

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-7710

Summary Calendar

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ROBERT J. CUPSTID, JR.,

Plaintiff-Appellee,

versus

DONALD A. CABANA, ET AL.,

Defendants-Appellants.

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Appeal from the United States District Court  
for the Northern District of Mississippi  
(CA GC89-291-S-D)

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(August 26, 1994)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:\*

To prove that medical treatment by a prison physician has violated the Eighth Amendment's prohibition against the "unnecessary and wanton infliction of pain," a prisoner must allege acts or omissions by the physician that constitute deliberate indifference to the prisoner's serious medical needs. Mendoza v. Lynaugh, 989 F.2d 191, 193 (5th Cir. 1993). Appellants argue that

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the district court's findings of a serious medical need and of deliberate indifference are clearly erroneous. Specifically, they argue that Cupstid's records belie his claim that he repeatedly requested treatment for his tooth; Cupstid had no serious medical need because he testified that the tooth improved; he had no serious medical need because after he transferred to a federal prison the dentist there waited twelve days to remove the tooth; and Cupstid did not show deliberate indifference because he did not directly ask Dr. Tindle for treatment.

The court's findings were not clearly erroneous. They turn largely on the assessment of the credibility of other evidence, which showed that the medical records might not have been thorough, that federal personnel gave Cupstid pain medicine during the period between his examination and removal of his tooth, and that Cupstid could not directly ask Dr. Tindle for treatment. The seriousness of Cupstid's medical need is shown by the fact that he had to have his tooth extracted and that he required pain medicine.

Appellants also argue that the district court's finding of deliberate indifference is clearly erroneous because a piece of evidence supporting it is hearsay. The contested evidence is testimony by the plaintiff that an unknown dental assistant told him that "Dr. Tindle did not wish to treat me [the plaintiff] and I asked him why and he said she's afraid you're a carrier, and he laughed and walked off and at that time they put the chains and shackles on me and returned to Unit 15-B." In overruling the defendants' hearsay objection, the magistrate said he would give

the evidence "the weight I think it deserves." Given this statement and the district court's independent review of the record, we do not see a reason to reverse. The circumstantial evidence in the record is adequate to support the district court's finding of liability.

AFFIRMED.