

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2718

GEORGE GORDON,

Plaintiff-Appellant,

versus

STATE OF TEXAS, ET AL.,

Defendants,

DR. PHAM TIEN and
DR. N. T. NGUYEN,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(84-CV-4660)

(December 6, 1993)

Before VAN GRAAFEILAND*, SMITH, and WIENER, Circuit Judges.

PER CURIAM:**

*Senior Judge for the Second Circuit Court of Appeals,
sitting by designation.

**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

Plaintiff-Appellant George Gordon appeals the district court's grant of summary judgment in favor of Defendants-Appellees Dr. Pham Tien and Dr. N. T. Nguyen on Gordon's Eighth Amendment claim that both doctors were deliberately indifferent to his serious medical needs. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Gordon, an inmate of the Texas Department of Criminal Justice, Institutional Division (TDCJID), filed a § 1983 action against the State of Texas, the TDCJID, various TDCJID officials, and several TDCJID physicians, including Dr. Pham Tien and Dr. N. T. Nguyen. After discovery ensued, Gordon elected to proceed against only Drs. Tien and Nguyen.

Gordon complains of the medical care he received during December 1982. He was admitted to TDCJID's Walls Unit on December 8, 1982, to be treated for athlete's foot. A TDCJID podiatrist, who has never been a party to this suit, prescribed Griseofulvin, an anti-fungal drug, to be taken twice a day for thirty days. Gordon alleges that he took the medication at the times and in the manner prescribed by the podiatrist.

On December 22, 1982, Dr. Tien examined Gordon at the Ramsey II Unit and reported that he had blisters on his right foot, a sore throat, swollen lips, and that he complained of feeling chilly and weak. Dr. Tien noted on Gordon's chart the

that this opinion should not be published.

"necessity" for determining whether Gordon was suffering an allergic reaction to the Griseofulvin previously prescribed by the podiatrist. Dr. Tien ordered Gordon's blisters drained and prescribed Benadryl and vitamin C.

That same day, at 10:30 p.m., a medical attendant found Gordon unconscious on a washroom floor. The medical attendant advised Dr. Tien that Gordon was the same patient whom the doctor had seen earlier in the day with a possible allergic reaction to Griseofulvin. Gordon's temperature at that time was 103 degrees; his blood pressure, 142/70. Dr. Tien prescribed Dexamethasone, Benadryl, and Tylenol. Gordon was held for observation in the prison infirmary following this incident. Gordon was examined that night, at 11:30 p.m. and again at 2 a.m. the next morning. Gordon's noted symptoms were a sore throat when swallowing and a temperature of 102.4 degrees.

At 7:55 a.m., Dr. Tien again examined Gordon and noted Gordon's sore throat, swelling of the throat and lips, difficulty swallowing, temperature, and Gordon's complaint of pain all over his body. Dr. Tien suspected Gordon was possibly suffering from a urinary tract infection or influenza, and prescribed several drugs (Arethromiacin, Benadryl, and Tylenol), a liquid diet, and forced fluids. Dr. Tien ordered Gordon transferred to Ramsey I unit for further observation. Gordon received no further care from Dr. Tien.

By December 24, Gordon's condition had worsened and he was transferred to the Huntsville Hospital Unit. On arrival at the

emergency room at 2:32 p.m., Gordon complained of having had foot pain for two days, inability to walk, and soreness. Gordon's mouth and throat were sore, there was purulent drainage from his mouth, and his lips were dry, cracked, and bleeding. Dr. Nguyen examined Gordon and made a tentative diagnosis of stomatitis or urinary tract infection. Gordon was admitted to the hospital and Dr. Nguyen prescribed aqueous Penicillin G and Tobramycin and ordered lab work that included a blood count and urinalysis.

At 6:35 p.m. Dr. Nguyen ordered that Penicillin G and Tobramycin be discontinued and prescribed Ampicillin. The memorandum opinion of the district court indicates that the Penicillin G and Tobramycin were discontinued before given.

The Ampicillin was discontinued the following day (December 25) by a different doctor who had come on duty. Gordon had received one dose of Ampicillin at 9:00 p.m. on December 24. Dr. Nguyen had no further contact with Gordon; other doctors continued caring for Gordon.

