IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7120

JOHN B. LESESNE, *et al.*,

Plaintiff-Appellant,

v.

JOHN DOE, OFFICER, *et al.*,

Defendants-Appellees

Appeal From The United States District Court
For The District of Columbia (1:10-cv-00602 (RLW)

APPELLANTS' OPENING BRIEF

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November 25, 2011

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rules 26.1 and 28(a)(1), undersigned pro-se counsel, Appellant hereby provide the following information:

PARTIES AND AMICI CURIAE

The following are all parties and *amici curiae* who appeared before the district court:

John B. Lesesne

Captain David Holmes, in his official capacity of the Department of Corrections of the District of Columbia;

Henry R. Lesansky, in his official capacity as Health Service Administrator of the Department of Correction of the District of Columbia;

John Doe Officer(s), of the Department of Correction of the District of Columbia;

Department of Correction of the District of Columbia, agency of the District of Columbia;

District of Columbia, a municipal corporation, the local government of Washington, D.C.

RULINGS UNDER REVIEW

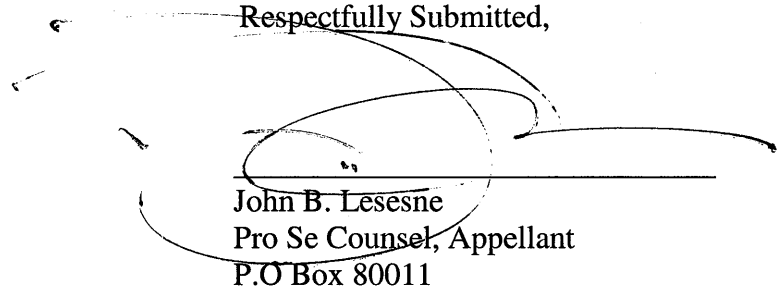
This appeal is from the September 30, 2011, judgment dismissing the complaint (Wilkins, R.) The court's accompanying opinion is reported at 254 F.3d 262, 269 (D.C. Cir. 2001); 625 F.3d 935, 948 (6th Cir. 2010).

RELATED CASES

This case on review has not been before the Court previously. Appellants are unaware of any other related cases currently pending in this Court or in any other court.

November 25, 2011

Respectfully Submitted,



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ISSUED PRESENTED

1. Is statutory requirement 42 U.S.C. 1997e(a) exhaustion administrative remedy of PLRA relevant or moot in scope of its statutory language, meaning?
2. Are appellee actions, inactions sufficiently extreme, outrageous to satisfy the subjective standard of deliberate indifference?
3. Is dismissal of claim for intentional infliction and emotional distress for failure to state a claim valid?

STATEMENT OF THE CASE

I. LEGISLATIVE LAW - STATUTE

A. PLRA - Administrative Exhaustion Remedy

42 U.S.C. 1997e (a) of the PLRA, exhaustion of remedy language states...

"No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional institution until such administrative remedies as are available are exhausted."

Legislative Purpose:

At to its purpose, the Supreme Court has observed:

"Beyond doubt, Congress enacted 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. *Porter v. Nussel*, 534 U.S. at 524-25.

B. Deliberate Indifference – Subjective Component

In addition to proving that an injury is sufficiently serious, a prisoner bringing an Eight Amendment medical claim must also prove that prison officials purposely allowed him to go without necessary help. While an x-ray can prove objectively that your leg was broken, what happened in the official's head when deciding what to do about your leg (in other words, his *subjective* state of mind) is impossible for a court to know for sure.

As the Court held in *Farmer v. Brennan,* 511 U.S. 825, 837 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994), an official cannot be found liable for an Eighth Amendment violation unless two things happen. First, the official has to **know** the facts that cold have shown or proven that a prisoner's health was in danger. Second, after the official is aware of the threat to a prisoner's health, the official must actually **believe** that the prisoner's health is in danger.

