

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-11034  
Summary Calendar

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DARYL ANDRE WALLACE,

Plaintiff-Appellant,

versus

DALLAS COUNTY, TX, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the  
Northern District of Texas  
(3:93 CV 1421 X)

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(March 29, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:\*

I

Proceeding in forma pauperis (IFP), Daryl Andre Wallace filed a complaint in the district court in July 1993. Wallace named as defendants Dallas County, Sheriff Jim Bowles, the Dallas County Sheriff's Department, and unnamed county detention officers. Wallace alleged a variety of irregularities in the Dallas County

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Jail.<sup>1</sup> Wallace alleged, inter alia, that he had suffered pain because of the failure of the jail's medical department to respond to requests for medical treatment. The magistrate judge ordered Wallace to respond to a set of written interrogatories.

In his answers to the magistrate judge's interrogatories, Wallace alleged that he had been incarcerated in the county jail on January 16, 1993.<sup>2</sup> Wallace alleged that he fell while at the county's Government Center facility and struck his chest against the corner of a seat. Shortly thereafter, he noticed a swollen, bruised area on his chest and felt a slight pain. He notified several officers and, evidently, two nurses, "Pam" and "Doris," of the incident. The officers and nurses told him to submit a request to the medical department. The nurses also advised Wallace to take aspirin. Wallace submitted several request forms, at both the Government Center and the Lew Sterret facility but, he alleges, he received no response. Wallace alleged that grievances were sent to Dallas County Sheriff Jim Bowles and the jail commander, but he received no relief. Wallace also alleged that an inmate housed in an adjoining cell in the jail's Lew Sterret facility was diagnosed with tuberculosis around July 11, 1993. According to Wallace, the diseased inmate's cellmates were inoculated against tuberculosis.

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<sup>1</sup>Wallace contends on appeal only that he received inadequate medical care in the Dallas County Jail.

<sup>2</sup>Wallace alleged in his motion to amend his complaint that he was convicted on June 1, 1993.

Wallace believed that he had been exposed to germs and hazardous material in the air.

Slightly more than one year after submitting his answers to the interrogatories, Wallace filed a motion seeking leave to amend his complaint. Wallace wished to add as defendants an unnamed doctor, unnamed nurse, unnamed medical assistant, unnamed medical department employee, unnamed jail commander, and grievance officers J. Vance and "Lt. John Doe #60." Wallace alleged that he had suffered "severe chest pains and a bruised and swollen area in his chest[,]" and that the defendants had done nothing to remedy the situation, violating the Due Process Clause when he was a pretrial detainee and the prohibition against cruel and unusual punishment after he had been convicted.

Wallace alleged that he was housed in the county jail from January 16, 1993, until November 17, 1993. He was convicted of two offenses on June 1, 1993.

Wallace alleged that Sheriff Bowles had failed to promulgate adequate procedures to address his health problems. He alleged that copies of his inmate grievances had been forwarded to Bowles on June 2, June 5, June 9, June 13, June 14, 1993, and July 23, 1993. According to Wallace, Bowles did nothing to ensure that he obtained access to medical care.

Wallace alleged that he had submitted several requests for attention from the medical department for treatment of his serious chest pains and bruised and swollen chest. According to Wallace,

on June 2, 1993, he requested to visit a physician and to have a chest x-ray performed. The medical department did not respond to Wallace's requests. Wallace also alleged that the medical staff was too small to care for the number of inmates in the county jail. He alleged that the medical staff was underfunded. He alleged that the inadequacies of the medical staff were partly responsible for the deliberate indifference exhibited toward his serious medical needs.

Wallace alleged that he had submitted jail grievances regarding his chest pain on June 2, June 13, June 14, and July 23, 1993, and on other, unspecified, dates as well. According to Wallace, grievance officer Lt. John Doe #60 responded to his June 2 grievance by telling him that "we have already responded to these complaints."<sup>3</sup> Lt. John Doe #60 gave Wallace an identical response to his June 13 grievance.<sup>4</sup> Lt. John Doe #60 responded to Wallace's June 14 grievance by telling him that "this is the same as a pending complaint under investigation. Will not handle as a new complaint."<sup>5</sup> Wallace alleged that copies of his grievances were forwarded to Bowles and to the jail commander, neither of whom

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<sup>3</sup>In his appellate brief, Wallace refers to this grievance as "grievance stamped June 14, 1993[,]" evidently referring to the date he alleged in his amended complaint that the grievance was stamped "received."

<sup>4</sup>In his appellate brief, Wallace appears to change the date of his second grievance to June 9.

<sup>5</sup>In his appellate brief, Wallace changes the date of his third grievance to June 13.

responded. According to Wallace, grievance officer J. Vance responded to a June 2 grievance by telling Wallace that copies of the complaint addressed to the shift commander and the sheriff had been attached to the grievance office copy and that an investigation had turned up no infractions. Vance responded to a June 13 grievance by telling Wallace that the grievance would be investigated. Wallace contended that Lt. John Doe #60, Vance, and the jail commander denied him access to medical care.

