UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10225
Summary Calendar

JONATHAN ARNOLD DAVIS,

Plaintiff-Appellant,

VERSUS

RANDY McLEOD, Warden, TDCJ,
Clements Unit, ET AL.,

Defendants,

RANDY McLEOD, Warden, TDCJ,
Clements Unit,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(2:92 CV 275)

(August 22, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:[1]

Jonathan Arnold Davis, a prisoner in the Texas Department of Criminal Justice, filed a § 1983 suit against a number of prison officials and physicians. Davis appeals the portion of the district court's order dismissing his claim against two of the

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

defendants as frivolous under 28 U.S.C § 1915(d). We find no error and affirm.

I.

The complaint concerns Davis's four hernia surgeries and his work assignments between the surgeries. After the magistrate judge held a **Spears** hearing, the court directed one of the defendants, Stanfield, to file an answer. Thereafter, the magistrate judge severed the complaint as to Stanfield and dismissed the remaining defendants, McLeod, Westfall, Revell and Elston. In the same order, the magistrate judge dismissed as frivolous the complaint against McLeod, Westfall, Revell and Elston under 28 U.S.C. § 1915(d).[2]

On appeal, Davis does not challenge the propriety of the portion of the district court's order severing his complaint against Stanfield.[3] The only issue he raises is the correctness of the portion of the district court's order dismissing his claims of deliberate indifference to his serious medical needs against two of the doctors, Revell and Elston. He raises no complaint about the dismissal of either McLeod or Westfall.

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[2] The parties consented to proceed before the magistrate judge and agreed that any appeal must be taken to this court.

[3] We have appellate jurisdiction to consider the dismissal of the claims against the severed defendants. **See United States v. O'Neil**, 709 F.2d 361, 369 (5th Cir. 1983); **Robbins v. Amoco Production Co.**, 952 F.2d 901, 903, n.3 (5th Cir. 1992).

II.

To establish a violation of the Eighth Amendment, Davis must demonstrate that the doctors engaged in wanton acts or omissions sufficiently harmful to evidence deliberate indifference to his serious medical needs. **Wilson v. Seiter**, 501 U.S. 294, 296-305, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991); **Estelle v. Gamble**, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). To prove deliberate indifference in an Eighth Amendment case, a

> claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. . . . Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

Farmer v. Brennan, ___ U.S. ___, 114 S. Ct. 1970, 1981, ___ L. Ed. 2d ___ (1994) (failure-to-protect case).

Davis stated at the **Spears** hearing that he had no independent recollection of the details surrounding his hernia surgeries; he admitted that his claim was based on his medical records. The medical records, as reported at the **Spears** hearing by Dr. Revell showed that Davis had his first hernia repair surgery in November 1991. Following the surgery, Davis was advised to discontinue work for six weeks. Davis remained on medical leave from work until March 1992 when he was assigned to work in the laundry room with

the restriction of "no lifting greater than 25 pounds and restrict to lighter, slower activities."

In April 1992, Davis's medical restriction was increased to no lifting because of a reoccurrence of his hernia. Davis continued to work until May 1992, when he was again placed on work leave for medical reasons after a second surgery to repair his hernia. Following that surgery he remained unassigned from work for two months and had a restriction from lifting greater than 15 pounds for any reason.

A third surgery was performed in June 1992, because the second surgery was not successful. Dr. Revell testified that Davis could not have reinjured himself working in the laundry room if he had stayed within the lifting restrictions. Davis remained without a work assignment from June until September 1992, when he was assigned to the laundry room with a 15-pound and light-duty restriction. Davis worked in the laundry room until October 10, 1992, when he was assigned another job. He was again excused from work for medical reasons on October 31, 1992, and remained unassigned until his fourth surgery in February 1993.

At the **Spears** hearing, the magistrate judge asked Davis why he was suing Drs. Revell and Elston. Davis responded that "they were the ones who was evaluating me, okay? They seen to it that I had another rupture, okay? But before they went ahead and evaluated me, they told me that I could perform work, okay, the both of them. [sic]" Davis conceded that the doctors had placed restrictions on his working, but noted that he disagreed with their opinion. Davis

specifically claimed that the doctors had been negligent. On appeal, Davis again argues that the doctors were negligent. Specifically, Davis argues that he should recover for pain and suffering "most of all [due to] the unsuccessful surgery I went [through] because of [the] medical staff[']s negligence." **Id**. Also, on appeal, Davis alleges that the doctors had knowledge that he could have ruptured his hernia by working as classified.

All of Davis's allegations amount to no more than a claim of negligence, neglect, or medical malpractice. These allegations show no more than a disagreement with the doctors' evaluation of his condition following surgery and the limits placed on his physical activity. Davis's allegations do not suggest that sending him back to work with restrictions following surgery was a wanton action in which the doctors acted unreasonably in the face of a known substantial risk to his health.

In **Farmer**, 114 S.Ct. at 1982-83, the Supreme Court stated that "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." Following each surgery, Davis was unassigned from work for at least six weeks and was then returned with restrictions on his activities. Davis does not allege that this treatment was unreasonable. The magistrate judge therefore did not abuse his discretion in finding that Davis lacks an arguable basis for his constitutional claim against Drs. Revell and Elston of deliberate

indifference to Davis' serious medical needs.[4] **See Ulmer v. Chancellor**, 691 F.2d 209, 213 (5th Cir. 1982).

AFFIRMED.

[4] Davis also briefly complains of the magistrate judge's order denying appointment of counsel. "Counsel will be appointed in civil cases only in exceptional circumstances." **Richardson v. Henry**, 902 F.2d 414, 417 (5th Cir. 1990), **cert. denied**, 498 U.S. 1069 (1991). This case presents no such exceptional circumstances.