A prisoner can meet the subjective standard if he proves that a prison official should have been aware of a serious and substantial risk to his health *because the problem was so obvious.*

C. Fed. R. Civ. P. 12(b)(6) – Failure to state a claim upon which relief can be granted.

II. COMPLAINT

Civil suit brought in reference to conditions of confinement while plaintiff was being detained under probable cause in the process of being arraigned, adjudicated thereafter primary treatment and recovery from traumatic gunshot wound.

The complaint alleges that the Department of Correction, its agents, being an agency of the District of Columbia intentional, emotional inflicted pain and suffering on plaintiff by denying and ignoring prescribed treatments for his serious medical needs.

Plaintiff alleges that the prohibited practice under the Eight Amendment of Cadena temporal (wrist, ankle cuffing while defendants having foreknowledge of his condition) was administered 24 hours a day to his neurological leg injury thus resulting in muscle atrophy injury and the permanent use of prosthetic.

Plaintiff alleges, thus having foreknowledge of plaintiffs' neurological injury suffered from gunshot wound defendants denied, disregarded repeated request from physician that plaintiff be allow to ambulate (walk) as a prescribed treatment for his neurological leg injury.

Plaintiff alleges denial of treatment exacerbated, prolonged plaintiffs' pain and suffering because defendants denied repeated request for plaintiff treatments for his serious medical needs.

Plaintiff alleges this was the case when upon release, medical staff apprised (both verbally and with prescribed medical documentation) 'john doe officers' as well as patient that plaintiff should be transported due to his serious medical needs and condition 'via wheelchair.'

Plaintiff alleges John Doe officers foreknowing of plaintiff's condition outright disregarded medical release order given them and forced plaintiff to walk with ankle cuffs on his neurologically damaged leg where upon their inability to secure plaintiff, fall injured

plaintiff as to the point he could not breathe and became disoriented, whereupon officer placed plaintiff in cruiser and transported him to D.C. Jail.

Plaintiff alleges at the D.C. Jail, due to plaintiff condition medical technician became concern and examined plaintiff and immediately requested 911 emergency transport back to the hospital whereupon doctor examination and test confirmed plaintiff suffered numerous pulmonary embolism to the lung causing cardiac arrest symptoms.

Plaintiff was placed in intensive care under observation for eleven days thereafter.

Plaintiff alleges after his treatment for pulmonary embolism injuries, plaintiff was again released to the custody of defendants having a foreknowledge of plaintiffs serious medical needs provide in his medical record with prescribed treatments defendants totally disregarded all aspects of plaintiff treatments (no cleaning of wound or bandage change, no Coumadin medication for embolisms were forthcoming).

Plaintiff alleges his condition worsened due to the fact he was unable to affect proper hygiene, obtain proper medical care resulting in MRSR like infection which he had until he could seek medical attention upon his release.

III. DISTRICT COURT DECISION.

The district court found for defendant 'motion to dismiss or the alternative, motion for partial summary judgment for failure to exhaust administrative remedies required by PLRA asserting "plaintiff was able to access and file sick call forms, and thus he could have filed and inmate grievance but failed to do so." Court dismissed claims for intentional infliction of emotional stress pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. 'Plaintiff motion to leave to file an amended complaint,' was denied and considered futile because plaintiff failed to exhaust administrative remedies.

SUMMARY OF ARGUEMENT

Statutory Construction – Language, Meaning, Interpretation

"The Court has expressed[1] an interest "that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.' *Finley v. United States*, 490 U.S. 545, 556 (1989). Executive Order 12988 , which provides guidance to executive agencies on preparing legislation, contains a useful checklist of considerations[2] to keep in mind when drafting legislation. The starting point in statutory construction is the language itself. The Supreme Court often recites the "plain meaning

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[1] CRS Report for Congress – Statutory Interpretation: General Principles and Recent Trends., Aug. 31, 2008

[2] 61 Fed. Reg. 4729 (February 5, 1996), reprinted in 28 U.S.C. 519.

rule," that, if the language of the statute is clear, there is no need to look outside the statute to its legislative history in order to ascertain the statute's meaning."

