UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-5783
Summary Calendar

CALVIN JACKSON,

Plaintiff-Appellant,

versus

BEXAR COUNTY ADULT
DETENTION CENTER,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Texas
(SA-91-CA-357)

(January 26, 1993)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellant Calvin Jackson (Jackson), *pro se* and *in forma pauperis*, filed this suit under 42 U.S.C. § 1983 against defendant-appellee Bexar County Adult Detention Center (BCADC) alleging inadequate medical treatment while incarcerated there.

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The district court granted summary judgment for BCADC, and Jackson appeals.

Facts and Proceedings Below

Jackson was incarcerated in the Bexar County Adult Detention Center between January and June 1991 as a pretrial detainee.[1] On February 2, 1991, Jackson injured his back. Jackson also suffered from a chronic sinus condition. Jackson apparently saw a physician's assistant (PA) on February 2 regarding his back, but the PA did not examine Jackson and informed him that the pain was in his mind. Jackson finally saw a doctor on February 11 regarding his back.

On April 16, 1991, Jackson filed his complaint under 42 U.S.C. § 1983 against BCADC alleging lack of medical treatment. Jackson asserted that on several occasions since February 2 he had requested treatment or medication for his lower back pain without receiving either. Jackson also claimed that his sinus problems had been inadequately addressed by BCADC's medical staff. BCADC filed a motion for a more definite statement. On May 16, 1991, the magistrate judge granted BCADC's motion for more definite statement and directed plaintiff to amend his complaint and provide further factual allegations in support of his claim for relief.

On May 30, 1991, Jackson filed a "Response to a Motion for A

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[1] In his complaint, Jackson did not allege whether he was in BCADC as a convicted prisoner or a pretrial detainee. However, in his objections to the magistrate judge's report below and in his brief to this Court, Jackson has alleged that he was a pretrial detainee. Additionally, BCADC in memorandum brief concedes that Jackson "was a pre-trial detainee rather than a convicted prisoner."

More Definite Statement," listing specific events that he characterized as inadequate medical care during February-May 1991. In paragraph 10 of his Response, Jackson stated that he "is suing PA Seanz, Joseph Valdez, Dr. John C. Sparks, Mr. Thomas Barry and Sheriff Harland Copeland." The record reflects, however, that Jackson never requested service of process on any of those persons and that none of those individuals were, in fact, ever served. In most of the subsequent pleadings that Jackson filed, he styled the case "*Calvin Jackson v. Bexar County Adult Detention Center, Thomas Barry, Dr. John C. Sparks, Joseph Valdez, PA Seanz*."

On June 11, 1991, BCADC filed a Motion to Dismiss or, in the Alternative, for Summary Judgment, on the ground that Jackson failed to allege facts or omissions sufficiently harmful to evidence deliberate indifference to his serious medical needs. It also asserted that it could not be vicariously liable for defaults of its non-policymaking personnel not chargeable to its policies. BCADC submitted an affidavit of Dr. John Sparks, which attached ten pages of Jackson's Bexar County medical file detailing Jackson's treatment for back and sinus pain from February 11 to June 3, 1991. The records indicated nine medical visits, including one complete physical with x-ray performed by a doctor at the emergency room. The records further reflect that on seven occasions Jackson was prescribed Motrin for his back pain and Maalox to ease any accompanying stomach discomfort. Jackson was also frequently prescribed Sudafed, Robitussin, Dimetapp, or Benadryl for his sinus condition. The magistrate judge explained to Jackson the nature of summary judgment procedure and directed Jackson to respond within

ten days.

Jackson filed two pleadings responding to BCADC's motion. In the first, Jackson asserted that his lower back had not been x-rayed, that he was still in pain and had trouble sleeping, that other medical treatment should have been administered, that he should have been examined by a specialist, and that he had not been seen on all of the occasions he requested treatment in the period from February 11 to June 3. He also challenged three descriptions in the medical reports as incorrect, claiming that they mischaracterized his complaints or falsely reported that he had played basketball or had a normal range of motion. Jackson also responded that he had not been treated on February 2, the day of the injury, and that BCADC had not shown that he had been so treated. Also in response to BCADC's Motion for Summary Judgment, Jackson filed a pleading entitled "Pleadings as Evidence," which included copies of numerous requests and grievances that he had submitted to BCADC, none of which refuted BCADC's evidence that Jackson was treated repeatedly.

