

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40257  
(Summary Calendar)

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JEFFREY HANNAH, SR.,

Plaintiff-Appellant,

versus

DR. THOMAS FORD, ET AL.,

Defendants-Appellees.

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Appeals from the United States District Court  
for the Eastern District of Texas  
(6:93-CV-714)

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(August 29, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

Plaintiff-Appellant Jeffrey Hannah, Sr., a prisoner at the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID), appeals the dismissal of his 42 U.S.C. § 1983 case as

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

frivolous under 28 U.S.C. § 1915(d). As error, he urges that the magistrate judge abused her discretion by ruling, on the basis of a Spears<sup>1</sup> hearing, that (1) the defendants could not have been deliberately indifferent to Hannah's serious medical needs; and (2) the defendant-physicians' failure to change Hannah's work assignment due to his back troubles did not violate his Eighth Amendment rights. For the reasons set forth below, we conclude that the magistrate judge committed no reversible error, and therefore affirm .

I

FACTS AND PROCEEDINGS

Proceeding pro se and in forma pauperis (IFP), Hannah filed this civil rights action against TDCJ-ID physicians Thomas Ford and Arron Larson and TDCJ-ID Health Administrator Billy Layton, alleging that they violated his Eighth Amendment rights by providing him with inadequate medical attention for his back. In his complaint Hannah asserted that he injured his back in January 1991. According to Hannah, he was examined by Dr. Ford in late January 1991. After Dr. Ford placed Hannah on a bed and asked him to lift one leg at a time, he told Hannah that nothing was wrong and that he was not injured. Hannah alleged that he was seen by Dr. Ford again in April 1991, on a complaint of "unbearable" back pain and numbness in the legs. Dr. Ford again required him to lie down and lift one leg at a time. Hannah was again informed that nothing was wrong, but he was nevertheless referred to Dr. Larson.

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<sup>1</sup> Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

Hannah indicated that in November 1991 Dr. Larson conducted the same leg-lifting exam as had Dr. Ford and was of the same no-injury opinion.

Hannah alleged that his back worsened and his legs remained numb, and that he was provided no relief for his pain despite seven other medical examinations between November 1991 and May 1992. According to Hannah, he told Layton about the continuing back problems, but Layton refused to assist Hannah, indicating that he stood by the findings of Ford and Larson. Hannah further asserted that Layton and prison medical personnel refused his request for a back x-ray.

According to Hannah, he was sent to the Skyview Unit in June 1992 where he was provided a "proper" medical examination by a physician who ordered x-rays and discovered a hernia and "some type of back injury." Hannah indicated that he had a hernia operation in November 1992 and a back operation in December 1992. He stated that his back surgeon ordered eight weeks of physical therapy and a follow-up visit, but that the therapy was discontinued after two weeks and that he was not taken for his follow-up visit. Hannah insists that he continued to have back pain and numbness in his legs but did not see a physician between September and October 1993, despite submitting five sick-call requests. As of the time that he filed his complaint in November of that year, he still had not been seen by a doctor.

Finally, Hannah alleges that prior to his back surgery he received disciplinary reports and punishment when he refused to

work in the field because he was unable to do that type of work.

The magistrate judge conducted a Spears hearing to develop Hannah's allegations, and his testimony was consistent with his complaint. At the Spears hearing Hannah explained that he had surgery for "a complete spinal blockage . . . caused [by] a herniated disc" and an "upper gastric hernia." Hannah indicated that he was told that he could not go to the hospital for his follow-up because he was in administrative segregation.

Dr. Ford testified that he could find no medical records from January 1991 indicating that Hannah had complained of back problems. According to Dr. Ford, even though Hannah was seen numerous times in 1991, he did not complain about a back problem until December of that year.<sup>2</sup> Dr. Ford explained that Hannah was sent to Skyview in February 1992, and that he was seen by Dr. Larson in May 1992, at which time he complained that his back had been bothering him for four or five months, with no known injury. The records indicated that Larson found that Hannah moved his back "okay" and without pain and that Larson taught Hannah 21 back exercises to be performed daily.

