

AUG 25 2016

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U.S. COURT OF APPEALS

## NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAY LYNN PEMBER,

Plaintiff-Appellant,

v.

AL RAMOS; et al.,

Defendants-Appellees.

No. 15-15627

D.C. No. 2:11-cv-02332-SMM

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
Stephen M. McNamee, District Judge, Presiding

Submitted August 16, 2016\*\*

Before: O'SCANNLAIN, LEAVY, and CLIFTON, Circuit Judges

Arizona state prisoner Jay Lynn Pember appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging constitutional claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo.

*Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013). We

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

affirm in part, reverse in part, and remand.

The district court granted summary judgment for defendant Dr. Baird because it found that the record showed a mere difference in medical opinion regarding the need for surgery and no personal participation by Dr. Baird in Pember's alleged lack of adequate pain medication. However, there is nothing in the existing record that shows why Dr. Baird failed to schedule Pember for surgery in 2009 and as a result, there is a genuine dispute of material fact as to whether Dr. Baird's alleged failure to schedule Pember for surgery in 2009 and his alleged inadequate treatment of Pember's herniated disc and related pain was deliberately indifferent. *See* Fed. R. Civ. P. 56(a) (stating movant's burden on summary judgment); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (plaintiff can show deliberate indifference if "the course of treatment the doctors chose was medically unacceptable under the circumstances"). Accordingly, we reverse the judgment for Dr. Baird and remand for further proceedings.

Because Pember only challenges summary judgment on his deliberate indifference claim against Dr. Baird, we affirm the remainder of the district court's summary judgment.

The parties shall bear their own costs on appeal.

**AFFIRMED in part, REVERSED in part, and REMANDED.**