IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 91-4524
Summary Calendar

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HENRY KELLY,

Plaintiff-Appellant,

versus

JOHN DAY, ET AL.,

Defendants-Appellees.

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Appeals from the United States District Court for the
Western District of Louisiana
(CV-88-1370)

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(January 26, 1993)

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant Henry Kelly (Kelly) injured his shoulder while in jail and commenced this suit against the jail officials after his release. The district court held a bench trial and rendered judgment for the defendants, holding that Kelly's suit was barred by prescription and that he had failed to prove a denial of

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

adequate medical care. Kelly brings this appeal. We affirm.

Facts and Proceedings Below

At the times relevant to this suit, Kelly was an inmate in the Union Parish Jail in Farmerville, Louisiana, and the defendants-appellees were law enforcement officials in Union Parish; John Day (Day) was the jail administrator, Larry Averitt (Averitt) was the sheriff of Union Parish, and Donald Holdman (Holdman) was the chief deputy in the sheriff's office.

In early July 1986, Kelly, whose ordinary duty was cooking for the other inmates, assisted with some roofing work, allegedly on Day's instructions. In doing so, he injured his right shoulder when a gust of wind blew against a piece of plywood that he was lifting. Although according to his trial testimony he was in pain from the moment of the accident and complained to the jailers immediately, he first filled out a slip to receive medical attention approximately three weeks later, on July 28.[1] He saw the jail doctor, Dr. J. E. Booth (Booth), the same day. Kelly told the doctor that the pain in his arm went from his elbow to his shoulder, and that he dropped things when he tried to pick them up. Booth prescribed medication and told him not to pick up anything heavy.

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[1] Kelly's trial testimony was somewhat contradictory as to these dates. He testified that he was injured on July 28 and that he filled out a medical request form three weeks later. The medical request form, however, was dated July 28. Even after being shown the form Kelly reiterated his testimony that he had filled it out three weeks after his injury. Because the medical records begin on July 28, we assume that Kelly's initial testimony about the date of his injury was mistaken. Whether the injury occurred in early July or on July 28 is, in any event, immaterial to the outcome of the case.

Eight days later, on August 5, Kelly completed another medical request slip, and was again allowed to see Booth on the same day. He told Booth that his elbow and shoulder were no better and that he had a popping sensation in his elbow. Booth took x-rays, which were negative, and prescribed an anti-inflammatory drug. Primarily out of concern that Kelly might drop something in the kitchen and burn himself, Booth advised him that he might need to stop performing kitchen duty for a while if his condition did not improve. Although the jailer accompanying Kelly heard this advice and Booth noted it on the report, Booth did not consider the advice mandatory and did not take further steps to communicate it to other jail officials.

Kelly was thereafter relieved of kitchen duty for a period of time; Kelly testified that he thought it was a total of four days, and Day's recollection at trial was that it had been two weeks. Kelly continued to experience pain in his arm, and he asked Day to allow him to go to the Veterans Administration (VA) hospital in Shreveport. Day refused, but said he would take Kelly there if Booth instructed him to.

Kelly did not fill out another slip to see Booth about his arm until April 5, 1987 (though in the intervening months he did see Booth or other health officials on four occasions for unrelated ailments). On that date Kelly stated that he had fallen from a chair on his right shoulder and aggravated his injury. Booth took a second set of x-rays, but again found no fracture. He prescribed more anti-inflammatory medicine.

Kelly was released from Union Parish jail on May 18, 1987. A

short time later, he sought treatment for his shoulder at the VA hospital. He underwent rotator cuff surgery in November 1987 and January 1989.

On May 18, 1988, one year to the day after his release from the jail, Kelly commenced this action by filing a complaint against Day and Holdman seeking monetary damages under 42 U.S.C. § 1983. He alleged that, contrary to Booth's medical orders, he was forced by the defendants to continue to work in the kitchen, and that the lifting of pots and pans necessitated by that duty caused him extreme pain. He further alleged that despite his repeated requests to be relieved of his work duties and his constant complaints about his pain, Day and Holdman ordered that he continue his work, and threatened to transfer him to the state penitentiary if he did not stop complaining. Kelly claimed that during the entire period of his incarceration Day and Holdman had refused his requests for medical treatment. This conduct, the complaint alleged, amounted to deliberate indifference to Kelly's serious medical needs, in violation of his constitutional rights, and also gave rise to liability under state tort lawSQfor gross negligence, intentional infliction of emotional distress, and other unnamed intentional torts.

