UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-5237

(Summary Calendar)

ARNOLD DAVILA,

Plaintiff-Appellant,

versus

JAMES A. LYNAUGH, ET Al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:90cv12)

(March 31, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Proceeding pro se, Arnold Davila appeals several rulings of the magistrate judge relating to his complaint filed pursuant to 42 U.S.C. § 1983 (1988). Finding no error, we affirm.

While an inmate of the Texas Department of Criminal Justice, Institutional Division ("TDCJ-ID"), Davila filed a complaint against various prison officials alleging, *inter alia,* that certain officials had used excessive physical force against him, deprived

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* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

him of adequate medical care, and deprived him of his right of access to the courts.[1] After conducting a *Spears* hearing,[2] the magistrate judge dismissed all of Davila's claims on summary judgment, except his claim that jailers Hukill and Harrington used excessive force. A jury trial was held on this remaining claim. After the jury rendered a verdict against Davila, the magistrate judge dismissed Davila's action with prejudice.

On appeal, Davila argues that the magistrate judge: (a) erred in granting summary judgment for defendants Garner, Fulton and Ferrell, and on his claim that he was denied adequate medical care; (b) erred in denying his discovery requests; (c) erred in refusing to add certain individuals as defendants; and (d) erred in denying his motions for appointment of counsel.

We first address Davila's contention that the magistrate judge erred in granting partial summary judgment. We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Cent. R.R.,* 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Because defendants Garner and Fulton were sued solely on the basis

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[1] Davila named as defendants James Lynaugh, Jack Garner, Carl White, Kevin Hukill, Ricky Harrington, Dennis Ferrell, James Fulton, Cynthia Snelson, and Larry Dean. Lynaugh was the director of the Texas Department of Corrections. while Garner was the warden of Davila's prison. The other defendants all worked in some capacity at the prison.

[2] *Spears v. McCotter,* 766 F.2d 179 (1985).

of vicarious liability,[3] summary judgment as to these defendants was proper. *See Thompkins v. Belt,* 828 F.2d 298, 303 (5th Cir. 1987) ("Under section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability."). Davila stated at the *Spears* hearing that he sued defendant Ferrell "to make sure he brings [sic] the film." Ferrell had manned the camera which filmed an alleged assault upon Davila. Because Davila did not allege that Ferrell deprived him of a constitutional right, summary judgment as to Ferrell was also proper. *See Daniels v. Williams,* 106 S. Ct. 662, 664 (1986) (stating that in a § 1983 action, a plaintiff must show a violation of a constitutional right); *see also* 42 U.S.C. § 1983.

Davila also argues that the magistrate judge erred in granting summary judgment on his claim of inadequate medical care. "To prevail on an eighth amendment claim for deprivation of medical care, a prisoner must prove that care was denied and that this denial constituted `deliberate indifference to serious medical needs.'" *Johnson v. Treen,* 759 F.2d 1236, 1237 (5th Cir. 1985) (quoting *Estelle v. Gamble,* 97 S. Ct. 285, 291 (1976)). "The legal conclusion of `deliberate indifference' must rest on facts clearly evincing `wanton' action on the part of the defendants." *Id.* at

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[3] For example, at the *Spears* hearing, Davila stated that he was suing Garner for his failure to control his officer's actions. As for Fulton, Davila stated that "Fulton was present during the alleged assault and he didn't do anything to correct the officers' misconduct." Davila did not allege at the hearing that either Garner or Fulton implemented a policy which itself was a repudiation of constitutional rights or was a moving force of a constitutional violation.

1238. Because Davila failed to offer any evidence showing that he was denied care for a serious medical need or that prison officials were deliberately indifferent to any such need,[4] summary judgment of Davila's claim of inadequate medical care was proper.

Davila next contends that the magistrate judge erred in denying his motion for admissions and his discovery request regarding the identity of defendant John Doe #1.[5] Because Davila's action was classified as a Track 2 case pursuant to the Eastern District of Texas's *Civil Justice Expense and Delay Reduction Plan* ("Plan"),[6] the magistrate judge properly denied Davila's motion for admissions. Under the Plan, discovery in Track 2 cases is limited to disclosure.[7] We further find that any error the district court may have committed in not allowing discovery of John Doe #1's

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[4] The medical testimony and documentation at the *Spears* hearing established that after the use-of-force incident, Davila was brought to the prison clinic where he was treated by Nurses Arnold and Brooks. Those nurses cleansed the bleeding from his lower lip and prescribed Tylenol for the pain. Some time later, x-rays taken of Davila's neck, back and ribs revealed no significant injuries.

[5] John Doe #1 allegedly participated in the use-of-force incident.

[6] *See also The Civil Justice Reform Act of 1990,* 28 U.S.C.A. § 471 et seq. (West 1993).

[7] Track 2 cases warrant, *inter alia*, disclosure of the names, addresses, and phone numbers of each person likely to have information bearing on any claim or defense, disclosure of all documents in the control of the party that are likely to bear significantly on any claim or defense, and the disclosure of any evidence which may be presented in the form of expert testimony. *See also* Fed. R. Civ. P. 26(a). In contrast, Track 3 cases warrant disclosure *plus* "15 interrogatories, 15 requests for admission, depositions of the parties, and depositions on written questions of custodians of business records for third parties."

identity was harmless. *See* Fed. R. Civ. P. 61. The record shows that the names of all officers involved in the use-of-force incident were revealed to Davila in the defendant's motion for summary judgment.[8] We therefore reject Davila's challenge to the magistrate judge's denial of his discovery requests.

Davila also contends that the magistrate judge erred in refusing to add certain individuals as potential defendants, who Davila named in his motion in opposition to summary judgment. We disagree. The magistrate judge correctly noted that because a responsive pleading had been filed, Davila had to obtain leave of court to amend his claims. *See* Fed. R. Civ. P. 15(a). It is undisputed that Davila never sought leave of court to amend his complaint.

Lastly, Davila contends that the magistrate judge erred in denying his motions for appointment of counsel.[9] The district court may appoint counsel in civil rights cases presenting "exceptional circumstances." *Ullmen v. Chancellor,* 691 F.2d 209, 212 (5th Cir. 1982). Factors to be considered, among others, are the complexity of the issues and the plaintiff's ability to represent himself adequately. *Id.* at 213. The issues presented in Davila's action are not complex. Moreover, Davila's pleadings

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[8] This information was not revealed too late since the magistrate judge did not dismiss the use-of-force claim on summary judgment. Furthermore, the record shows that Davila never sought leave to amend his complaint to add additional defendants. *See* Fed. R. Civ. P. 15(a).

[9] Although Davila had court-appointed counsel at trial, he contends that the magistrate judge erred in not appointing counsel earlier in the proceedings.

demonstrate his ability to provide himself with adequate representation. The magistrate judge therefore did not abuse his discretion by refusing to appoint counsel earlier in the proceedings.[10]

Accordingly, we AFFIRM the district court in all respects.

[10] We further reject as frivolous Davila's contention that the magistrate judge "prevented" certain individuals from testifying on his behalf. We find no support in the record for Davila's claim.