

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7652
Summary Calendar

MARIO A. SALINAS,

Plaintiff-Appellant,

VERSUS

JAMES A. COLLINS, J. C. BARBER, RINKU DUTT,
ESTHER DUNN, HELEN LI, C. HENDEL, AND KEITH PRICE,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(91-CV-77)

(November 28, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

FACTS AND PROCEDURAL HISTORY

Appellant appeals from the disposition by dismissal and summary judgment of his civil rights action against certain Texas prison officials and physicians providing inmate health care. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Proceeding pro se and in forma pauperis, Mario Salinas (Salinas), an inmate at the Darrington Unit of the Texas Department of Criminal Justice (TDCJ-ID), filed a civil rights action under 42 U.S.C. § 1983 alleging inadequate medical treatment. Named as defendants were TDCJ-ID Director James Collins, Darrington Unit Warden Keith Price, Darrington Unit physician Dr. C. Hendel, and John Sealy Hospital (John Sealy) physicians, Drs. J.C. Barber, Esther Dunn, Rinku Dutt, and Helen Li.

Salinas alleged the following in his complaint. Upon admission to prison, Salinas was diagnosed as having a cataract in his right eye. In March 1988 John Sealy doctors recommended that Salinas undergo surgery to remove the cataract. In April 1989 John Sealy student ophthalmologist Dr. Dutt advised Salinas that he needed a cornea transplant. Salinas consented to the operation, which was performed by Dr. Dutt, on April 25, 1989. The cornea transplant was unsuccessful; Salinas's right eye "turned white all over," and he experienced severe pain in both eyes which later spread to his nose, gums, ears, and neck.

In July 1989 Dr. Dunn informed Salinas that a second cornea transplant would be necessary. She told him that the first operation was unsuccessful because it had been performed by a student doctor and assured him that the second operation would be successful and leave him pain-free. Salinas consented to the second operation, and Dr. Dunn performed the surgery on July 19, 1989. The second operation was also a failure, and Salinas

experienced severe, constant pain in his head and face which left him barely able to speak.

On August 11, 1989, Dr. Dunn discharged Salinas from the John Sealy to the Darrington Unit with prescriptions for Tylenol-3, eye pads, tape, ointments, and eye drops for his right eye. At the Darrington Unit, it took prison authorities more than two weeks to get Salinas's prescriptions to him. They told him that the delay was due to an error concerning his cell number. Salinas submitted numerous sick-call requests to Dr. Hendel during this time. None of these were answered. Sometime prior to receiving his medication on September 1, 1989, Salinas noticed that his right eye was becoming infected. Salinas then submitted grievance forms and wrote to Warden Price. On September 14, 1989, Salinas saw Dr. Hendel at the unit infirmary but, by this time, the infection was already quite advanced, and Dr. Hendel ordered Salinas's immediate transfer to John Sealy.

On September 18, 1989, Dr. Li performed a "flap operation" on Salinas's right eye. This operation left the eye glassy-looking and an ugly white, grayish, and red color. Besides being totally blind in his right eye, Salinas still endures "irritating, sometimes unbearable pain" and migraine headaches. On October 16, 1989, Salinas was discharged from John Sealy without any prescribed medication because Dr. Li, a student doctor, was not authorized to issue prescriptions outside the hospital. According to Salinas, had he known that Dr. Li was a student doctor, he would not have consented to the "flap operation."

Salinas also alleged that he contracted the HIV virus from the first cornea transplant donor.

Defendants Hendel, Dutt, and Li were not served with the complaint. Defendants Collins, Price, and Dunn filed a motion to dismiss, and defendant Barber moved for summary judgment. They asserted, among other things, that they were qualifiedly immune from § 1983 damage claims.