On June 8, 1988, the defendants answered the complaint, raising, *inter alia*, the defense that Kelly's suit was barred by prescription. Averitt was added as a defendant on April 3, 1990. In the same April 1990 amendment of his complaint, Kelly added an allegation that he suffered considerable pain and suffering during the delay in obtaining proper treatment, for which he should be

compensated.

Following a bench trial on May 17, 1991, the district court entered judgment in favor of the defendants. The court concluded that the action was barred by prescription, and that even if it were not, Kelly had failed to prove a wrongful denial of medical care. On the prescription argument, the court rejected Kelly's contention that under the doctrine of *contra non valentem*,[2] prescription did not begin to run against him until his injury was diagnosed after his release from jail. The court instead found that Kelly "knew, or should have known, that the cause of action, if any, had manifested itself with sufficient certainty to be susceptible to proof in a court of justice." Through an amended judgment dated June 18, 1991, the district court clarified that all of Kelly's claimsSQthe section 1983 claims and the pendent state law claimsSQwere dismissed. Kelly brings this appeal.

Discussion

Because there is no specified federal statute of limitations for section 1983 suits, federal courts borrow the forum state's general personal injury limitations period. *Owens v. Okure*, 109 S.Ct. 573, 582 (1989); *Wilson v. Garcia*, 105 S.Ct. 1938, 1947-48 (1985). It is well settled that the one-year prescriptive period of La. Civ. Code Ann. art. 3492 (West Supp. 1992) governs section 1983 suits against Louisiana officials. *See Elzy v. Roberson*, 868 F.2d 793, 794 (5th Cir. 1989); *Freeze v. Griffith*, 849 F.2d 172,

[2] "*Contra non valentem*" is shorthand for *contra non valentem agere nulla currit praescriptio*, meaning "no prescription runs against a person unable to bring an action."

175 (5th Cir. 1988) (per curiam).

A federal court should give effect to the state's rules for tolling a prescriptive period. *Hardin v. Straub*, 109 S.Ct. 1998, 2003 (1989); *Jackson v. Johnson*, 950 F.2d 263, 265 (5th Cir. 1992) (per curiam). However, the determination of when a section 1983 action accrues is a matter of federal law. *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989). The standard used in this Circuit is that a cause of action accrues "'when the plaintiff knows or has reason to know of the injury which is the basis of the action.'" *Id*. (quoting *Lavellee v. Listi*, 611 F.2d 1129, 1131 (5th Cir 1980)).

Kelly argues that the prescriptive period did not begin to run until he was aware of his *loss*, *i.e.*, his damaged rotator cuff requiring surgery, and that the mere fact that he had earlier experienced pain or discomfort from the injury did not suffice to commence the prescriptive period. As he did before the district court, Kelly places primary reliance on *Brown v. State, Through Department of Correction*, 354 So. 2d 633 (La. Ct. App. 1977). In *Brown*, an inmate with a serious acidic stomach condition was examined by physicians, who recommended a bland diet. The Department of Correction failed to provide such a diet, with the result that the inmate eventually was required to undergo surgery entailing the removal of seventy percent of his stomach. He filed suit exactly one year after his surgery. After reviewing the doctrine of *contra non valentem*, the court concluded that Brown's action for damages for the removal of his stomach was not prescribed. Although Brown "was long aware of the cause of his

pain and suffering and the inability of obtaining a bland diet," the defendant "failed to establish that the plaintiff knew or had constructive knowledge prior to a year from filing of his suit that he would sustain the loss of part of his stomach." *Id*. at 635. The dissent argued that the prescriptive period should have begun when Brown knew of the injury to him and the breach of duty that caused his injury. *Id*. at 636 (Ponder, J., dissenting). The district court in the present case indicated in its judgment that "[t]his Court cannot follow the majority opinion in *Brown* and must agree with the dissent."