Understanding the 'scope and applicability of the statute,' provisionally expressed of 42 U.S.C. 1997e(a):

"No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

"Statutory construction...is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Association v. Timber Inwood Forest Associates*., 484 U.S. 365, 371 (1988). Thus, the meaning of a specific statutory directive may be shaped, for example, by the statutes definition of terms, by a statute's statement of findings and purpose, by the directive's relationship to other specific directives, by purposes inferred from those directives or from the statute as a whole, and by the statute's overall structure. Courts also look to the broader context of the body of law into which the enactment fits. *Green v. Bock Laundry Machine Co*., 490 U.S. 504, 528 (1990).

Prince Georges Community Hospital is non-descriptive of a 'prison, jail, or other correctional facility and cannot be considered within the statutory requirement. The very language of the phrase, *'confined in a jail, prison, or other correctional facility'* presuppose the process of adjudication has occurred. The language of the phrase infers the various

stages of incarceration by which a prisoner navigates the penal industrial complex once convicted. Hospital by definition is, 'an institution providing medical and surgical treatment and nursing care for sick or injured people.

Appellant, being a pretrial detainee (prior to arraignment) held under probable cause, was a patient seeking, requiring treatment for wounds suffered from a gunshot. Custodians' sole responsibility was to detain and secure appellants' person while receiving the necessary treatment for his serious medical needs. Courts have held that the government may take measures that are reasonably calculated to effectuate pretrial detention. The authority to take these measures is based upon the legitimate government interest to manage the facility in which the individual is detained. Another basis for the authority of prison officials over pretrial detainees comes from the responsibility of prison officials to ensure the appearance of detainees at trial. Newkirk v. Sheers, 834 F. Supp. 772 (E.D.Pa. 1993).

Remedies as are available

"The Second Circuit has suggested that in considering a prisoner's claim that his or her case should proceed despite a failure to exhaust or to exhaust correctly, any issue of availability of remedies should be considered first." *Abney v. McGinnis*., ___Fd.3___,2004 WL 1842647 at *3 (2d Cir., Aug. 18, 2004). If remedies are unavailable, the prisoner is simply not required to exhaust. Statutory language, '*remedies as are available are exhausted,*' purports 'to mechanism already in place to address the issue.' This could not be the case where appellant hospital stay was eventful of nothing more than pain, restraint and the observation of officers whom provided no administrative functions other than to secure

the appellant person. Prisoners may also be unable to use a grievance system because they have been transferred or were otherwise absent from the institution or prison system when they should have filed a grievance. *In Bernard v. District of Columbia.*, 223 F. Supp. 2d 211, 214 (D.D.C. 2002) prisoner was first hospitalized then involved in hearings, then transferred during the fifteen days he had to file a grievance, may not have been able to use the grievance system. One might assess from these circumstances demonstrated where individual movements and access to limited administrative resources are greatly curtailed condemn them to unconstitutional practices.

Remedies may be made unavailable by acts or omissions of prison personnel. Acts of denying appellants prescribed treatment were numerous, appellees disregard (on both occasion of his release) for appellants prescribed medical treatment plan for his serious medical needs were the 'proximate cause' of appellants muscle atrophy, pulmonary embolism and MRSR infection injuries whereby during the few days appellant was at the jail no medical treatment was administered of the treatment plan where appellees knew that pulmonary injury suffered appellant required strict monitoring and the administration of medication because he was now susceptible to stroke and heart attack. Even the grievance filed by appellant went unanswered, maybe due to the fact of appellants release some days after. The statutory language speaks for itself.

Deliberate Indifference – Subjective Component

In *Benter v. Peck*, 825 F. Supp. 1411, 1417 (S.D. Iowa 1993) a district court of Iowa found that doctors treating prisoners have a responsibility to provide the medical care that

they need. In that case, the doctor allowed the prison to withhold eyeglasses from a prisoner who could not function without them in order to force him to pay for the glasses. The court held that withholding the prescription glasses from the prisoner rose to the standard of deliberate indifference. "A serious medical need is present whenever the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." Clement v. Gomez, 298 F.3d 898, 904 (9th Cir. 2002).