In July 1992 a Dr. Presley examined Hannah regarding a ventral hernia. Later that month a Dr. Hanley diagnosed Hannah as

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<sup>2</sup> There is a medical record indicating that Hannah complained of back pain in November 1991. The magistrate judge reviewed the medical records and determined that Hannah's first complaint of back pain was made on November 23, 1991. There is also a record indicating that Hannah injured his right shoulder in January 1991 after wrestling with a cell mate. Another record from September 1991 details a complaint made by Hannah that he injured his knee when he jumped down from his bunk. As late as April 1992 Hannah reported that he injured a knee playing basketball.

suffering from "lumbar disc disease." A CAT scan was performed on Hannah the following August which showed "impression peculiar deformity on L2-L3" and "considerable narrowing." In September 1992 Dr. Hanley recommended that Hannah be given a myelogram to determine if surgery would be beneficial. Dr. Presley "apparently" repaired Hannah's ventral hernia in November 1992. A myelogram revealed that Hannah had a complete blockage of the spinal canal at L2, L3, which was probably caused by Hannah's large disc. According to Dr. Ford, it appeared that Hannah received a discectomy and decompression to relieve the blockage. Dr. Ford indicated that Hannah had follow-ups scheduled for the discectomy and for orthopedics.

Hannah explained that Ford's summary of his medical records was accurate, but that he had left out a portion of Hannah's medical history, including the physical therapy. But Dr. Ford read a record that explained that Hannah had been discharged from physical therapy and that he would be continuing his exercises at his unit.

Hannah concluded that both physician-defendants had provided him with inadequate medical care by failing to take x-rays that would have allowed them to diagnose his condition. He asserted that they needlessly caused him to suffer for a year before his ailments were properly diagnosed. Hannah also complained that the physicians failed to provide him with a job change; that they kept him assigned to work in the field; and that they did not change his sleeping assignment from the top bunks. Hannah conceded that he

had no difficulty obtaining appointments with the two physician-defendants, and he asserted that one of them had referred him to the hospital for treatment of what the doctor had supposedly mistakenly "diagnosed" as a "back tumor" that turned out to be the hernia.

Hannah and the defendants consented to proceed before the magistrate judge. After assuming that, to the extent that Hannah's allegations differed from Dr. Ford's testimony, they were true, the magistrate judge dismissed Hannah's complaint with prejudice as frivolous under 28 U.S.C. § 1915(d). The magistrate judge determined that, inasmuch as physicians had examined Hannah on numerous occasions and determined that his back was normal, he had failed to establish that the defendants were deliberately indifferent to his serious medical needs. The magistrate judge also ruled that Hannah's work assignment was consistent with the doctors' observations of his physical capabilities. Finally, the magistrate judge found that Hannah stated that he could do his physical therapy exercises at the unit where he was confined and that he failed to allege that any defendant was responsible for curtailing his physical therapy visits. When his case was dismissed as frivolous, Hannah timely filed a notice of appeal.

## II

### ANALYSIS

Hannah argues that his due process and equal protection rights were denied during the Spears hearing because the magistrate judge did not accept his factual assertion that the physician-defendants

denied him medical treatment and refused to change his work assignment. He no longer argues that he was denied medical attention because his physical therapy was improperly curtailed or that he was improperly forced to remain in the top bunks. Issues raised but not argued are ordinarily abandoned. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993). Issues not raised or briefed are considered abandoned. See Evans v. City of Marlin, Tex, 986 F.2d 104, 106 n.1 (5th Cir. 1993).

Prisoner pro se § 1983 pleadings are construed liberally. Wesson v. Oglesby, 910 F.2d 278, 279 (5th Cir. 1990). A § 1915(d) dismissal is reviewed for abuse of discretion. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992). A complaint is frivolous if it lacks an arguable basis in law or in fact. Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994) (citing Denton v. Hernandez, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1728, 1733-34, 118 L.Ed.2d 340 (1992)). We are authorized by the IFP statute "to pierce the veil of the complaint's factual allegations if they are clearly baseless." Ancar, 964 F.2d at 468. Clearly baseless complaints include those that "describe fanciful, fantastic, or delusional scenarios." Id. Facts are frivolous if they are "irrational or wholly incredible." Id. The district court enjoys "broad discretion in determining at any time whether an IFP suit is frivolous." Wesson, 910 F.2d at 281.

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. Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); Mendoza v. Lynaugh, 989 F.2d 191, 193 (5th Cir. 1993); see Wilson v. Seiter, 501 U.S. 294, 296, 303, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).

