UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-3236

JAY R. WENZL,

Plaintiff-Appellant,

versus

DR. HEGMANN, ET. AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Louisiana

(CA-91-434-A-M2)

(November 30, 1994)

Before JONES and DeMOSS, Circuit Judges, and SHAW, District Judge.[*]

PER CURIAM:[**]

Appellant Jay Wenzl is a state prisoner at Hunt Correctional Center in St. Gabriel, Louisiana, serving a felony sentence for his fourth offense of driving while intoxicated. Wenzl brought a pro se 42 U.S.C. § 1983 complaint, alleging that prison officials

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[*]District Judge of the Western District of Louisiana, 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

maliciously denied him adequate treatment for his painful back, which had a ruptured disc, and deprived him of the use of a wheelchair. The complaint, which alleged cruel and unusual punishment, named as defendants the State of Louisiana; the Louisiana Department of Public Safety and Corrections; Department of Public Safety and Corrections Secretary Bruce N. Lynn; Hunt Correctional Center Medical Director Michael Hegmann; Hunt Warden C. Martin Lensing; Hunt Assistant Warden Cornel H. Hubert; Hunt Medical Services Administrator Bob Abel; and John S. Johnson, a male nurse at Hunt. Wenzl requested monetary damages and that the Department of Corrections be ordered to provide him adequate medical treatment.

The magistrate judge recommended summary judgment against Wenzl as to all defendants except Dr. Hegmann, basing this recommendation on Wenzl's medical records. The district court, however, granted summary judgment in favor of all defendants and dismissed the action. Wenzl brought this pro se appeal.

For the reasons stated in this opinion, and in light of the Supreme Court's recent holding in Farmer v. Brennan, 114 S. Ct. 1970, 1979 (1994), we vacate the judgment as to Wenzl's claim against Dr. Hegmann and remand that part of the case for further proceedings. We affirm the summary judgment granted by the district court as to all other defendants.

FACTUAL BACKGROUND

Wenzel arrived at Hunt Correctional Center on September 11,

1990[1] in a wheelchair because of a herniated spinal disc. He alleged that he was X-rayed but not examined. Wenzl later asserted that he was interviewed but not examined by Hunt's Dr. Paul.

Wenzl alleged that after his arrival at Hunt, he made numerous requests for pain medication but he received only Tylenol, which was not effective. On October 1, defendant-appellee Dr. Hegmann authorized Wenzl to continue using his wheelchair for the next six months.

On November 21, Hunt's Dr. Dienst saw Wenzl at emergency sick-call. Wenzl alleged that the doctor asked him questions but did not examine him. Wenzl told Dr. Dienst that he had a "crushed" spinal disc and was having constant pain in his back and legs. Dr. Dienst prescribed Motrin for pain and Benadryl to help Wenzl sleep. The doctor allegedly told Wenzl he had a "pinched nerve" and scheduled him for a CAT scan.

Wenzl alleged that on November 30, he was summoned to the medical unit and ordered to give up his wheelchair, on orders of Dr. Hegmann. Wenzl allegedly told them he could not walk due to pain and weakness, but he was threatened with lock-down if he refused. Wenzl also allegedly was told that he would not be given crutches or a walker. He tried to walk back to his dormitory with the help of two other inmates, but he was unable to because of sharp pains. A nurse then retrieved Wenzl's wheelchair.

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[1]In the second version of his complaint, plaintiff alleged that he was admitted to Hunt Correctional Center on September 11, 1991. This is clearly erroneous as the petition was filed on April 29, 1991. The court presumes that the correct arrival date is the date listed on plaintiff's original complaint, September 11, 1990.

Wenzl was allowed to keep his wheelchair until December 13 [he says 14], when Dr. Hegmann personally ordered Wenzl to relinquish it. When Wenzl asked why, the doctor allegedly replied "Because I run this place." Wenzl was then taken to lock-down (solitary confinement), where he stayed for nine days, allegedly unable to shower or shave. Wenzl alleged that he was having cramps in his legs constantly, and also that he would have sudden sharp pains in his legs. He alleged that he has no sensation in his left thigh.