On December 28, 1982, Gordon was transferred to John Sealy Hospital in Galveston. Gordon's condition continued to worsen; his final diagnosis was toxic epidermal necrolysis (TEN).¹ According to Gordon's complaint, he "suffered irreversible eye damage resulting in partial blindness, heart damage, kidney damage, burns over his entire body" and he was presently confined

¹Toxic epidermal necrolysis is the most serious of a series of disorders beginning with erythema multiforme (e.g., thrush), followed by Stevens-Johnson Syndrome (e.g., a more severe variant of erythema multiforme), culminating in the most serious condition: toxic epidermal necrolysis.

to a wheelchair.

The basis of this lawsuit is that the Defendants' failure to conduct an evaluation for a possible suspected allergic reaction to the drug Griseofulvin, coupled with the administration of medication that is highly cross-reactive with Griseofulvin, resulted in Gordon's hospitalization for treatment of TEN. Gordon alleged that Dr. Tien was deliberately indifferent to his serious medical needs by ignoring the suspected allergic reaction to Griseofulvin that was manifested by his unconsciousness in the washroom, high fever, and rapid pulse, and by administering additional prescription medication without verifying whether Gordon was having an allergic reaction. Dr. Nguyen was alleged to have been deliberately indifferent to Gordon's serious medical needs because the doctor prescribed intravenous aqueous Penicillin G and Ampicillin, and ignored the "potentially devastating" cross-reactivity of both drugs with Griseofulvin.

The Defendants moved for dismissal, or in the alternative for summary judgment, arguing that the summary judgment evidence revealed that Gordon could only establish mere negligence, not intent, which they claim is the requisite culpable state of mind.² In support of their position, they filed Gordon's medical

²The doctors also asserted that they were entitled to summary judgment because no facts indicated that Gordon's worsening condition would not have been inevitable regardless of the doctors' acts and omissions. Gordon's expert, Dr. Harris Busch, controverted the doctors' claim by asserting that the administration of Penicillin G or Ampicillin^{SQ}even one dose^{SQ}caused Gordon to suffer TEN. Dr. Busch stated that penicillins are notorious for producing TEN and that Ampicillin is one of the most allergenic of all penicillins. Summary

records, which they argue indicate that the Defendants were "extremely attentive and caring for [Gordon's] well-being."

Gordon opposed the motion and offered as controverting evidence the deposition testimony of his expert witness, Dr. Harris Busch. Gordon asserted that his evidence amounted at least to gross negligence or recklessness, which he argues is tantamount to deliberate indifference. As the Physicians' Desk Reference warns, because Griseofulvin is derived from a species of penicillin, the possibility existed that Griseofulvin would be cross-reactive with penicillin. Ampicillin, Dr. Busch contends, is known to be "far more allergenic" than Penicillin G. Dr. Busch noted that Dr. Tien correctly assessed on December 22 that there was a need to rule out allergy, but that Dr. Tien needed at that juncture to define with great precision the cause of the allergy. Goodman and Gillman (the standard textbook on pharmacology) warn that if a new drug regimen is to be administered, allergic reactions such as erythema multiforme can occur. Dr. Busch stated that Dr. Tien should have stopped all medication, which he contends is the proper procedure for drug allergy. Dr. Nguyen, he contends, should not have prescribed Penicillin G or Ampicillin without knowing whether Gordon was allergic to Griseofulvin. The district court granted summary judgment in the Defendants' favor, and Gordon appeals.

II

STANDARD OF REVIEW

judgment was not granted on this basis.

We review the district court's grant or denial of summary judgment de novo, "reviewing the record under the same standards which guided the district court."³ Summary judgment is proper when no genuine issue of material fact exists that would necessitate a trial.⁴ In determining on appeal whether the grant of a summary judgment was proper, all fact questions are viewed in the light most favorable to the nonmovant.⁵ Questions of law are always decided de novo.⁶

III

ANALYSIS

A. Deliberate Indifference

To prevail on an Eighth Amendment claim for "unnecessary and wanton infliction of pain," Gordon must prove that Defendants were deliberately indifferent to his serious medical needs,⁷ which indifference resulted in harm.⁸ The facts underlying a claim of deliberate indifference must clearly evince the medical

³Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

⁴Celotex Corp v. Catrett, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 2552-54, 91 L. Ed. 2d 265 (1986); see FED. R. CIV. P. 56(c).

