

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 94-10716  
(Summary Calendar)

---

NICK PETE ATHAS,

Plaintiff-Appellant,

versus

JIM BOWLES, SHERIFF OF  
DALLAS COUNTY,

Defendant-Appellee.

---

Appeal from the United States District Court  
for the Northern District of Texas  
(3:93-CV-1300-R)

---

(February 7, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

In this § 1983 action, Nick Pete Athas, a Texas state prisoner, seeks injunctive relief and damages from the Sheriff of Dallas County, Jim Bowles, stemming from Athas' alleged slip and fall in the wash area of the Dallas County Jail. Athas' answers to the interrogatories of the court revealed that he claims that on June 2, 1993, he slipped and fell due to excess water on the bathroom floor caused by a leaky toilet. It appears that the incident occurred while Athas was a pretrial detainee awaiting

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

trial on burglary charges and that after his conviction he was transferred on December 13, 1993, to a Texas Department of Criminal Justice (TDCJ) facility.

Athas alleged that he was in severe pain throughout his back, shoulders, and head and that he was taken to the medical department where someone did a visual examination and informed him that nothing more could be done. Athas also alleged that he had tingling sensations in both legs, blurred vision, earaches, and problems with his balance.

Athas conceded that he initially received medical treatment and that the person who examined him scheduled him for x-rays. Athas alleged that the x-rays were taken in the wrong area of his body and that no further x-rays were taken. Athas further alleged that he filed numerous grievances, but that he had not received any medical attention or seen a doctor. Athas also alleged that he made numerous oral requests to have the leaking commode in the bathroom fixed and to have a mop and bucket to keep water off the floor, but that no actions resulted from his requests. Athas contended that the commode was not fixed until the day after his accident and that up until that time the plumbing and standing water on the floor had been a chronic problem of which prison authorities were aware but had failed to correct. Athas contended that Bowles was liable for Athas' injuries due to his direct responsibility for the facility in which Athas was held.

Athas filed two motions for appointment of counsel, contending that because of his lack of legal knowledge and his incarceration

appointment of counsel would enhance Athas' efforts and ability to research his case. The district court referred Athas' latest motion for appointment of counsel to the magistrate judge for determination. Before the magistrate judge could make his determination, the district court granted summary judgment for Bowles and entered a judgment dismissing Athas' § 1983 action.

Athas filed a Fed. R. Civ. P. 59 motion for reconsideration of the judgment. Athas also filed a timely, unsigned notice of appeal of the judgment without waiting for a ruling on the motion for reconsideration. Id. at 158. The district court denied the motion for reconsideration, struck the notice of appeal for being unsigned, and returned the notice of appeal for Athas' signature. The notice of appeal was returned to the district court unsigned with the notation "wrong TDC# - don't match name." Following instructions from this Clerk's office, the district court clerk's office filed the unsigned notice of appeal with the date on which the district court originally received the notice in the mail.

#### DISCUSSION

##### Does this court have jurisdiction?

As an initial matter, Bowles argues that this Court does not have jurisdiction over Athas' appeal because Athas did not sign his notice of appeal. A pro se appellant's timely but unsigned notice of appeal, in which he is the sole appellant, vests jurisdiction upon this Court. See McNeil v. Blackburn, 802 F.2d 830, 831-32 (5th Cir. 1986). This Court has jurisdiction to consider Athas' appeal.

The time for filing a notice of appeal begins to run from the entry of the order disposing of a timely Rule 59 motion. Fed. R. App. P. 4(a)(4); see Lauderdale County School Dist. v. Enterprise Consol. School Dist., 24 F.3d 671, 681 (5th Cir.), cert. denied, 115 S.Ct. 484, 130 L.Ed.2d 397 (1994). Under a recent amendment, "[a] notice of appeal filed . . . before the entry of the judgment or order is treated as filed on the date of and after the entry." Rule 4(a)(2). Therefore, Athas' notice of appeal, filed before the district court ruled on the Rule 59(a) motion, became effective upon the entry of the court's denial of that motion.

The grant of Bowles' motion for summary judgment

a. Standard of Review

We review the grant of summary judgment de novo. Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991). 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. (quoting Fed. R. Civ. P. 56(c)). If the moving party meets the initial burden of showing that there is no genuine issue, the burden shifts to the non-moving party to produce evidence or set forth specific facts showing the existence of a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Fed. R. Civ. P. 56(e). "If the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's

response." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc).

b. Did Athas raise as error the district court's grant of Bowles' motion for summary judgment?

It is possible that Athas' brief, liberally construed, may raise the issue of whether the district court erred in granting summary judgment for Bowles. In his original brief Athas admits that Bowles attached admissible summary judgment evidence to the motion for summary judgment that was favorable to Bowles and that Athas was unable to produce contrary evidence to support his allegations. However, Athas' only request for relief is a vacation of the dismissal of his case and a district court hearing to determine whether Athas is entitled to counsel. In his original brief, Athas does not specifically assign as error the district court's grant of Bowles' summary judgment motion.