Wenzl alleged that on November 30, 1990, another Hunt inmate overheard Dr. Hegmann talking with appellee Johnson, the male nurse at Hunt. Exhibit A to the complaint is the affidavit of inmate Carlos Rodriguez, which states that the doctor asked Johnson if he saw or thought that there was something wrong with Wenzl's back. Johnson assertedly said to Dr. Hegmann: "Mr. Wenzl just [doesn't] want to work. . . . send him to the [cell] block and keep him there until he decides to go to work."

Wenzl also attached a report of a CAT scan done at a Veterans Administration hospital in 1985 which reported "degeneration of the disc at the level of L4-L5 and L5-S1," and an indication that the latter disc may be herniated. In their response to discovery, the defendant-appellees answered "No" to the question whether they were aware of Wenzl's VA medical records. In his administrative proceeding, Wenzl wrote a letter to appellee Lynn dated February 11, 1991, stating: "I have my VA records to support my condition." In addition, as early as November 1, 1990, Hunt records show that Wenzl told a nurse at sick call that he was a veteran and preferred

to be treated at the VA hospital where he had been before.

The defendants filed a motion for summary judgment, supported by a copy of Wenzl's prison medical records, an unsworn statement of purportedly undisputed facts, and the records of Wenzl's relevant prison administrative remedy proceedings. Paragraph 9 of the statement reads: "On or about, November 30, 1990, Dr. Hegmann again examined inmate Wenzel [sic]. Dr. Hegmann could find nothing wrong with inmate Wenzel. It was Dr. Hegmann's determination that inmate Wenzel was still suffering from a pinched nerve."

Wenzl filed an unsworn "statement of disputed facts," wherein he asserted that Dr. Hegmann did not see him on November 30, 1990, or previously. Wenzl's sworn complaint supports this assertion. In his pro se motion for summary judgment, Wenzl "avers that until December 13, 1990 he had no idea of what Dr. Hegmann even looked like." However, a note in the medical records dated November 29, apparently initialed by Dr. Hegmann, states: "Patient seen today by me. No new C/O or findings. Status unchanged."

In his statement of disputed facts, Wenzl iterated that he told Hunt personnel that his VA medical records would show that he had been scheduled for surgery at a VA hospital, but he stated that he had to cancel it to take care of his mother. Wenzl points out that (as appellees admitted), Dr. Hegmann was not an orthopedist and no orthopedist recommended taking Wenzl's wheelchair from him.

In the three weeks following Wenzl's arrival at Hunt, during which he was in its hospital unit, the nurses noted that when he moved about, he always used his wheelchair. He also complained of

pain. On September 18, 1990, Dr. Fields, an orthopedist, ordered that Wenzl received an EMG and a CAT scan, and be referred to Charity Hospital New Orleans (CHNO). On October 11, CHNO resident doctors reported as their impressions "Normal NCS [nerve conduction study]" and "Normal EMG [electromyographic study]." However, it is not clear from the medical notations in the appellate record whether the ordered CAT scan was performed on Wenzl in October 1990.

Wenzl went to sick call several times during October, November and December of 1990, complaining of pain. As stated previously, Dr. Dienst saw him at emergency sick call on November 21. Dr. Dienst referred Wenzl to Dr. Fields, who opined on November 27: "Needs EMG/NCS [electromyographic study/nerve conduction study]" probable disc L5-S1, Send to CHNO for EMG/NCS. EMG done[,] Neg. Imp.: Chronic LBP[.] Light Duty[.] Cont[inue] Motrin." Despite these notes, on the same report, Dr. Hegmann wrote a note dated November 29 stating: "Neg EMG/NCS indicated[.] No objective findings to support the pts claim of severe back pain[.] [P]lan: D/C [discontinue] wheelchair, LDI may take 10 min. break [each] hour[.] No squatting, No lifting perm."

After he returned the wheelchair to Wenzl on November 30, Dr. Hegmann asked Dr. Fields whether he thought Wenzl needed a wheelchair. The orthopedist responded on December 11, stating "I cannot find any reason for [Wenzl's legs going numb.] I think for complete W/U [workup] to end this problem a CT [CAT scan] of his sacral spine would complete W/U - otherwise I have no suggest."