A prisoner can meet the subjective standard if he proves that a prison official should have been aware of a serious and substantial risk to his health because the problem was so obvious. For example, in *Brown v. Coleman*, 60 F.3d 837, 837 (10th Cir. 1995) opinion reported at No. 94-7183, 1995 U.S. App. LEXIS 16928, at 4-5 (10th Cir. Jul. 12, 1995) the court found deliberate indifference because although the prison medical staff repeatedly recommended surgery for a prisoner, officials with no medical training ignored the recommendation. Similarities in the conduct of Brown v. Coleman and appellants allegations confirm these are ongoing outrageous institutional practices by prison officials. Appellees were constantly communicated with by and through physicians and administrators of the hospital requesting repeatedly that appellant undergo prescribed treatment (ambulation). Appellees were called, and faxed repeatedly only to deny and then ignored repeated request. They were culpable, and the 'proximate cause' of appellants pulmonary emboli injuries outright disregarding documented medical orders to transport appellant 'via wheelchair' to his destination. In *Martinez v. Mancusi*, 443 F.2d 921, 924 (2d Cir. 1970) the court found that the prisoner could bring a claim against prison officials who had used force to remove him from a hospital where he was recovering from leg surgery. Prison officials ignored the

doctor's instruction that the prisoner could not walk and removed the prisoner, who was partially paralyzed, without the doctor's permission. This caused the surgery to be unsuccessful. Whether recovering from leg surgery or being ankle cuffed suffering from the preliminary stages of paralysis the similarities in these ongoing institutional practices are extreme, intentional and outrageous. The easiest way to meet the subjective standard is to offer proof that a doctor diagnosed you with a serious medical condition and prescribed treatment for you, but you never received that treatment. In *Hudson v. McHugh*, 148 F. 3d 859, 861 (7th Cir. 1998), the prisoner was transferred from a halfway house to a county jail but was not given his medicine. After eleven days without it, despite repeated request to the jail's medical personnel, he had a seizure. The Seventh Circuit held this was the most obvious kind of case in which a prisoner could raise a claim.

From day one of appellant stay in hospital correctional officials demonstrated egregious, outragous conduct having a complete knowledge and assessment there given them by physician of appellants condition. They were aware of the gunshot wound, operation to repair appellants intestinal tract (resection) and most of all that appellant suffer paralysis in his lower extremity from the gun wound confirming his 'disability' only to have the appellees acquiesce in the same behavior of ankle cuffing known injury (a violation of the Eighth Amendment and the American with Disabilities Act)[3], and denying prescribed treatment for his serious medical needs by physicians that were essential to appellant's recovery.

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[3] Most recently, in *United States v. Georgia (Goodman)*, 126 S. Ct. 877, 882 (2006), the Court held that "insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.

In *Phillips v. Roane County, Tenn.,* 534 F.3d 531, 539-40 (2008), the Sixth Circuit ruled that correctional officers at Roane County Jail, as well as a doctor and paramedic who worked at the facility, were liable for the death of a female prisoner. Medical examiners testified that the prisoner died from untreated diabetes. Prison authorities were aware of her condition, and their failure to take her to the hospital was considered "deliberate indifference" to her medical needs. Medical conditions that fall well short of life-threatening can nevertheless constitute "serious medical needs," if they result in pain or loss of function.

Appellees acquiescence into denying appellants prescribed treatment even disregarding medical release orders *Estelle v. Gamble*, 429 U.S. at 105 (Forcing appellant to walk ankle cuffed with injury of paralysis) which caused pulmonary embolisms, near fatal incident of cardiac arrest which has resulted in permanent disability caused by appelles outrageous conduct.

Without doubt, appellees conduct was demonstrative of; ignoring appellants obvious medical conditions; failing to provide treatment for diagnosed conditions by denying and disregarding (which they had no right to practice because they were not medical professionals) prescribed medical treatments expressed both verbally and documented; failing to investigate to make an informed judgment as physician attempted both verbally and through and by other means communication by repeated request to administer prescribed medical treatments; delaying and ignoring treatment which caused muscle atrophy, pulmonary embolism and severe MRSR infection; interfered with access by cuffing injury, disregarding written prescribed treatment causing incident of pulmonary embolism; making

medical decision being untrained and unfamiliar with the medical practice; and making 'medical' judgment so bad it caused injury.