In his reply brief, Athas does clearly argue the district court's error in granting summary judgment against him. If the reply brief is the only place in which Athas raised this issue, this Court does not need to consider it. See Knighten v. Commissioner, 702 F.2d 59, 60 & n.1 (5th Cir.), cert. denied, 464 U.S. 897 (1983). However, we consider the line in this case a fine one to draw on the question of whether the issue was adequately raised in the original brief. Therefore, under the principles of liberal construction we construe Athas to have raised the issue in his original brief when he requested vacation of his dismissal.

c. Did the district court err in granting Bowles' motion for summary judgment?

To pass constitutional muster, Athas' conditions accompanying his pretrial detention must not have amounted to punishment because "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." Bell v. Wolfish, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The Court must determine whether the disability is imposed for the purpose of punishment or whether it is merely an incident of a legitimate governmental purpose. Id. at 538. Additionally, under the Fourteenth Amendment, "pretrial detainees are entitled to reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective." Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987).

Mere negligence may not be enough to demonstrate a due process claim under § 1983. Salas v. Carpenter, 980 F.2d 229, 307 (5th Cir. 1992). However, "constitutional deprivation can result from tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g., deliberate (or conscious) indifference, recklessness, or gross negligence." Id. (internal citations and quotations omitted). Finally, an employer may not be vicariously liable under the theory of respondeat superior in a § 1983 claim. Williams v. Luna, 909 F.2d 121, 123 (5th Cir. 1990).

Bowles' motion for summary judgment alleged that Athas failed to state any actionable claims for relief against Bowles under

§ 1983. Bowles also alleged qualified immunity and the doctrine of mootness.

Bowles' motion for summary judgment contained an affidavit from the custodian of the Dallas County Jail records, Robert Knowles. Knowles stated in his affidavit that the records indicated that on June 2, 1993, Athas informed jail authorities that he had slipped and fallen down in his tank because of standing water next to the shower area. On that same day, Athas was taken to see a nurse for medical treatment. Knowles also stated in his affidavit that neither Athas nor any other inmate had previously complained of standing water in the tank's shower area. On December 13, 1993, Athas was transferred from the Dallas County Jail to TDCJ. Attached to Knowles' affidavit were prison records supporting the contents of his affidavit.

Also attached to the summary judgment motion was the affidavit of Barbara Stacy, a registered nurse who was the Director of Nursing in the Dallas County Jail and custodian of medical records for the inmates during the time of the incident in question. Attached to her affidavit were Athas' medical records. The records reflect that on June 2, 1993, a jail nurse saw Athas after he stated that he had fallen in the shower area of the tank and had hurt his right hip. The nurse examined Athas, set him up for x-rays, and referred him to a jail physician for further evaluation. The doctor evaluated Athas' condition and prescribed him some pain medication. On June 18, 1993, a physician surveyed the x-rays and determined that the results were negative. Athas continued to

complain of hip pain for several months. The nurse's notes dated September 15, 1993, states that Athas was still complaining of right hip pain and that he had indicated to the nurse that the Motrin given to him was not working and that the medication made him sick. He was advised to take the medicine with food. The nurse wrote that Athas "seem[ed] to be drug seeking" and that he was "very argumentative." The nurse's notes also indicate that although Athas informed her that the information in his chart was false, Athas was seen by two doctors and given medication for his pain. Jim Bowles stated in his affidavit attached to his summary judgment motion that he did not personally participate in any of the alleged incidents regarding Athas' claims that he slipped and fell in the jail and was later denied medical care for his injuries by the jail medical staff. Bowles further stated that no policy or custom of his caused any of the alleged incidents on which Athas based his suit and that his actions were taken in the good faith performance of his official duties as sheriff.

Athas filed his opposition to the summary judgment motion, alleging, inter alia, that Bowles committed perjury in his summary judgment motion. He alleged that Bowles refused to supply Athas with documents, not filed in the record, that consisted of tank inspections, medical records, and grievances. Athas further alleged that before the accident the toilet in his tank needed repair and that he was assured that such repairs would be done. Finally, Athas alleged that because Bowles was entrusted with the



daily operation of the jail, he knew or should have known of the possible problem before Athas' accident occurred.

Athas attached as exhibits some copies of his medical records that appear to have been made from Bowles' attachments to the summary judgment motion. However, Athas also attached copies of documents that were not previously placed in the record by Bowles. These documents include copies of five responses to Athas' grievance complaints about a lack of medical care. The responses reflect that Athas saw doctors on several occasions following his accident, had x-rays taken and reviewed, and was placed on medication. Athas stated in an affidavit that the responses were lies and that he had not received any medical treatment. Athas did not attach any documents regarding his claim of unrepaired plumbing and standing water in his tank that led to his accident, despite the fact that he claims to have made numerous complaints about the conditions.