Based on this, the next day, Dr. Hegmann directed: "D/C wheelchair[.] CT ordered." In an interrogatory answer, defendants state that Dr. Hegmann ordered Wenzl to give up his wheelchair on December 12, 1990 "after orthopedic consultation, EMG & Nerve Conduction Studies, CT scan of lumbar spine." However, it appears that the CAT scan was not performed until January 17, 1991. Further, the report relative to the CAT scan was not signed by the CHNO doctor until June 5, 1991. The reason for this delay of nearly five months is not clear in the record. A medical note apparently in Dr. Hegmann's handwriting states: "5/22/91 Still C.T. not back." When the CAT scan results finally were obtained, they appeared to confirm the 1985 VA records and provide some objective reason for Wenzl's pain and his need for a wheelchair. As Dr. Fields had suspected, there were "[s]evere degenerative changes in the L5-S1 intervertebral disc with . . . protrusion" of the disc. Assuming that Wenzl got his wheelchair back, it was not until about June 1991.

DISCUSSION

A: Claims Against Dr. Hegmann

Wenzl's Eighth Amendment claim based on inadequate medical care will succeed only if he proves that the denial of care constituted "deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 104 (1976); Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981). While the instant case was pending on appeal, the Supreme Court issued its opinion in Farmer v.

Brennan, 114 S. Ct. 1970, 1979 (1994). The Brennan opinion addressed in considerable detail the context and proper interpretation of the phrase "deliberate indifference" in Eighth Amendment cases. In reversing and remanding a summary judgment in favor of prison officials, the Court stated:

> "Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. ... Whether a prison official had the requisite knowledge of a substantial risk i[s] **a question of fact subject to demonstration in the usual ways**, including inference from circumstantial evidence, ... and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."

Brennan, 114 S. Ct. at 1981 (emphasis added). Keeping in mind the magistrate's finding in this case of genuine issues of material fact as to Dr. Hegmann's actions and the medical information available to him when he took away Wenzl's wheelchair, we conclude that, in light of Brennan, a remand on that part of the case is necessary. Remaining factual issues include, but are not limited to (1) whether Dr. Hegmann ever "saw" or examined Wenzl prior to ordering him to relinquish the wheelchair on December 13, (2) whether a CAT scan was performed in the fall of 1990; and (3) whether and when Dr. Hegmann became aware of Wenzl's VA records. Accordingly, we vacate the summary judgment in favor of Dr. Hegmann and remand that part of Wenzl's case to the district court for further factual development and consideration in light of Brennan.

B: Claims Against Other Defendants

Plaintiff also named Secretary Lynn, Warden Lensing, Assistant Warden Hubert and Medical Services Director Abel as defendants. To be liable under section 1983, a person must either be personally involved in the acts causing the alleged deprivation of constitutional rights, or there must be a causal connection between the act of the person and the constitutional violation sought to be redressed. Lozano v. Smith, 718 F.2d 756, 768 (5th Cir. 1983). A state supervisory official cannot be held liable in a section 1983 action solely on the basis of respondeat superior. Monell v. Dept. of Social Services, 436 U.S. 658, 663 (1978); Barksdale v. King, 699 F.2d 744, 746 (5th Cir. 1983). We affirm the findings of the trial court and the magistrate judge that Wenzl failed to allege or designate any facts in the record to show a causal connection or personal involvement by Lynn, Lensing, Hubert or Abel with regard to any actions that resulted in deliberate indifference to Wenzl's serious medical needs.

As to Johnson, the nurse, we agree with the findings of the magistrate judge and district court that Wenzl's allegations against Johnson amount to mere negligence and malpractice. Unsuccessful medical treatment does not give rise to a section 1983 cause of action, and even negligence, neglect and medical malpractice do not rise to the level of a constitutional violation. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991); Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985).

The two remaining defendants, the Department of Public Safety and the state of Louisiana, are immune from suit pursuant to the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651, 659 (1974)(holding that a non-consenting state is immune to suits brought in federal court seeking money damages or equitable relief). Therefore, we hold that the summary judgment was correctly entered as to all defendants except Dr. Hegmann.

CONCLUSION

Accordingly, we VACATE the judgment as to Wenzl's claim against Dr. Hegmann and REMAND that claim for further proceedings on whether Dr. Hegmann's actions constituted deliberate indifference as reinterpreted in Brennan. We AFFIRM the summary judgment granted by the district court as to all other defendants.

AFFIRMED in part, VACATED and REMANDED in part.