

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-8241  
(Summary Calendar)

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GREGORY HOUSE,

Plaintiff-Appellant,

versus

DR. CATHY A. HURLEY,

Defendant-Appellee.

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Appeal from the United States District Court  
For the Western District of Texas

(W-91-CA-90)

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(January 11, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:\*

In this prisoner's civil rights case under 42 U.S.C. § 1983, Plaintiff-Appellant Gregory House appeals the district court's dismissal of his claim pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

granted. Finding that the dismissal was proper as to House's claim against Defendant-Appellee Dr. Cathy A. Hurley for deliberate indifference constituting inadequate medical attention and treatment, we affirm that part of the district court's order of dismissal. Inasmuch as House's complaint contained allegations of his being forced by unidentified persons, who were not made defendants by House, to perform physical labor in violation of his medical work restrictions, we vacate the order of dismissal in part and remand to permit amendment of House's petition to name proper parties defendant to those claims related to work related violations.

I

FACTS AND PROCEEDINGS

House filed this prisoner's § 1983 action pro se only against Dr. Cathy A. Hurley, the senior doctor at the A.D. Hughes Unit of the Texas Department of Criminal Justice (TDCJ), alleging inadequate medical attention and treatment for a lower back injury which he sustained prior to incarceration. House alleged that 1) Dr. Hurley did not request his medical records regarding this injury from the hospital where he had been treated, and 2) when he asked Dr. Hurley to send him to an outside hospital for an examination of his back, she stated that black people do not have back problems.

The magistrate judge conducted a Spears<sup>1</sup> hearing and recommended that House's complaint be dismissed pursuant to

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<sup>1</sup> Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

Fed.R.Civ.P. 12(b)(6) because the allegations of the complaint and the testimony and medical records presented at the Spears hearing did not establish a claim of deliberate indifference. The district court adopted the magistrate judge's report and dismissed the suit. Neither the order nor the judgment indicates whether the dismissal was with or without prejudice.

The Spears hearing revealed that House's back had been injured in January of 1985 in an automobile accident. He was convicted and sent to TDCJ, Eastham Unit, in December of 1985. He did not complain of back problems at Eastham Unit because his work assignment there did not cause him pain. He was transferred to Darrington Unit where he began to complain about his back problem when he was required to do field work. His back was treated with heat packs at Darrington. He was then transferred to Coffield Unit where his work assignment remained the same. He did not receive any treatment at Coffield.

House was next assigned to the Hughes Unit when it opened in January of 1990. Dr. Hurley first saw House in January of 1991 for complaints of back pain. Prior to that time House had always been classified as being in perfect health. House told Dr. Hurley that he had been in a motor vehicle accident in 1984 and that he was having a hard time working in the fields. Dr. Hurley examined him, ordered x-rays of his lumbar spine, sent him to physical therapy, and sent him for two consultations to the Galveston Orthopedic Clinic. They diagnosed chronic low back pain and prescribed Motrin, exercise, and a low bunk. TDCJ changed his medical

classification to proscribe lifting more than 50 pounds and assigned him to a low bunk.

House testified that he was required to cut grass and tree branches and pick up rocks over 50 pounds. Warden Dretke testified that House's work assignment did not require him to lift over 50 pounds, and that House should tell his crew supervisor that he was not supposed to lift more than that. House also complained of being disciplined for not cutting a reasonable amount of grass, his explanation for his under-productivity being that he could not keep up the same pace as the other inmates.

House stated that he did not feel that Dr. Hurley was taking his complaints of back pain seriously because she did not attempt to get his medical records from the time immediately following the automobile accident. Dr. Hurley testified that those records were not necessary to her treatment; that she assumed that House was telling the truth about his accident and injury; and that she based her treatment on the opinions of the orthopedists who had seen House on two recent occasions.

## II

### ANALYSIS

House continues to complain on appeal that Dr. Hurley did not make sufficient attempts to obtain his medical records relating to the accident. He also complains that his back injury was aggravated due to excessive work and failure of medical officials to conduct a proper evaluation of the problem.

In reviewing a dismissal for failure to state a claim under

Fed.R.Civ.P. 12(b)(6), we accept all well pleaded facts as true and view them in the light most favorable to the plaintiff. Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078, 1082 (5th Cir. 1991). We may not affirm the dismissal unless "it appears `beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief.'" Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (other citations omitted).

To state a claim for relief under 42 U.S.C. § 1983 for denial of medical care, a prisoner must show that care was denied and that this denial constituted deliberate indifference to his serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). A complaint that medical personnel have been negligent in diagnosing or unsuccessful in treating a medical condition is not sufficient to show deliberate indifference. Estelle, 429 U.S. at 106; Varnado, 920 F.2d at 321.

Here, the district court was correct in concluding that House's allegations did not demonstrate deliberate indifference to his medical needs by Dr. Hurley. House acknowledged at the Spears hearing that Dr. Hurley examined him, ordered x-rays and sent him to John Sealy Hospital three times. She prescribed pain medication, and his work classification was changed to light duty with no lifting over 50 pounds. The fact that Dr. Hurley did not request his previous medical records does not show deliberate indifference; neither does the fact that his back pain has

continued demonstrate a constitutional violation. See *Mayweather v. Foti*, 958 F.2d 91 (5th Cir. 1992).

The district court correctly dismissed House's claims against Dr. Hurley. A dismissal for failure to state a claim under Rule 12(b)(6) is considered a judgment on the merits. Therefore, although the judgment did not state whether dismissal was with or without prejudice, it is deemed to be with prejudice as a matter of law. See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). We affirm the dismissal with prejudice of House's complaints against Dr. Hurley.

House's complaint also contained allegations of being required to lift over 50 pounds in violation of his work restrictions and to cut grass at a faster pace than he was physically able to do, all of which aggravated his back pain. Facially, those allegations do state a claim of deliberate indifference by those persons who required House to work in violation of his medical restrictions. See *Jackson v. Cain*, 864 F.2d 1235, 1244-47 (5th Cir. 1989). Unfortunately, the district court did not address these allegations. Dr. Hurley was the only named defendant and she was not the appropriate defendant for those work related claims. We have no choice, therefore, but to vacate the judgment of dismissal in part and remand this case so that House may amend his petition to name the proper defendants to his work related claims. See *Neal v. State of Georgia*, 469 F.2d 446, 448 (5th Cir. 1972). So ordered.

AFFIRMED in part and VACATED and REMANDED in part.