On September 5, 1991, the magistrate judge recommended granting BCADC's motion for summary judgment. The magistrate judge noted that the evidence "establishes that plaintiff was examined and treated for his complaints of both lower back pain and sinus discomfort on at least nine separate occasions between February 11 and June 3, 1991." The magistrate judge concluded that "the quality of plaintiff's medical care during the relevant time period is well within the requirements of the Constitution. The fact that such medical care may not have given the plaintiff the relief he

requested as quickly as the plaintiff would have wished does not establish a constitutional deprivation."

On September 12, 1991, Jackson filed an "Answer" to the Magistrate's Memorandum and Recommendation. In it, Jackson asserted that he was a pretrial detainee and that he could "prove beyond a reasonable doubt that the Defendant's Pa Seanz and Joseph Valdez intentionally deprived the Plaintiff of Proper medical care and treatment and needs." On September 26, 1991, the district court considered the magistrate's recommendation and Jackson's objections thereto. After making a *de novo* determination as to the matters to which specific objections were made and conducting an independent review of the record, the district court accepted the magistrate's recommendation and granted summary judgment for BCADC. Jackson timely filed a notice of appeal.

Discussion

Jackson appeals from the district court's entry of summary judgment in favor of BCADC. Jackson argues that the magistrate judge erred in determining that he received adequate medical care. "This court reviews the grant of a summary judgment motion de novo, using the same criteria used by the district court in the first instance." *Walls v. General Motors, Inc.*, 906 F.2d 143, 145 (5th Cir. 1990). The evidence and any inferences to be drawn therefrom are reviewed in the light most favorable to the non-moving party. This Court thus affirms a grant of summary judgment where it is convinced "`after an independent review of the record, that "there is no genuine issue as to any material fact" and that the movant is "entitled to judgment as a matter of law."'" *Hartford Accident &*

Indem. Co. v. Costa Lines Cargo Serv., Inc., 903 F.2d 352, 362 (5th Cir. 1990) (quoting *Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co.*, 832 F.2d 1358, 1364 (5th Cir. 1987)).

We note that BCADC suggested below that it was not a jural entity capable of being sued. However, it did not clearly raise this issue in its motion to dismiss or for summary judgment, which was entirely directed to the merits. Neither the magistrate nor the district court addressed in any way the question whether BCADC was a legal entity subject to suit. BCADC was represented below, and is represented on appeal, by the Criminal District Attorney of Bexar County, Texas, and the mentioned motion to dismiss or for summary judgment states at its end that the attorney signing it is "Attorney for Defendant, Bexar County." BCADC's answer is similarly signed by the Bexar County Criminal District Attorney and his assistant as "Attorneys for Defendant, Bexar County." In its appeal memorandum the BCADC does not urge affirmance on the basis that it is not a legal entity subject to suit. Jackson does not suggest that affirmance is improper because BCADC is not a jural entity. We have stated in such cases that it would be appropriate to allow the *pro se* plaintiff to amend to make the county, rather than its jail, the party defendant. *See Wright v. El Paso County Jail*, 642 F.2d 134, 136 n.3 (5th Cir. 1981). So, we turn to the merits.

The Supreme Court has stated that in order to state a cognizable section 1983 claim for lack of medical treatment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."

Estelle v. Gamble, 97 S.Ct. 285, 292 (1976). In contrast, the rights of a pretrial detainee to medical care following his arrest are governed by the due process clause of the Fourteenth Amendment rather than the Eighth Amendment's prohibition against cruel and unusual punishment. *City of Revere v. Massachusetts Gen. Hosp.*, 103 S.Ct. 2979, 2989 (1983). The due process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to the convicted prisoner; while the convicted prisoner is entitled to protection only against punishment that is cruel and unusual, the pretrial detainee, who has yet to be adjudicated guilty of any crime, may not be subjected to *any* form of punishment. *Id.* at 2983. But not every inconvenience encountered during pretrial detention amounts to punishment in the constitutional sense. To establish that a particular condition or restriction of confinement is constitutionally impermissible punishment, the pretrial detainee must show either that it was (1) imposed with an expressed intent to punish or (2) not reasonably related to any legitimate nonpunitive governmental objective, in which case an intent to punish may be inferred. *Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987) (citing *Bell v. Wolfish*, 99 S.Ct. 1861, 1871-74 (1979)). Thus, pretrial detainees are entitled "to reasonable medical care unless the failure to supply it is reasonably related to a legitimate governmental objective." *Jones v. Diamond*, 636 F.2d 1364, 1378 (5th Cir.) (en banc), *cert. dismissed sub nom. Ledbetter v. Jones*, 102 S.Ct. 27 (1981). We have also recognized that no due process violation is established if the case involves only negligence of the officials. *Ortega v.*

Rowe, 796 F.2d 765 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 1887 (1987). *See also Davidson v. Cannon*, 106 S.Ct. 668, 671 (1986); *Feagley v. Waddill*, 868 F.2d 1437, 1440 (5th Cir. 1989); *Partridge v. Two Unknown Police Officers of the City of Houston*, 791 F.2d 1182, 1187 (5th Cir. 1986).