Finding that the facts as alleged by Salinas did not rise to the level of either a cognizable First or Fourth Amendment violation, the magistrate judge recommended that Salinas's claims brought under these Amendments be dismissed for frivolousness under 28 U.S.C. § 1915(d) or alternatively for failure to state a claim for relief under Fed. R. Civ. P. (12)(b)(6). The magistrate judge then analyzed Salinas's complaint as a denial-of-adequate-medical-care claim under the Eighth Amendment and recommended dismissal for failure to state a claim under which relief could be granted as to defendants Collins, Price, and Dunn.¹ The magistrate judge also recommended that defendant Barber's motion for summary judgment be granted. Finally, the magistrate judge recommended dismissal under then Fed. R. Civ. P. 4(j) as to defendants Dutt, Li, and Hendel for failure to serve those defendants.

The district court considered Salinas's objections, conducted de novo review, and adopted the magistrate judge's recommendations

¹ Salinas also brought a claim, invoking the Fourteenth Amendment, alleging that Dr. Dunn prematurely and arbitrarily dismissed him from John Sealy. The magistrate judge also recommended dismissal of this claim.

with the exception of the recommended Rule 4(j) dismissal of Drs. Dutt, Li, and Hendel. Instead, the court dismissed the claims against these defendants for failure to state a claim upon relief could be granted. The court granted the motion to dismiss filed by defendants Collins, Price, and Dunn and granted Dr. Barber's summary judgment motion.

The Rule 12(b)(6) Dismissals

On motion to dismiss for failure to state a claim, the plaintiff's factual allegations, though not his conclusional allegations or legal conclusions, are accepted as true. Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993). "Unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, the complaint should not be dismissed for failure to state a claim" Id. at 284-85 (internal quotation and citation omitted). The facts are taken from the plaintiff's complaint and the attachments to the complaint. Fed. R. Civ. P. 10(c); Neville v. American Republic Ins. Co., 912 F.2d 813, 814 n.1 (5th Cir. 1990).

In seeking dismissal under Rule 12(b)(6), defendants Collins, Price, and Dunn contended that they were entitled to qualified immunity. This Court, in assessing a qualified-immunity claim, first determines whether the plaintiff has alleged a "violation of a clearly established constitutional right." See Rankin v. Klevenhagen, 5 F.3d 103, 105 (5th Cir. 1993) (internal quotations and citation omitted). If so, the Court then decides whether the

defendant is entitled to immunity from suit because his conduct was objectively reasonable in the light of the law as it existed at the time of the conduct in question. Id. at 108.

The Eighth Amendment's prohibition against "cruel and unusual punishment" protects Salinas from improper medical care only if the care is "sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Deliberate indifference encompasses only unnecessary and wanton infliction of pain repugnant to the conscience of mankind. Id. at 105-06. Thus, a prison official or doctor acts with deliberate indifference "only if he knows that inmates face a substantial risk of serious harm and [he] disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, ___ U.S. ___, 114 S. Ct. 1970, 1984, ___ L. Ed. 2d ___ (1994). Acts of negligence, neglect, or medical malpractice are not sufficient to give rise to a § 1983 cause of action. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

The district court properly granted the motion to dismiss filed by defendants Collins, Price, and Dunn. With respect to Salinas's claim against TDCJ-ID Director Collins, Salinas fails to address, in his brief, the merits of the district court's judgment as to this defendant. This Court will not raise and discuss legal issues that Salinas has failed to assert. See Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987).

Salinas's complaint alleged that Warden Price, in his official capacity, "displayed callous disregard" of Salinas's serious medical needs. The Eleventh Amendment bars claims for damages against a state official in his official capacity. Will v. Michigan Department of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

Assuming arguendo that Salinas intended to sue the Warden in his individual capacity, Salinas's claim also fails. Salinas alleged that Warden Price ignored his letter complaining about the inadequate medical treatment Salinas received at the Darrington Unit immediately following his second corneal transplant. An attachment to Salinas's complaint shows that Warden Price received a grievance from Salinas filed on September 1, 1989, and responded on September 8, 1989, that Salinas had been seen by Dr. Hendel. Salinas then sent to the Warden a letter dated September 8, 1989, in which he complained that he had not received his medication due to an error regarding his cell location and had not been able to see a doctor. However, Salinas's complaint indicates that he began receiving his medication on September 1, 1989, and that he saw Dr. Hendel on September 14, 1989, less than one week after having written the letter to Warden Price. Thus, Salinas's allegations do not rise to the level of deliberate indifference to his serious medical needs on the part of Warden Price.