Wallace further alleged that he was transferred from the Dallas County Jail to the Diagnostic Unit of the Texas Department of Criminal Justice ("TDCJ") on November 17, 1993. Wallace received a complete physical examination, including a test that revealed he had been exposed to tuberculosis. He alleged that a prisoner in a tank next to his tank in the county jail had been diagnosed with tuberculosis in July 1993. All of the other inmates in the diseased inmate's tank were tested for the malady. A prisoner in Wallace's own tank also was diagnosed with tuberculosis. That prisoner was treated for tuberculosis. Wallace alleged that jail officials did not segregate inmates with tuberculosis from the general population and that they did not test him for tuberculosis.

Wallace further alleged that a physician at TDCJ's Price Daniel Unit examined his bruised and swollen chest. The physician diagnosed a tumor in Wallace's chest. He recommended surgical

removal of the tumor. In his appellate brief, Wallace alleges that a surgeon removed the tumor on August 19, 1994.

## II

The magistrate judge recommended that the district judge dismiss Wallace's complaint as frivolous, pursuant to 28 U.S.C. § 1915(d). The magistrate judge found that examination of his chest by the nurses was reasonably adequate medical care. He also noted that the fact that Wallace's positive response to TDCJ's tuberculosis test did not indicate that he had been exposed during his stay at the Dallas County Jail or as a result of the indifference of the medical staff. The magistrate judge found that the treatment of the inmates in the tank next to Wallace's tank indicated that the medical staff was not indifferent to the risk of tuberculosis. Wallace objected to the magistrate judge's report. The district court adopted the magistrate judge's report and recommendation and dismissed Wallace's complaint with prejudice.

## III

Wallace contends that medical personnel and grievance officers Vance and Lt. John Doe #60 denied him access to medical care for his chest pain. He also contends that Vance and Lt. John Doe #60 failed to forward grievances addressed to the sheriff, the jail commander, and the shift commander. He also contends that Lt. John Doe #60 did not follow jail guidelines because he failed to submit Wallace's grievances to the grievance committee. Wallace contends that the nurses gave him a cursory and inadequate examination when

he complained about his chest pain and that the medical staff repeatedly denied his requests to see a physician.

A pauper's complaint is subject to dismissal as frivolous "if it `lacks an arguable basis in law or in fact.'" Graves v. Hampton, 1 F.3d 315, 317 (5th Cir. 1993)(footnote and citation omitted). This court "review[s] a district court's section 1915(d) dismissal utilizing the abuse of discretion standard." Id. (footnote omitted).

Wallace did not contend in his district court pleadings that Lt. John Doe #60 violated jail policy by failing to forward his grievances to the grievance board. Nor did he contend that the hearing officers had failed to forward his grievances to higher authorities. Instead, Wallace alleged that the grievances had been submitted to the grievance board, and that copies had been forwarded to the sheriff, jail commander, and shift commander. We need not consider factual allegations not made in the district court. "[I]ssues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

Regarding his remaining medical-care claims against the grievance officers and medical staff members, Wallace alleges that he was convicted on June 1, 1993. He was incarcerated in the county jail from January 16 until November 17. It appears that

Wallace was both a pretrial detainee and a convict during his time in the jail.

"[P]retrial 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). "The inquiry . . . `is whether the denial of medical care was objectively reasonable in light of the Fourteenth Amendment's guarantee of reasonable medical care and prohibition on punishment of pretrial detainees.'" Fields v. City of South Houston, 922 F.2d 1183, 1191 (5th Cir. 1991)(quoting Pfannstiel v. City of Marion, 918 F.2d 1178, 1186 (5th Cir. 1990)). A detainee's medical care could be unreasonable if officials knew of a serious medical condition and essentially ignored it. Fields, 922 F.2d at 1191; Pedraza v. Meyer, 919 F.2d 317, 319 (5th Cir. 1990).

Denial of medical care to an imprisoned convict is governed by the Eighth Amendment. To prevail, a plaintiff "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). "The legal conclusion of `deliberate indifference[.]' . . . must rest on facts clearly evincing `wanton' actions on the part of the defendants." Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985).

[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the



official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer v. Brennan, \_\_\_ U.S. \_\_\_, 114 S.Ct. 1970, 1979 (1994); Reeves v. Collins, 27 F.3d 174, 176 (5th Cir. 1994)(applying Farmer to medical claims). "Unsuccessful medical treatment does not give rise to a § 1983 cause of action. Nor does '[m]ere negligence, neglect or medical malpractice.'" Varnado, 920 F.2d at 321 (citations omitted).