In determining whether Jackson has stated a claim for lack of medical treatment, we will look at two different periods: the period between his injury and when he was first treated by a doctor, February 2-11, and the period after February 11. We find that Jackson has not presented any evidence that he received inadequate medical care after February 11. The record reflects that between February 11 and June, Jackson had nine medical visits and usually received several prescriptions at each visit. While the diagnoses and treatment were not to his liking and the visits were not as frequent as he desired, Jackson's dissatisfaction alone is insufficient to prove that his treatment was arbitrary or purposeless after February 11. Jackson has not presented any issue of material fact regarding whether he received adequate medical care after February 11, and the district court properly entered summary judgment for BCADC with regard to this period.

The period between February 2 and 11 is in a different posture, however. Jackson has alleged that he was injured on February 2, but did not see a doctor or receive medical treatment until over a week later, on February 11. This delay in treatment at least arguably does not qualify as reasonable medical care, and BCADC does not posit, and it is not easy to imagine, any legitimate government objective that such delay furthers. Despite this

apparently plausible claim of lack of reasonable medical care, the district court correctly granted summary judgment for BCADC. Liability of a municipal entity under section 1983 cannot be premised solely on a theory of *respondeat superior.* *See Monell v. Dep't of Soc. Serv. of City of N.Y.*, 98 S.Ct. 2018, 2036 (1978). Jackson has not alleged that BCADC (or Bexar County), either by formulating or implementing a policy regarding medical treatment, was itself responsible for the delay in medical care.

Summary judgment was properly granted in favor of BCADC.

The district court did not address, however, Jackson's claim of inadequate medical treatment with regard to the five individuals listed in his Response. Jackson has alleged that these five individuals were involved in depriving him of medical care during the period between February 2 and February 11. Federal courts have generally treated cases alleging a complete denial of medical care more favorably than those alleging inadequate medical treatment. *See Estelle*, 97 S.Ct. at 291 (concluding deliberate indifference is manifested by intentionally denying or delaying access to medical care); *U.S. ex rel. Walker v. Fayette County, Penns.*, 599 F.2d 573, 575 n.2 (3rd Cir. 1979). While Jackson's *pro se* complaint against these five defendants, as amended by his Response, appears to lack the factual specificity necessary to survive a motion to dismiss or a motion for summary judgment, the Supreme Court has cautioned that complaints filed *in forma pauperis* should not automatically be dismissed as frivolous under 28 U.S.C. § 1915(d) because the complaint fails to state a claim. *See Neitzke v. Williams*, 109 S.Ct. 1827, 1834 (1989). Instead, section 1915(d) "accords judges

not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Id.* at 1833. At this stage of the proceedings, it is impossible to tell with certainty that Jackson is unable to make any rational argument in law or fact to support his claim for relief against these individuals. Thus, we must remand this case for further proceedings as to these five individuals. We remand solely so the district court has the opportunity to address specifically Jackson's claims against these five individuals.[2]

Conclusion

We affirm the district court's grant of summary judgment in favor of BCADC (and Bexar County). The district court, however, failed to discuss Jackson's claim of lack of medical treatment against PA Seanz, Joseph Valdez, Dr. John C. Sparks, Mr. Thomas Barry, and Sheriff Harland Copeland. Accordingly, we remand for the district court to address Jackson's claims against these five individuals.

AFFIRMED in part and REMANDED in part

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[2] Jackson has filed a Motion for Summary Judgment and a Motion for Subpoena Duces Tecum with this Court. In his Motion for Subpoena Duces Tecum, Jackson apparently seeks to have this Court order the production of certain medical records that were not before the district court and then supplement the record with these documents. Given that these documents were not presented to the district court, we deny his request that the record be supplemented with these documents. We also deny his Motion for Summary Judgment. Jackson is free, however, to present these motions to the district court on remand in reference to the five mentioned individuals.