

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-4308

(Summary Calendar)

VINCENT LEE BAKER,

Plaintiff-Appellant,

versus

UNIDENTIFIED SMITH, MD,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas
92 CV 224

June 21, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Vincent Baker, an inmate of the Texas Department of Criminal Justice, Institutional Division ("TDCJ-ID"), proceeding pro se and in forma pauperis, appeals the district court's dismissal of his civil rights action against Warden George Waldron. Finding error, we vacate and remand.

From December 1990 to March 1991, Baker allegedly filed three grievances with prison authorities, all describing how he had been

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

threatened by some of his fellow inmates. Baker specifically claimed that: (1) an inmate threw hot water on him as he made his way from the shower to his cell on the D pod of the Michael Unit of the TDCJ-ID; (2) a TDCJ-ID employee opened an inmate's door, allowing the inmate to attack Baker and slash him with a knife; and (3) an inmate with whom he had experienced conflict had arranged to stop up the shower on row one of the D pod so that Baker would be forced to shower on row two. See Record on Appeal at 29-30. Baker claims that after filing the above grievances, and receiving no response, he was shot in the eye by an inmate using a "zip gun," as he was walking toward the row two shower.¹

Baker brought an action under 42 U.S.C. § 1983 (1988), alleging that Warden Waldron acted with deliberate indifference in failing to protect him from attacks by other inmates.² See *Johnston v. Lucas*, 786 F.2d 1254, 1259 (5th Cir. 1986) (stating that "[t]he Eighth Amendment affords prisoners protection against injury at the hands of other inmates"). Finding that Baker's suit was "so insubstantial and attenuated as to be absolutely devoid of merit," Record on Appeal at 23, the magistrate judge³ recommended

¹ Baker, an African-American, claims that the inmate who shot him was a member of a white-supremacist organization, and that his shooting was therefore racially-motivated. See Record on Appeal at 31.

² Baker also filed § 1983 claims against two prison doctors for negligence. See Record on Appeal at 17. The district court dismissed these claims without prejudice))for improper jurisdiction and venue))so that Baker could refile these claims. See *id.* at 23. Baker does not appeal that dismissal.

³ Baker's suit was referred to a magistrate judge, pursuant to 28 U.S.C. § 636(b)(1) (1988), who made a report and

that Baker's suit be dismissed for want of subject matter jurisdiction. See *Hagans v. Lavine*, 415 U.S. 528, 536-37, 94 S. Ct. 1372, 1378-79, 39 L. Ed. 2d 577 (1974) (stating that federal courts lack power to entertain claims that are "so attenuated and unsubstantial as to be absolutely devoid of merit"); see also *Neitzke v. Williams*, 490 U.S. 319, 327 n.6, 109 S. Ct. 1827, 1832 n.6, 104 L. Ed. 2d 338 (1989) (citing with approval *Hagans*). The district court adopted the magistrate judge's recommendation, and dismissed Baker's claims against Warden Waldron. Baker filed a timely notice of appeal.

The district court, adopting the magistrate judge's report, concluded that Baker's complaint was so insubstantial and attenuated as to deprive it of subject matter jurisdiction. See Record on Appeal at 3, 23. The court based this conclusion upon its view that Baker's claims, at most, alleged negligence on behalf of Warden Waldron. See *Davidson v. Cannon*, 474 U.S. 344, 347-48, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677 (1986) (holding that "where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required" (citation omitted)). We disagree. If Baker's grievances gave Warden Waldron notice that Baker was in danger of attack by other inmates, and Warden Waldron intentionally or recklessly disregarded these warnings, then Baker may prevail on his claims of deliberate

recommendation without an evidentiary hearing.

indifference.⁴ See *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985) (defining "deliberate indifference" as the "`conscious failure by one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril'" (quoting *Smith v. Wade*, 461 U.S. 30, 39 n.8, 103 S. Ct. 1625, 1632 n.8, 75 L. Ed. 2d 632 (1983))). Without further development of the record, we cannot discern whether Warden Waldron received Baker's grievances, or what actions may have been taken in response to those grievances.⁵

⁴ We also disagree with the district court's conclusion that Baker's allegations of deliberate indifference were unsupported by specific facts, and thus did not constitute valid § 1983 claims. See Record on Appeal at 23 (citing *Brinkmann v. Johnston*, 793 F.2d 111, 113 (5th Cir. 1986) (stating that § 1983 claimants must state specific facts, and not mere conclusory allegations)). Baker alleged that he filed grievances, one of which appears in the record, see *id.* at 51, which specifically described the threatening behavior of his fellow inmates. Baker also alleged that he did not receive a response to any of these grievances, prior to being allegedly shot in the eye. Without the opportunity to further develop the record, we do not know of any other specific facts which Baker could have alleged in support of his deliberate indifference claims. Thus, we find the district court's reliance upon *Brinkman* misplaced. See *id.*, 793 F.2d at 112-13 (holding that mere conclusory allegations of conspiracy cannot state a valid § 1983 claim).

⁵ We recognize that Baker must ultimately show that Warden Waldron wantonly disregarded his grievances; a mere mistaken belief that Baker's situation was not serious or failure to take due care in responding to the grievances, will not suffice. See *Davidson v. Cannon*, 474 U.S. 344, 347-48, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677 (1986). While a failure to produce evidence on this issue may ultimately result in summary judgment of Baker's claims, we believe that the district court's dismissal for lack of subject matter jurisdiction, based upon a conclusion that the claims were "absolutely devoid of merit," was premature.

We therefore hold that Baker's claims against Warden Waldron were not so "attenuated and insubstantial" as to deprive the district court of subject matter jurisdiction. Accordingly, we **VACATE** the court's dismissal, and **REMAND** for factual development of the record.