Who is competent to provide, decide treatment other than those trained to do so. Prisons should not decide what medical treatment you get based on factors like their own lack of staff, *Casey v. Lewis*., 834 F. Supp. 1477, 1547-48 (D. Ariz. 1993) or interpreters *Anderson v. County of Kern*., 45 F.3d 1310, 1316 (9th Cir. 1995) In particular, "systematic deficiencies in staffing, facilities, or procedure [which] make unnecessary suffering inevitable" may support a finding of deliberate indifference. *Todaro v. Ward*., 565 f.2d 48, 52 (2nd Cir. 1977). This is exactly the case of a 'rank and file' administrator of a jail making medical decision where he lacked the proper training. Having the knowledge of the serious medical needs appellant was in need thereof. Having medical staff there whom made no attempted to investigate the matter placed appellant beyond substantial risk and in turn injuries occurred immediately thereafter.

Fed. R. Civ. P. 12(b)(6) – Failure to state a claim for relief

Failure to state a claim is an affirmative defense which can be used by a defendant to dismiss a suit. Under Fed. R. Civ. P. 12(b)(6), complaint's allegations are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiff. Sufficiency of a complaint for failure to state a claim is claim should not be dismissed "unless it appears beyond doubt that the Plaintiff can prove no set of facts of his claim that would entitled him

to relief. See Port of Authority of New York and New Jersey v. Arcadian Corp., 189 F.3d 305, 311 (3d Cir. 1999). Appellee acts and omissions were commiserate of and contrary to the objects of appellant's serious medical needs. Appellees actions, inactions prolonged and exacerbated appellants pain and suffering. Fact that appellees were not medical practitioners and were making medical decisions in reference to appellants serious medical needs affirms the intent whereby the denial of treatment of itself would lead to distress and infliction of pain.

A condition or restriction placed upon a pretrial detainee may amount to impermissible punishment if it can be shown that the officials were "deliberately indifferent" to a substantial risk to the detainee's safety. In Zarnes v. Rhodes, 64 F.3rd 285, 290 (7th Cir. 1995), the court held that an inmate's allegation that prison guards had shown deliberate or reckless disregard for her safety by placing her with a dangerous inmate, was sufficient to state a claim under the Due Process Clause.

The occurrence of guards disregarding physicians prescribed treatment to transport appellant 'via wheelchair' upon his release from hospital (being expressed and given in documentation) demonstrated evidence of prison officials total lack and disregard for appellant safety even to the point of forcing appellant to walk paralyzed with ankle chains having a foreknowledge demonstrated evidence that they (prison officials) disregarded prescribed medical treatment beforehand and placed appellant at substantial risk of harm which occurred immediately thereafter the fall during transport and return to hospital for near fatal pulmonary embolism affecting near fatal cardiac arrest.

Deliberate indifference which violates due process rights requires a showing that prison officials intended for the inmate to die or suffer grievously or that they acted with criminal recklessness.

There could be no doubt that prison officials who were constantly communicated with by hospital physicians and administrators knowing the sole purpose of appellant hospital stay was for medical treatment of his injuries only to have those serious medical needs[4] denied, disregarded by prison officials cause every eventful injury to appellant thereafter his initial injury. Appellees denial and disregard for appellant well-being is demonstrated evidence of the injuries (muscle atrophy, pulmonary embolism, MRSR like infection) thereafter. Security measure were in place and there could be no doubt that being a pretrial detainee no manner of treatment should have been denied to afford appellant his due process right and recovery.

[4] "A serious medical need is present whenever the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." Clement v. Gomez, 298 F.3d 898, 904 (9th Cir. 2002).

CONCLUSION

Dismissal of the complaint should be vacated and reversed, remanded for the plaintiff due to 42 U.S.C 1997(e)(a) being rendered moot. Dismissal of claims for intentional infliction for emotional distress should be vacated and reversed for lack of standing. Plaintiff motion for leave to amend complaint should be affirmed.

Respectfully Submitted.

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November 25, 2011