Salinas has also failed to state a claim against Dr. Dunn. According to the complaint, Dr. Dunn performed the second cornea transplant, oversaw Salinas's post-operative care, and discharged

Salinas more than three weeks after the surgery. The fact that this transplant was unsuccessful does not give rise to a claim under § 1983. Varnado, 920 F.2d at 321. Furthermore, a disagreement between an inmate and his physician over the inmate's proper medical treatment does not state a § 1983 claim. Id. Notwithstanding Salinas's contrary assertion, there is no indication that the decision to discharge Salinas amounted to deliberate indifference. Although Salinas asserted that an HIV tainted cornea caused the difficulties with his operations, his complaint did not allege any facts showing that Dr. Dunn knew either that the first cornea was tainted or that Salinas had contracted the HIV virus from the first cornea transplant.

Nor did the district court err in dismissing Salinas's claims against Drs. Dutt, Li, and Hendel for failure to state a claim. His allegations concerning Drs. Dutt and Li amount to a disagreement with his medical treatment based on the fact that the operations performed by these doctors were not successful. See Varnado, 920 F.2d at 321. He failed to plead any facts showing that these doctors were aware of his alleged HIV status or its alleged cause. Salinas accused Dr. Hendel of "gross negligence", but failed to allege facts indicating deliberate indifference on the part of this defendant.

Summary Judgment and Discovery

Salinas also challenges the district court's grant of summary judgment to Dr. Barber, and further argues that he should have been

allowed to conduct discovery "to establish sufficient proof to create a genuine issue."

Summary judgment is reviewed de novo under the same standards the district court applies when determining whether summary judgment is appropriate. FDIC v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993), cert. denied, 114 S. Ct. 2673 (1994). Summary judgment is proper when, viewing the evidence in the light most favorable to the non-movant, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Id.; Fed. R. Civ. P. 56(c). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the non-moving party to produce evidence of the existence of a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The non-moving party "may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial." Rosado v. Deters, 5 F.3d 119, 123 (5th Cir. 1993).

Dr. Barber moved for summary judgment on the ground of qualified immunity. Review of the record as a whole reveals that summary judgment in favor of Dr. Barber was proper. Most of the allegations against Dr. Barber were based on his role as a supervising physician. A supervisory official cannot be held liable under § 1983 on the basis of respondeat superior. Williams v. Luna, 909 F.2d 121, 123 (5th Cir. 1990). As to Salinas's conclusional allegation that Drs. Barber and Dunn arbitrarily

discharged him from the hospital, this claim has already been rejected as meritless with respect to Dr. Dunn.

To the extent Salinas alleges that Dr. Barber's conduct involves more than merely negligent treatment, his claim is also unavailing. In his affidavit filed in opposition to Dr. Barber's motion for summary judgment, Salinas asserts that Dr. Barber "kept the truth from plaintiff of the high possibility that the organ used in plaintiff's initial cornea transplant was infected with the H.I.V. virus." However, he failed to allege specific facts showing either that Dr. Barber knew that the cornea was tainted or when Dr. Barber found out that Salinas was HIV positive. Because he has failed to allege any facts evincing deliberate indifference on the part of Dr. Barber, Salinas has not shown that Dr. Barber deprived him of a constitutional right.

Because appellant failed to state a viable § 1983 claim and because the immunity defense could be properly determined from the pleadings alone, the trial court did not abuse its discretion in failing to allow discovery before ruling on Barber's motion for summary judgment. Williamson v. U.S. Dep't of Agric., 815 F.2d 368 (5th Cir. 1987); Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991).

Finally, because appellant's appeal is found to be without merit, we deny Salinas' motion for appointment of counsel. See Ulmer v. Chancellor, 691 F.2d 209 (5th Cir. 1982).

The judgment of the district court is **AFFIRMED**.