UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4160
Summary Calendar

BOYD RAY MULLENS,

Plaintiff-Appellant,

VERSUS

UPSHUR COUNTY JAIL, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(2:91-CV-94)

(June 3, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.
PER CURIAM:[1]

Boyd Ray Mullens, a pretrial detainee during the events underlying this 42 U.S.C. § 1983 action, appeals, *pro se*, the district court's refusing to appoint counsel for him; denying his discovery motions; and granting summary judgment for defendants. We **AFFIRM**.

I.

Convicted and sentenced on November 3, 1988, Mullens was in custody at the Upshur County Jail from the time he was arrested (October 19, 1988) until December 28, 1988, when he was

---

[1] 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

transferred. He filed several amended complaints after filing suit on July 25, 1991. Named as defendants were Sheriff Dale Jewkes (later deceased, and thereafter dismissed); prison physician Dr. Jack Kirby; Upshur County; the Upshur County Jail; and several county, jail, and sheriff's department employees, including deputies Stanley Jenkins, Jerry Webb, and Fran Gardner.

Mullens' amended complaints, like his original complaint, allege with varying degrees of specificity that he was, among other things, denied reasonable medical care while a pretrial detainee.[2] Mullens' allegations center on events that occurred October 24-26, 1988. He alleged that Kirby prescribed medication to which Mullens had an allergic reaction; deputies Webb and Jenkins failed to

---

[2] In district court, Mullens also alleged that he was subjected to a blood test to which he did not consent; that several defendants maliciously and publicly stated that he had AIDS; that he was denied adequate dental care; and that his hair was cut by a non-licensed barber. He does not re-urge these claims on appeal; therefore, they are abandoned.

Further, we do not consider Mullens' last two complaints, both styled "Third Amended Original Complaint". These documents appear to be cumulative of Mullens' testimony and prior complaints; and, they are, like the two previous amended complaints, unverified. Moreover, one of the "Third Amended Original Complaints" was filed October 27, 1992, after the magistrate judge had entered his report and recommendations on September 23, 1992. The other was filed November 6, 1992, after the final judgment was entered on November 4, 1992. Accordingly, they are not timely.

Mullens also contends that the district court erred by not allowing him a transcript of the ***Spears*** hearing at no cost, and that this prejudiced his ability adequately to respond to defendants' summary judgment motions. The district court refused to provide the transcript initially because the record showed that Mullens, who had paid a partial filing fee, was not proceeding *in forma pauperis* (IFP), so that he was not entitled to a free transcript. On appeal, however, Mullens is proceeding IFP; and when, on appeal, he renewed his motion for preparation of a transcript, it was granted.

respond properly by calling paramedics; and deputy Gardner later re-administered the same medication to Mullens, causing a similar reaction. As noted, these events occurred while Mullens was a pretrial detainee. Mullens alleged that this treatment violated his civil and constitutional rights.

Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6), and, later, for summary judgment. After a ***Spears*** hearing on June 26, 1992, *see* ***Spears v. McCotter***, 766 F.2d 179 (5th Cir. 1985), the magistrate judge recommended granting summary judgment. The district court adopted the report and recommendations, granted summary judgment over Mullens' objections, and dismissed the action with prejudice.

II.

Mullens contends that the district court should have appointed counsel to represent him at the ***Spears*** hearing; challenges the denial of his discovery requests; and contests summary judgment.[3]

A.

We review a decision not to appoint counsel only for abuse of discretion. *E.g.*, ***Thomas v. Kipperman***, 846 F.2d 1009, 1011 (5th Cir. 1988). There is no automatic right to counsel in § 1983 actions; counsel need not be appointed except in exceptional circumstances. ***Cupit v. Jones***, 835 F.2d 82, 86 (5th Cir. 1987)

---

[3] Mullens also contends that the district court erred in not analyzing his case under the Eighth Amendment's prohibition against cruel and unusual punishment. As a pretrial detainee, Mullens was protected, instead, by the Fourteenth Amendment's due process clause. *See* ***infra***. Accordingly, the district court analyzed his claims under the proper standard.

(citing ***Ulmer v. Chancellor***, 691 F.2d 209, 212-13 (5th Cir. 1982)). Such circumstances include very complex cases; cases in which the movant cannot adequately present or investigate his case; and cases where the evidence consists largely of conflicting testimony so as to require skill in cross-examination and presentation of evidence. *E.g.*, ***Parker v. Carpenter***, 978 F.2d 190, 192 (5th Cir. 1992); ***Ulmer***, 691 F.2d at 213.

The district court considered these factors, and concluded that the case was "rather routine ... and the applicable law is well-settled. The Court has no reason to believe that the plaintiff will be unduly hindered in presenting his case without the assistance of counsel...." Also, it concluded that, based on "the quality of the pleadings, [] plaintiff has been able to articulate his claim and there is no need for an attorney at this stage to present the claim to the Court." There was no abuse of discretion.