Considering the evidence presented to the district court, especially Bowles' affidavit stating that he did not personally participate in any of the alleged incidents and that the department did not have any policy or custom on the events surrounding Athas' alleged incident, Bowles appears to have met his initial burden in demonstrating that the excess water in the tank was due to no more than mere negligence. Athas does not present any other evidence, other than his allegations in his pleadings that Bowles' actions were intentional or that they rose to the level of tortious conduct required for a finding of a constitutional deprivation. A party

cannot rest on the bare allegation of the pleadings. Athas' affidavit basically is just a regurgitation of the bald allegations of his complaint; such unsupported contentions are not converted into "evidence" merely because they are recited in an affidavit. The documents Athas did produce in response to Bowles' motion for summary judgment, i.e., the grievance responses, support a finding that the practice in the sheriff's office was to carefully address every grievance filed. This evidence rebuts any contention that the sheriff was personally involved in the events complained of or that he promoted a custom or practice of ignoring detainees' complaints. Therefore, Athas fails in his burden to produce evidence or set forth specific facts showing the existence of a genuine issue of fact for trial that Bowles had actual knowledge of the events complained of or had a policy or custom in place that resulted in tortious conduct amounting to a constitutional deprivation. See Reese v. Anderson, 926 F.2d 494, 499 (5th Cir. 1991) (at the summary judgment stage, specific evidence, rather than allegations, is required).

Bowles appears to have carried his burden of showing no genuine issue of material fact by demonstrating that Athas received reasonable medical care. He submitted both affidavits and medical records demonstrating that Athas was seen by doctors, given x-rays, and medicated for pain. As stated earlier, Athas asserted that the Bowles' evidence regarding this issue were lies and that he did not receive medical treatment. However, Athas' assertions do not consist of specific evidence that he did not receive reasonable

medical care, but instead, consist of bare allegations that the statements in his medical records are untruths. Consequently, Athas fails in his burden to produce evidence or set forth specific facts showing the existence of a genuine issue for trial that he was denied reasonable medical care. See Ibid. The district court did not err in granting summary judgment for Bowles. We AFFIRM. The denial of Athas' motion for appointment of counsel

Athas argues that the district court erred in denying his motion for appointment of counsel.<sup>1</sup> He contends that because he was unable to have counsel, he could not obtain materials through discovery, uncover the perjury that Athas alleged Bowles committed in his summary judgment motion, or file a proper response to Bowles' motion for summary judgment which would have shouldered his burden of proof at the summary judgment stage.

The standard of review is whether the district court abused its discretion. See Jackson v. Dallas Police Dep't, 811 F.2d 260, 261 (5th Cir. 1986).

A trial court is not required to appoint counsel for an indigent plaintiff asserting a claim under § 1983 unless there are exceptional circumstances. Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982). The district court does not abuse its discretion in appointing counsel for a plaintiff proceeding pro se if doing so would advance the proper administration of justice. 28 U.S.C. §

---

<sup>1</sup>As stated earlier, the magistrate failed to rule on Athas' motion for appointment of counsel before the district court granted summary judgment for Bowles. We construe the magistrate's failure to rule on the motion as an implicit denial of it.

1915(d). Among the factors to determine whether exceptional circumstances warrant appointment of counsel in a civil rights suit, the Court should consider: (1) the type and complexity of the case; (2) whether the indigent was capable of adequately presenting the case; (3) whether the indigent was in a position to investigate the case adequately; and (4) whether the evidence would consist in large part of conflicting testimony requiring skill in the presentation of evidence and in cross-examination. Ulmer, 691 F.2d at 213.

Athas does not demonstrate that the district court abused its discretion in implicitly denying his motion for appointment of counsel. This case consisted of an alleged unconstitutional condition of confinement that resulted in a slip and fall for which medical treatment was allegedly denied. Athas does not show that this case is not of the type and complexity contemplated in Ulmer as needing counsel's assistance. Although Athas argued that he was not capable of adequately presenting the case because of Bowles' alleged refusal to comply with discovery, he was able to present the court with copies of documents not previously presented by Bowles. Thus, he has demonstrated an ability to represent himself adequately in requesting and obtaining documents he has requested. Interestingly, Athas has never filed with the court a motion to compel discovery of the grievance complaints he claims he filed about the leaky plumbing, which he claims have not been produced to him: this in spite of the fact that Athas has demonstrated a marked ability to adequately and correctly prepare various other motions and filings with the court. Nor did Athas ever propose to the court that he be allowed to inspect the documents in a manner

other than Bowles' offer that Athas inspect and copy the documents in his counsel's office. We are convinced that Athas' failure to produce documents to support his contentions is not because Athas has not been in a position to investigate his case. Finally, although the evidence in the case would have consisted of conflicting testimony that would require cross-examination, the evidence would not have been complex. We AFFIRM the denial of Athas' motion for appointment of counsel.

AFFIRMED.