UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-4027
Summary Calendar

WILLIAM CHARLES TURNER,

Plaintiff-Appellant,

VERSUS

NASH MOXON, ET AL.,

Defendants-Appellees.

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

(September 30, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

William Charles Turner (Turner) is imprisoned in a facility of the Texas Department of Criminal Justice, Institutional Division (TDCJ). He alleged in his complaint that, on August 23, 1989, he fell outside a prison shower and injured his back. He complained of serious pain but was denied medical attention. On August 24,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Turner visited a prison infirmary emergency room as a walk-in patient. On September 16, 1989, Turner was placed on work-restriction status. On May 16, 1990, he was referred to the brace and limb clinic. On July 24, 1990, he was x-rayed for the first time since his fall. He was diagnosed as having a chronic lower back sprain. Turner believed that he received inadequate medical attention and that the shower was unsafe. He filed a complaint under 42 U.S.C. § 1983, in which he named as defendants Warden Terry Terrell, Assistant Warden Nash Moxon, Dr. Ken Kuykendall, Rosemary Haney, and the medical department of TDCJ's Beto I Unit. The clerk of the district court received Turner's complaint on March 31, 1992. The magistrate judge granted Turner leave to proceed in forma pauperis (IFP).

In his complaint, Turner averred that he had filed a step-one grievance regarding his injury but had never received a response. The magistrate judge ordered him to exhaust his remedies pursuant to Texas' three-step grievance procedure. Turner then exhausted his prison administrative remedies and was denied relief at all three levels.

The magistrate judge held a Spears hearing on Turner's complaint. Turner testified that two guards responded to his protestations that he had hurt his back by telling him to submit a sick-call request. The guards told Turner that a prisoner could receive treatment only after submitting such a request. Turner submitted a sick-call request and later was told to report in about a week. The morning after the fall, Turner asked his work boss to

take him to the prison infirmary. Turner's boss took him to the infirmary. A nurse examined Turner's back with his fingers and felt nothing unusual. The nurse submitted a sick-call request. Later, Turner was told he had suffered a back strain. A doctor prescribed therapy.

Later, Turner's examiner at the brace and limb clinic found that one of Turner's legs was one-quarter inch shorter than the other leg. The examiner opined that Turner's back was deformed and asked if Turner had been x-rayed. Turner told the examiner that he had not been x-rayed.

According to Turner, TDCJ officials at first told him that his pain was psychosomatic. The officials retreated from that diagnosis after Turner's x-ray revealed a fracture.

A TDCJ physician responded to the magistrate judge's questions about Turner's prison medical records. He stated that Turner submitted sick-call requests on August 22 and August 23, 1989, complaining of a back injury. A nurse and a physician examined Turner on August 24. Turner identified Kuykendall as the examining physician. The physician referred Turner to physical therapy, prescribed Motrin, and recommended a three day lay-in for Turner. Turner went to physical therapy on August 24 and three times thereafter, with only slight improvement. He was instructed to continue an exercise program.

Turner was x-rayed on July 23, 1990. The film showed an old compression fracture that the testifying physician believed could have occurred in August 1989.

Turner's TDCJ clinic notes indicate that he was seen twice on August 24, 1989, and that the physician referred him to physical therapy, prescribed Motrin, and recommended a three-day lay-in. Turner was seen again on August 28. The clinic notes indicate that his back had improved. Turner was seen again about his back on September 16. He was referred to a "chronic clinic." He was seen again on September 21. According to the notes, Turner said that medication had helped his back problem. Later on September 21, Turner's Motrin prescription was renewed when he again was seen for his back-pain complaint. Turner next was seen about his back complaint on March 16, 1990. He complained that his pain was getting worse. His Motrin prescription was renewed and the dosage increased. Turner was seen again on March 27 regarding his back pain. On April 23, a physician renewed Turner's Motrin prescription, and prescribed physical therapy, heating pads, and a two-week lay-in for Turner. On April 24, the physician referred Turner to the brace and limb clinic. An entry of May 7 notes that Turner already was receiving physical therapy and medication. Turner visited the brace and limb clinic on May 16. He was seen again on May 22 for his back-pain complaint and his Motrin prescription was renewed. He was seen again on May 24, June 6, and June 22. The notes for those dates indicate that his treatment remained the same and that his Motrin prescription was renewed on June 22. Turner again was seen on July 20. A physician prescribed Motrin and Tolectin. An entry of July 24 indicates that Turner's x-rays had been done and that Tolectin had helped Turner's back

pain. Turner's x-rays revealed "minimal compression wedging deformities of the 12th thoracic and 1st lumbar vertebral bodies." Turner was seen for back pain throughout 1990, 1991, and 1992. He was treated with medication, a back brace, another set of x-rays, and work and bunk assignments.

The magistrate judge recommended that the district court dismiss Turner's complaint as frivolous. The magistrate judge found that Turner had failed to raise his claims about the shower and the guards' initial reactions to his injury within the applicable limitations period. The magistrate judge also found that Turner's claim that he received inadequate medical care was legally frivolous. The district court adopted the magistrate judge's report and recommendations and dismissed Turner's complaint.