B.

Likewise, we review discovery rulings only for abuse of discretion. *See, e.g.*, ***Cupit***, 835 F.2d at 86-87; ***Feist v. Jefferson County Comm'rs Court***, 778 F.2d 250, 252 (5th Cir. 1985) (summary calendar). Mullens' discovery requests were submitted on October 27, 1992, well over a year after his original complaint was filed, and over one month after the magistrate judge's report and recommendations were entered.[4] Kirby moved for a protective order,

---

[4] Mullens' case was assigned to "Track Two" pursuant to the Civil Justice Expense and Delay Reduction Plan (the Plan) adopted by the United States District Court for the Eastern District of

stating that the request was improper in light of the fact that it came after the magistrate judge had entered his report and recommendations. That motion was granted on the same day that the district court entered summary judgment for all defendants. Mullens' motions for discovery regarding the other defendants were similarly untimely. There was no abuse of discretion.

C.

We review a summary judgment *de novo*, viewing the record and inferences drawn from it in the light most favorable to the non-movant. ***Topalian v. Ehrman***, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 82 (1992). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). If the movant meets its initial burden of showing that there is no material fact issue, the burden shifts to the non-movant to produce evidence or designate specific facts showing the existence of such an issue for trial. ***Celotex***, 477 U.S. at 322-24; ***Martin v. Harrison County Jail***, 975 F.2d 192, 193 (5th Cir. 1992) (*pro se* litigants held to same standards as are other litigants with regard to requirements of Rule 56); Fed. R. Civ. P. 56.

Texas in December 1991. Pursuant to the Plan, Mullens was not entitled to conduct discovery without the district court's permission.

As noted, pretrial detainees are protected by the Fourteenth Amendment's protection against punishment without due process of law, rather than by the Eighth Amendment's prohibition against cruel and unusual punishment. ***Colle v. Brazos County***, 981 F.2d 237, 244 (5th Cir. 1993); ***Cupit***, 835 F.2d 82, 84-85. That is, they are entitled to "be free from punishment altogether". ***Colle***, 981 F.2d at 243; *see also* ***Parker***, 978 F.2d at 192 (if action or inaction by prison officials constitutes punishment of pretrial detainee, it is forbidden), *citing* ***Bell v. Wolfish***, 441 U.S. 520 (1979).

With regard to medical care, Mullens was entitled under this standard to reasonable medical care, unless the failure to supply it was reasonably related to a legitimate government interest. ***Colle***, 981 F.2d at 243 (citing cases). Disagreement with medical care, or an allegation that defendants have been merely negligent, does not provide a basis for § 1983 recovery. ***Bowie v. Procunier***, 808 F.2d 1142 (5th Cir. 1987); ***Johnson v. Treen***, 759 F.2d 1236, 1238 (5th Cir. 1985).

Defendants submitted evidence showing that Mullens received reasonable care. With regard to the October 24-26 events, they presented evidence showing the following. When Mullens arrived at the jail on October 19, 1988, he stated that he was taking Tolectin (a prescription blood pressure medication) and Entex LA, but that he did not have any. When Kirby examined Mullens on October 24, he prescribed Tolectin, which was given to Mullens on October 24. According to the jail log, Mullens complained of faintness at about

9:45 p.m. that day, and stated that he had had a reaction to the Tolectin. He was moved to a holding cell for observation, and the next shift was advised of his complaints. About 11:30 p.m., Mullens advised jail personnel that he had no more chest pains, but had a headache; the log states that Mullens "appeared to be resting comfortably".

The following day, the log reflects that Mullens reported a rash on his hand and arm; he was again moved to the holding cell for observation, and was given Benadryl. About half an hour later, "he began to shake and say he was sick". Kirby stated by affidavit that he was called from the jail on October 25 and informed that Mullens had taken the Tolectin, developed a rash, and begun to shake. Kirby ordered the Tolectin discontinued. He examined Mullens at the jail on November 23; on that date, there was no evidence of the rash, which had "resolved itself". Kirby stated that he acted reasonably in prescribing Tolectin and then discontinuing it when an allergic reaction was reported.

By contrast, Mullens submitted very little competent evidence in opposition to summary judgment. The "affidavit" that he submitted is not notarized, nor does it state that it is true and correct under penalty of perjury. *See* 28 U.S.C. § 1746. And, as noted, unlike Mullens' original complaint, the amended complaints are not sworn or otherwise verified. *Compare* ***Barker v. Norman***, 651 F.2d 1107, 1114-15 (5th Cir. 1981) (complaint may serve as competent summary judgment evidence if it comports with requirements of Rule 56); *see also* 28 U.S.C. § 1746.