⁵Walker, 853 F.2d at 358.

⁶Id.

⁷Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); Mendoza v. Lynaugh, 989 F.2d 191, 193 (5th Cir. 1993).

⁸Mendoza, 989 F.2d at 193. Neither of the Defendants dispute that Gordon suffered harm, but they do dispute that their conduct caused that harm. See supra note 2.

need in question and the alleged official dereliction.⁹ Deliberate indifference must rest on facts clearly evincing "wanton" actions on the part of the Defendants.¹⁰

In the summary judgment context, "the materials before the court [must] raise genuine issues as to facts which, if true, (1) would clearly evince the medical need in question and (2) indicate that the denial of treatment was much more likely than not to result in serious medical consequences, and additionally that (3) the defendants had sufficient knowledge of the situation so that the denial of medical care constituted wanton disregard of the prisoner's rights."¹¹

As the Defendants contend, "wanton" does not have a fixed meaning. Its meaning, however, is to be determined with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.¹² Defendants urge that Estelle v. Gamble requires Gordon to demonstrate intent. Gamble does not go so far; rather it states that mere negligence is insufficient to demonstrate deliberate indifference.¹³ An

⁹Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985) (citing Woodall v. Foti, 648 F.2d 268 (5th Cir. 1981)).

¹⁰Johnson, 759 F.2d at 1238.

¹¹Id.

¹²Wilson v. Seiter, ___ U.S. ___, 111 S. Ct. 2321, 2326, 115 L. Ed. 2d 271 (1991). For example, if officials are responding to a prison disturbance in an emergency situation, "wanton" would then mean with malice, or sadistically, for the purpose of causing harm. Deliberate indifference is obviously a lesser standard.

¹³Gamble, 429 U.S. at 105-06.

inadvertent failure to provide adequate medical care, i.e., negligence, does not constitute an unnecessary and wanton infliction of pain.¹⁴ "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."¹⁵

B. The Summary Judgment Evidence

Again, the materials before the court must raise genuine issues as to facts which, if true, (1) would clearly evince the medical need in question and (2) indicate that the denial of treatment was much more likely than not to result in serious medical consequences, and additionally that (3) the defendants had sufficient knowledge of the situation so that the denial of medical care constituted wanton disregard of the prisoner's rights.¹⁶

Gordon has not introduced facts that indicate clearly the medical need in question. An allergic reaction was indicated, but so was a urinary tract infection, an upper respiratory infection, stomatitis, and the flu. Both Dr. Tien and Dr. Nguyen prescribed medicine that they thought appropriate based on their diagnosis of Gordon's condition. Not unlike Gamble, medical tests might have been conducted that would have led to appropriate diagnosis and treatment, but the question whether "additional diagnostic techniques or forms of treatment is

¹⁴Id.

¹⁵Id.

¹⁶Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985).

indicated is a classic example of a matter for medical judgment."¹⁷ Moreover, Gordon does not call our attention to any facts that indicate that his collapse on the washroom floor and the symptoms he exhibited at that time could only have been a result of an allergic reaction, thereby eliminating other possible diagnoses. Viewing the facts in the light most favorable to Gordon, this is at most a case of negligent misdiagnosis or medication management or both, not one of deliberate indifference. Although it may have been more than ordinary negligence to prescribe medicines that were potentially cross-reactive with Griseofulvin, this act did not amount to deliberate indifference. The consequences were serious, but the harm resulting from the medical care Gordon received cannot be relied upon to indicate the level of culpability in this case.¹⁸ We find no evidence of indifference to Gordon's serious medical needs, deliberate or otherwise.

IV

CONCLUSION

Gordon's summary judgment evidence does not raise a fact issue as to whether Defendants were deliberately indifferent to his serious medical needs. The facts alleged do not clearly indicate the medical need in question; at most Gordon's illness was misdiagnosed. Even though failure to follow proper

¹⁷Gamble, 429 U.S. at 107.

¹⁸Wilson, 111 S. Ct. at 2326 ("[W]antonness of conduct does not depend upon its effect upon the prisoner.")

diagnostic procedures, or prescribing medicines that are potentially cross-reactive, may amount to medical malpractice, neither constitutes deliberate indifference under the facts alleged and supported by Gordon's summary judgment evidence. Consequently, the district court's grant of summary judgment is AFFIRMED.