Because Wallace was both a pretrial detainee and a convicted prisoner during the time he complained of pains in his bruised and swollen chest, we must examine Wallace's claim under both the Fourteenth Amendment and the Eighth Amendment. Wallace contends that he submitted numerous requests for medical treatment to the medical department of the jail spanning at least a six-week period, but received no response in return. The record before us contains no evidence of the jail officials grounds for not responding to Wallace's requests for treatment of this seemingly common bruise and swelling over a six-week period. Although the jail officials in this case certainly may have provided to Wallace as a pretrial detainee reasonable medical care as contemplated under the Fourteenth Amendment, without such record evidence, we hold that the record before us is insufficient to allow the district court to

dismiss this claim as frivolous under § 1915(d).<sup>6</sup> Accordingly, we reverse the decision of the district court dismissing this claim and remand for further proceedings consistent with this opinion.

#### IV

Wallace contends that the medical staff and the grievance officers denied him adequate medical care by denying his requests for tuberculosis screening and treatment. He also contends that the medical staff should have screened and treated him because he "was in the foreseeable zone of danger to tuberculosis."

Wallace did not allege in his district court pleadings that he had requested tuberculosis screening or treatment. He did contend that he should have been screened and that screening procedures in the jail were inadequate. Because Wallace failed to allege in the district court that he had requested tuberculosis screening or treatment, we will not consider those allegations in his appellate brief. Varnado, 920 F.2d at 321. Wallace's contention about the failure of the medical request and grievance procedures regarding his tuberculosis allegations therefore is rejected.

Wallace next contends that the medical staff should have screened and treated him for tuberculosis. Wallace argues that an inmate in a tank adjacent to his was diagnosed with the disease on July 11, 1993, which placed him in the "foreseeable zone of danger

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<sup>6</sup>Because we reverse the district court on this issue on the basis of Wallace's Fourteenth Amendment rights as a pretrial detainee, we need not reach his rights under the Eighth Amendment as a convicted prisoner.

to tuberculosis." Because Wallace was a convicted prisoner, not a pretrial detainee,<sup>7</sup> prior to the diagnosis of the inmate's tuberculosis, Wallace is protected only by the Eighth Amendment's prohibition on cruel and unusual punishment prohibiting prison officials from acting deliberately indifference to Wallace's serious medical needs. Estelle, 429 U.S. at 106. Under this heavy standard, we hold that the officials in this case did not disregard an excessive risk to Wallace's health. See Farmer v. Brennan, 114 S.Ct. at 1979. The officials tested and treated all inmates housed in the tank with the sick inmate. We agree with the recommendation of the magistrate judge that this fact alone establishes that the prison officials were not indifferent to the threat of tuberculosis in the jail. Accordingly, we affirm the decision of the district court dismissing this claim with prejudice.

V

Wallace alleges that he addressed copies of his grievances to Sheriff Bowles, the jail commander, and the shift commander, and received no response from those defendants. Wallace also alleges that Lt. John Doe #60 and Vance failed to forward the copies to Bowles, the jail commander, and the shift commander. To the extent that Wallace might wish to hold Bowles, the jail commander, and the shift commander liable for failing to respond to his grievances,

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<sup>7</sup>On June 1, 1993, Wallace was convicted on drug charges.

his allegation that the hearing officers failed to forward those grievances negates his claim.

Moreover,

[u]nder section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability. However, a supervisor may be held liable if there exists either (1) his personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.

. . . .

Supervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy "itself is a repudiation of constitutional rights" and is "the moving force of the constitutional violation[.]'"

Thompkins v. Belt, 828 F.2d 298, 303-04 (5th Cir. 1987)(internal and concluding citations omitted). Wallace does not allege or contend that Bowles, the jail commander, or the shift commander have implemented a policy that resulted in his allegedly inadequate medical treatment. Those three individuals cannot be held liable on a theory of vicarious liability. Because Wallace had an opportunity to assert an arguable claim against the sheriff, the jail commander, or the shift commander, and failed to assert facts or law in his appeal that would support such a claim, we affirm the dismissal of Wallace's claims against those three defendants with prejudice. Graves v. Hampton, 1 F.3d at 319.

VI

Wallace contends that Dallas County is responsible for the failure to provide him adequate medical care because the jail is overcrowded, and the medical staff undermanned, underfunded, and undersupplied. Wallace raised his contention in his amended complaint.

To establish county/municipality liability under § 1983 . . . a plaintiff must demonstrate a policy or custom which caused the constitutional deprivation. A municipality may not be held strictly liable for the acts of its non-policy-making employees under a *respondeat superior* theory. It cannot be held liable solely because it employs a tortfeasor. Rather, only when the execution of a county's policies or its customs deprives an individual of constitutional or federal rights, does liability under § 1983 result.

Colle v. Brazos County, Texas, 981 F.2d 237, 244 (5th Cir. 1993) (footnotes omitted). Wallace does not allege how the general deficiencies he identifies caused him to receive inadequate medical care. The dismissal of his claims against the county with prejudice is affirmed. Graves, 1 F.3d at 319.

VII

For the foregoing reasons, the judgment of the district court is

AFFIRMED in part and REVERSED AND REMANDED in part.