Amended complaints supersede the original complaint, and render it without legal effect, unless they specifically refer to the original pleading or incorporate it. ***Boelens v. Redman Homes, Inc.***, 759 F.2d 504, 508 (5th Cir. 1985). Mullens' amended complaints do neither. And, because the amended complaints and Mullens' "affidavit" are not sworn, notarized, or otherwise verified, they are not competent summary judgment evidence. ***Abbott v. Equity Group, Inc.***, 2 F.3d 613, 619 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1219 (1994); ***Nissho-Iwai Amer. Corp. v. Kline***, 845 F.2d 1300, 1306 (5th Cir. 1988) (unsworn affidavit not competent to raise fact issue precluding summary judgment).

Thus, Mullens' only competent evidence is his testimony at the ***Spears*** hearing. At the hearing, his testimony about the events of October 24-26 was not particularly detailed. With regard to the events in question, he stated that he sued Kirby "for the giving me the medication and -- on two different occasions, and I [had] seizures to it on two different occasions or it thr[ew] me into a seizure. I have seizures because of this now." The district court asked Mullens whether he thought that Kirby had given him the medication "to intentionally make you have a seizure, or do you think he just might have prescribed the wrong medication or wrong dose?" Mullens replied, "I think he might've prescribed the wrong medication." And, when asked why he was suing Deputy Garner, Mullens testified that, at his request, she had given him two pills. He alleged that the pills caused vomiting and cramping; but

testified that he had asked for medication for back pain and took the pills without knowing what they were. Finally, with regard to Deputies Jenkins and Webb (whom Mullens alleges failed to call for paramedics after he had an allergic reaction to medication), Mullens produced no evidence that their actions were unreasonable or that they failed to provide him medical care for reasons unrelated to a legitimate state objective.[5]

---

[5] In his complaint, Mullens alleged that Jenkins told Mullens he would not call paramedics because Mullens was "faking [the allergic reaction]". With regard to Jenkins and Webb's actions, Mullens testified as follows in response to questions by the district court.

> Q. ... I notice Mr. Webb ... is the one that told you he was going to call for paramedics?
>
> A. Yes, sir.
>
> Q. And then he was overruled by Mr. Jenkins?
>
> A. Yes, sir.
>
> ***
>
> Q. Why do you think Jenkins did this again? Do you think he did it to hurt you, was it malicious, or do you think he honestly thought you were faking it and he just didn't pay as close of attention as he should've?
>
> A. I can't answer that, Your Honor, I don't know.
>
> Q. You don't know?
>
> A. I think that -- I don't know. It could be a series of things, Your Honor. I don't think -- I wasn't faking it.
>
> Q. No, I'm not saying that. Do you think Jenkins might have thought you were faking it, and he didn't pay close enough attention to see whether you were faking it, or whether you were really having this type of seizure?
>
> A. I can't answer that, Your Honor, I don't know.

In sum, Mullens' ***Spears*** hearing testimony does not show that the care he received was unreasonable. *See* ***Colle***, 981 F.2d at 243 (citing cases); ***Bowie***, 808 F.2d 1142 (plaintiff's disagreement with medical care, or allegation that defendants were negligent, not a basis for recovery under § 1983).[6] Moreover, he did not present specific facts sufficient to create a material fact issue. *See* ***Bell***, 441 U.S. 520, *cited in* ***Parker***, 978 F.2d at 192 (mere conclusory allegations insufficient to state a § 1983 claim); ***Celotex***, 477 U.S. at 322-24; Fed. R. Civ. P. 56(e). Therefore, summary judgment was proper.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

---

[6] The district court also dismissed Mullens' claims against the Upshur County Jail and Upshur County, stating that the jail, which has no legal existence separate from Upshur County, was not a proper defendant. *See* ***Ruiz v. Estelle***, 679 F.2d 1115, 1137 (5th Cir.) (Texas Board of Corrections, which is merely agency of state, is not "person" or proper party defendant in civil rights action), *amended in part & vacated in part on other grounds*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983); ***Shelby v. City of Atlanta***, 578 F. Supp. 1368, 1370 (N.D. Ga. 1984) (while municipality and policy-makers may be proper parties to civil rights action, sub-units of municipality which have no distinct existence apart from municipality's, are not proper parties).

And, Upshur County was dismissed because Mullens presented no evidence that its policies or customs led to the violation of his constitutional rights. ***Colle***, 981 F.2d 243-45 (discussing requirements for finding of county liability); *accord*, ***Turner v. Upton County***, 915 F.2d 133 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991). Indeed, Mullens testified at the ***Spears*** hearing that he did not know how he could show that Upshur County was in any way responsible for his medical problems. The county and jail were properly dismissed.