Louisiana courts have recognized four categories of situations in which *contra non valentem* may prevent the running of liberative prescription: (1) where some legal cause prevents the courts from taking cognizance of the plaintiff's action; (2) where a condition coupled with a contract or connected with the proceedings prevents the plaintiff from suing; (3) where the defendant himself takes action effectually to prevent the plaintiff from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. *Corsey v. State Department of Corrections*, 375 So. 2d 1319, 1321-22 (La. 1979). The *Brown* court stated the fourth of these categories to be applicable when "the cause of action has not manifested itself with sufficient certainty to be susceptible of proof in a court of justice." *Brown*, 354 So. 2d at 635.

In urging that this doctrine be applied to find that the prescriptive period did not commence until after his release from

jail, Kelly is effectively asking that this Court refer to state law for its determination of when his cause of action accrued. Although the Louisiana Supreme Court has indicated that *contra non valentem* is properly considered a doctrine of tolling and not accrual, *Owens v. Martin*, 449 So. 2d 448, 451 n.4 (La. 1984), application of the fourth category in these factual circumstances is tantamount to applying an accrual doctrine and would subsume the principle that accrual of section 1983 actions is a matter of federal law. We believe that under the test from *Burrell* quoted above, the district court was correct in sustaining the defense of prescription for the section 1983 claim: Kelly clearly knew prior to his release from jail of the "injury which is the basis for the action," *i.e.*, the alleged denial of medical care.[3]

The accrual of Kelly's pendent state law claims is, however, governed by state law. While we would tend to regard the district court's ruling on prescription as, despite *Brown*, in accordance with Louisiana as well as federal law,[4] it is not ultimately

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[3] Kelly also suggests in passing that we must consider the effect on the running of the prescriptive period of the defendants' alleged threats to send him to the state penitentiary if he continued to complain. However, Kelly's own testimony indicates that he continued to complain despite these alleged threats, belying the suggestion that they caused him to postpone assertion of his legal rights. Also, these alleged threats came in response to his requests to be taken to the VA hospital or to another outside doctor. Because it is clear from his testimony that he made no such request on the day of his release and could have received no such threat, it follows that he commenced the action more than a year after the last of the alleged threats could have had any conceivable effect.

[4] Four years after *Brown*, the same Louisiana court of appeals confronted a plaintiff who had injured his shoulder on April 13, 1979, and filed suit on May 30, 1980, and who resisted the defense of prescription by arguing that it was not until he

necessary for us to resolve that question, because the district court also rejected Kelly's claims on the merits, a conclusion with which we agree. The court stated in its judgment:

> "Assuming Plaintiff's claim is not barred by prescription, it is difficult for this Court, now, to find a cause of action. Every request for medical attention by Plaintiff was granted to Plaintiff. Mr. Day admitted denying VA treatment, but said he would have sent Plaintiff to the VA *if* Dr. Booth had said to. Mr. Day relied on the Doctor. As to Plaintiff's contention

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reinjured his shoulder on August 13, 1979, that the full extent of his April 13 injury became apparent. The court rejected this application of *contra non valentem* and held that the suit was barred. *Bernard v. Air Logistics, Inc.*, 407 So. 2d 469, 470 (La. Ct. App. 1981), *writ denied*, 409 So. 2d 656 (La. 1982). The court stated: "[P]laintiff knew he had suffered an actionable injury from the date of the first fall. The fact that plaintiff did not realize the full extent of his injury is not the controlling factor. Knowledge that he was hurt and that his injury was serious enough to warrant substantial medical attention is what controls." *Id*. The court distinguished *Brown*, saying that in that case the plaintiff was "unaware of the actionable nature of his ailment until the time that surgery was made a medical necessity." *Id*. The formulation of the *Bernard* courtSQ*i.e.*, looking to the first moment the plaintiff realizes he has an actionable injury, rather than to the time when the most serious result of his injury becomes apparentSQis consistent with an earlier reading of Louisiana law by this Court, *see Nivens v. Signal Oil & Gas Co., Inc.*, 520 F.2d 1019 (5th Cir.), *amended*, 523 F.2d 1382 (5th Cir. 1975) (per curiam), *cert. denied*, 96 S.Ct. 1509 (1976), and in our view remains the law in Louisiana. *See Laughlin v. Breaux*, 515 So. 2d 480, 482 (La. Ct. App. 1987); *Dixon v. Houck*, 466 So. 2d 57, 60 (La. Ct. App. 1985).