Turner first contends that the district court erred by dismissing his claims regarding the shower and the guards' initial reactions because he had failed to raise those claims within the applicable limitations period. Turner's contention is unavailing.

A reviewing court will disturb a district court's dismissal of a pauper's complaint as frivolous only on finding an abuse of discretion. A district court may dismiss a complaint as frivolous "`where it lacks an arguable basis either in law or in fact.'" Denton v. Hernandez, ___ U.S. ___, 112 S. Ct. 1728, 1733-34, 118 L. Ed. 2d 340 (1992)(quoting Neitzke v. Williams, 490 U.S. 319, 325 (1989)). A court may, sua sponte, raise limitations issues in proceedings under 28 U.S.C. § 1915(d) and may dismiss a complaint

as frivolous if it is clear that the claims in the complaint are barred by the relevant statute of limitations. Gartrell v. Gaylor, 981 F.2d 254, 256 (5th Cir. 1993).

Federal courts apply state personal-injury limitations periods to actions under 42 U.S.C. § 1983. Owens v. Okure, 488 U.S. 235, 251, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989). The applicable Texas limitations period is two years. Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989). Federal law determines when a § 1983 action accrues for the purpose of applying the statute of limitations. Id. "Under federal law, a cause of action accrues the moment the plaintiff knows or has reason to know of the injury," Helton v. Clements, 832 F.2d 332, 334 (5th Cir. 1987), or when "the plaintiff is in possession of the `critical facts' that he has been hurt and the defendant is involved." Freeze v. Griffith, 849 F.2d 172, 175 (5th Cir. 1988)(quoting Lavellee v. Listi, 611 F.2d 1129, 1131 (5th Cir. 1980)).

> If some injury is discernible when the tortious act occurs, the time of event rule respecting statutes of limitations applies, and the plaintiff's cause of action is deemed to have accrued. If the plaintiff later discovers that his injuries are more serious than originally thought, his cause of action nevertheless accrues on the earlier date, the date he realized that he had sustained harm from the tortious act.

Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 229 (5th Cir. 1984).

> [T]he continuing violation doctrine embraces two types of cases. The first includes cases in which the original violation occurred outside the statute of limitations, but is closely related to other violations that are

> not time-barred. In such cases, recovery may be had for all violations, on the theory that they are part of one, continuing violation.
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> The second type of continuing violation is one in which an initial violation, outside the statute of limitations, is repeated later; in this case, each violation begins the limitations period anew, and recovery may be had for at least those violations that occurred within the period of limitations.

Hendrix v. City of Yazoo City, Miss., 911 F.2d 1102, 1103 (5th Cir. 1990)(footnotes omitted). "In federal cases, filing a complaint with the court commences an action and tolls the applicable statute of limitations." Martin v. Demma, 831 F.2d 69, 71 (5th Cir. 1987).

The clerk of the district court received Turner's complaint on March 31, 1992. Absent some tolling of the statute of limitations, any non-continuing violations that occurred before March 31, 1990, therefore, were time-barred. It is possible that the statute of limitations governing § 1983 claims in Texas is tolled while a prisoner exhausts his administrative remedies. Gartrell, 981 F.2d at 258. Turner averred in his complaint that he had filed a step-one grievance but never received a response. He did not pursue his administrative remedies further until directed to do so by the magistrate judge. Because Turner did not exhaust his grievance remedies until after he filed his complaint, his pursuit of those remedies has no effect on the running of the limitations period.

Turner's claim that he slipped and fell outside the shower on August 23, 1989, is not continuous with his other claims. That claim is time-barred. Turner's claim that the guards told him to submit a sick-call slip rather than taking him to the infirmary, while related to his claim that TDCJ's medical personnel provided

him with inadequate medical care, is not part of that alleged continuing tort. Turner's claim regarding the guards' actions therefore is time-barred.

The magistrate judge found that Turner's claim regarding the medical care he received from TDCJ was not time-barred because Turner did not discover the full extent of his injuries until he was x-rayed in July 1990. Turner's medical records indicate that he should have known before then that his treatment was not healing his injury. Turner's medical-care contention appears to raise the continuing-violation doctrine. This Court need not determine precisely when the limitations period expired on Turner's medical-care claim; that claim is frivolous on its merits.

Turner also contends that TDCJ officials were deliberately indifferent to his medical needs. "Unsuccessful medical treatment does not give rise to a § 1983 cause of action. Nor does `[m]ere negligence, neglect or medical malpractice.'" Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991)(citations omitted). Turner's medical records and his testimony at the Spears hearing indicate that he was treated with various therapies for his back pain over a nearly three-year period. His medical-care claim therefore lacks basis in law and fact.

Finally, Turner requests the appointment of appellate counsel. Because this Court may dispose of Turner's appeal by applying established legal principles to the relatively uncomplicated facts of Turner's case, the "exceptional circumstances" required for appointment of counsel are not present. See Ulmer v. Chancellor,

691 F.2d 209, 212 (5th Cir. 1982). His request for appointment of counsel is denied.

AFFIRMED.