A prison official is deliberately indifferent "if [the defendant] knows that [the] inmate[] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, \_\_\_ U.S. \_\_\_, 114 S.Ct. 1970, 1984, 128 L.Ed.2d 811 (1994). Deliberate indifference is a legal conclusion which must rest on facts evincing wanton action on the part of the defendant. Walker v. Butler, 967 F.2d 176, 178 (5th Cir. 1992).

Facts do not constitute deliberate indifference unless they "clearly evince the medical need in question and the alleged official dereliction." Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985) (internal quotation and citation omitted). Deliberate indifference entails wanton actions. "Wanton means reckless--without regard to the rights of others . . . . Wantonly means causelessly, without restraint, and in reckless disregard of the rights of others." Id. (internal quotation and citation omitted). A physician must have a culpable state of mind before he can be found deliberately indifferent. Mendoza, 989 F.2d at 193. Deliberate indifference is the equivalent of "subjective recklessness as used in the criminal law." Reeves v. Collins, \_



F.3d \_\_\_\_ (5th Cir. Aug. 1, 1994, No. 93-1902) slip op. at 5480 (quoting Farmer, 114 S.Ct. at 1980). "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Gamble, 429 U.S. at 106. A physician's negligent treatment or diagnosis of a medical condition does not constitute a violation of the Eighth Amendment. Id. An inmate's disagreement with his medical treatment does not establish a constitutional violation. See Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

We agree with the magistrate judge that Hannah failed to allege in his complaint or at the Spears hearing any facts that would establish that the physician-defendants were deliberately indifferent to his serious medical needs. There is no indication that the defendants were wanton in their treatment of Hannah or that they knew that Hannah faced a substantial risk of serious harm and disregarded that risk by "failing to take reasonable measures to abate it." Farmer, 114 S.Ct. at 1984. To the contrary and accepting, as did the magistrate judge, that Hannah's assertion were true, the physician-defendants examined Hannah on at least three separate occasions. Hannah indicated that he was examined by medical personnel on seven other occasions. Hannah's medical record is replete with additional examinations. At most Hannah demonstrated that the physician-defendants may have been negligent in failing to diagnose his hernia and spinal canal blockage and that he disagreed with the manner in which they treated him. Neither of these assertions rise to the level of an Eighth

Amendment violation.

As for Layton, supervisory officials are not liable under § 1983 for the actions of subordinates under any theory of vicarious liability. Thompkins v. Belt, 828 F.2d 298, 303 (5th Cir. 1987). A supervisor may be liable for an employee's act if the civil rights plaintiff shows that the supervisor was (1) personally involved in the alleged constitutional deprivation, or (2) demonstrates "a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." Id. at 304.

Hannah fails to allege any facts showing that Layton was personally involved in the alleged failure to treat or that Layton implemented a policy so deficient that the policy itself was a "repudiation of constitutional rights" and the "moving force of the constitutional violation." Id. (internal quotations and citations omitted). As Hannah's medical claim is factually frivolous and as there is no indication that a policy existed to deny Hannah adequate medical treatment, we conclude that the magistrate judge did not abuse her discretion by dismissing the inadequate medical treatment claim against Layton.

Hannah also asserts that the defendants violated his Eighth Amendment rights by forcing him to continue to work in the fields when he could no longer do so, as a result of which he was punished for refusing to work. For purposes of the following analysis, it is assumed that Hannah requested that the defendants change his work assignment.

In certain circumstances, prison work conditions may violate the Eighth Amendment's prohibition against cruel and unusual punishment. Jackson v. Cain, 864 F.2d 1235, 1245 (5th Cir. 1989). In Howard v. King, 707 F.2d 215 (5th Cir. 1983) we cited an Eighth Circuit case which noted "that prison work requirements which compel inmates to perform physical labor which is beyond their strength, endangers their lives, or causes undue pain constitute cruel and unusual punishment." Id. at 219.

Absent clearly established law, "prison officials cannot be held to a higher standard of care than the surrounding community when providing for the safety of prisoners." Jackson, 864 F.2d at 1245. Hannah at no point attempted to explain how his work in the field was beyond his strength or caused undue pain, or that prison officials were implementing a lower standard of care than the surrounding community. Further, he did not suggest that the physician refused to change his work assignment knowing that his field work would aggravate his ailment or worsen his injury. The district court did not abuse its discretion by dismissing Hannah's work-related claim as frivolous pursuant to § 1915(d).

Finding no reversible error in the rulings of the magistrate judge in dismissing Hannah's actions, the judgment of the district court is, in all respects,

AFFIRMED.