Johnson next argues the district court erred in concluding the defendants were entitled to qualified immunity. To overcome defendants' qualified immunity, Mr. Johnson bore the burden to establish "(1) the defendant[s'] conduct violated a constitutional right and (2) the law governing the conduct was clearly established at the time of the alleged violation." *DeSpain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001).

A claim, such as Mr. Johnson's, alleging an Eighth Amendment violation due to deliberate indifference to serious medical needs has two components: objective and subjective. "The objective component of the test is met if the harm suffered is sufficiently serious to implicate the Cruel and Unusual Punishment Clause." *Callahan v. Poppell*, 471 F.3d 1155, 1159 (10th Cir. 2006) (internal quotation marks omitted). To meet the subjective component, Mr. Johnson must establish the defendants were "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [that they] also [drew] the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The district court concluded Mr. Johnson's claim failed both components. We agree Mr. Johnson failed the subjective component of the test, so it is unnecessary to consider whether he met the objective component.

Mr. Johnson argues he met the subjective component due to an alleged remark, which involved a racial epithet, by a prison nurse that "Boyd and Hodge don't like

[N******] who sue and that is why [he] is not receiving care." Aplt. Reply Br. at 2; *see also* Aplt. Opening Br. at 4; R. at 27. But the district court correctly concluded this alleged statement from a nonparty speculating on the motives of two defendants did not show either Boyd or Hodge inferred that a substantial risk of serious harm to Mr. Johnson existed. Indeed, Mr. Johnson alleged Boyd gave him pain medication and Hodge scheduled physical therapy appointments. Although the medication was ultimately ineffective, and although Mr. Johnson alleges Castillo eventually cancelled the appointments, we agree with the district court that, at most, Mr. Johnson's allegations indicated the defendants were negligent. But "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The nurse's statement also does nothing to implicate May, Allen, Castillo, or Wilson. The district court was therefore correct to conclude the complaint failed to state a viable deliberate indifference claim.

Mr. Johnson finally objects to the district court's dismissal of his complaint without granting him leave to amend. But because Mr. Johnson did not object to that portion of the magistrate judge's recommendation, he has waived appellate review of that issue under this court's firm-waiver rule. *See Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) ("The failure to timely object to a magistrate's recommendations waives appellate review of both factual and legal questions." (internal quotation marks omitted)). Mr. Johnson does not invoke any exception to the firm-waiver rule, so we decline to review this issue further.

## CONCLUSION

We affirm the judgment of the district court. We deny Mr. Johnson's motions for injunctive relief because he has not demonstrated entitlement to such relief under the relevant factors. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (listing traditional requirements for injunctive relief on appeal). We deny Mr. Johnson's motion to proceed in forma pauperis because he has not presented "a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991).

Entered for the Court

Jerome A. Holmes
Circuit Judge