Even the cases that depart somewhat from this principle do so based on a characterization not available to KellySQthat the injury sued upon is "distinct" from the one known earlier to the plaintiff. *See, e.g.*, *Zumo v. R.T. Vanderbilt Co., Inc.*, 527 So. 2d 1074, 1077 & n.2 (La. Ct. App. 1987). Kelly's situation could not plausibly be so characterized. He testified that when his shoulder injury persisted, he knew it was something more than a pulled muscle, and for that reason demanded medical treatment from the jail officials. To the extent, therefore, that his claim rests on Day's alleged responsibility for the injury itself, Kelly cannot claim to have discovered that he had a serious, "distinct" injury only after he left jail. Moreover, since it is his position that he knew while in jail that he had an injury for which he was entitled to treatment, he cannot maintain that the wrongfulness of any denial of medical care by jail officials became apparent only in retrospect.

> that he was forced to do heavy lifting in the kitchen, this was a decision the Doctor allowed Plaintiff to make - and he made it. The actions of the jail administrators were not violative of Plaintiff's rights." (footnote omitted)

The district court's findings are not clearly erroneous. Kelly admitted that he was given a medical request slip every time he asked for one, which was apparently only three times in ten months with regard to his shoulders—or at least that is a permissible interpretation of his testimony.[5] He did not contend that he was

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[5] Kelly testified as follows on direct examination:

> "Q. Okay. What action did any of these people take when you told them that you had pain in your shoulder?
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> "A. Medical slip. Fill out a medical slip and take you to the doctor.
>
> ". . .
>
> "Q. Okay. What was the procedure as far as going to the doctor at Union Parish Jail?
>
> "A. Fill out a slip, and whenever they had a jailer available or, that could get you in to see the doctor they would take you.
>
> "Q. Were you given a form to fill out every time you complained of pain?
>
> "A. Not every time. I complained constantly, but they wouldn't give me no form. But when I demanded a form they gave me one."

On cross-examination, the defense attorney returned to this topic:

> "Q. After the August visit, when was the next time that you requested to see the doctor for your shoulder?
>
> "A. I believe it was in April of '87.
>
> "Q. Okay. So from August of '86 until April of 1987, you made no request to see Dr. Booth, or a doctor, for your shoulder?

ever denied the opportunity to see Booth when he filled out a slip. Kelly also admitted that he never asked Booth to be sent to the VA hospital or to be allowed to see another doctor. Kelly's claim for denial of adequate medical care boils down to a challenge to Day's and the other defendants' refusal to take him to the VA hospital or to an orthopedic specialist despite the lack of any instruction from Booth to do so and the lack of any further request by Kelly to see Booth. The district court was correct in concluding that Kelly failed to show a breach of the defendants' duty to provide reasonable medical care, *see Elsey v. Sheriff of Parish of East Baton Rouge*, 435 So. 2d 1104, 1106 (La. Ct. App.), *writ denied*, 440 So. 2d 762 (La. 1983), and failed to prove conduct that would give rise to liability under any intentional tort theory.

It was also not clearly erroneous for the district court to conclude that Booth left up to Kelly the decision of whether or not to continue to work in the kitchen; Booth so stated in his deposition, and Kelly did not allege in his testimony that any of the defendants disregarded instructions from Booth. Finally, with regard to the initial assignment to assist with the roofing work, the only evidence was that Day asked Kelly to help out with that

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"A. Verbal, yes. Written, no.

"Q. Okay. Did you ever request to see Dr. Booth verbally?

"A. No, sir.

"Q. These verbal requests would have been take me somewhere where I can get some help.

"A. Where I can get some help."

job. There was no showing of the dangerousness of the job, nor any evidence that would support a breach of a duty of care by Day. Again, the district court was entirely correct in concluding that Kelly had failed to prove negligence or any other tortious conduct.

Conclusion

Because we find Kelly's points of error to be unavailing, the judgment of the district court is

AFFIRMED.