

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41122
Summary Calendar

ALBERT JACKSON,

Plaintiff-Appellant,

VERSUS

HOWARD ZERRANGUE, SR., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(93-CV-833)

(May 5, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Albert Jackson appeals an adverse summary judgment in his state prisoner's civil rights suit brought pursuant to 42 U.S.C. § 1983. Finding no error, we affirm.

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Jackson, a convicted inmate at the Lafayette Parish Correction Center, sued various prison officials, alleging delayed medical treatment and failure to protect him from harm. Defendant Dwight Joseph, the inmate who allegedly attacked Jackson, and an unknown insurance company were eventually dismissed from the suit for failure to prosecute. All of the defendants, except for Dr. Michael Basile, moved for summary judgment.

The magistrate judge reported that there was no deliberate indifference to a serious medical need and that there was no genuine issue of material fact regarding Jackson's allegation that the defendants failed to protect him from harm by a fellow inmate by allowing, in the jail, a cup which could be used as a weapon. The magistrate judge recommended granting summary judgment and dismissing Jackson's claims against all of the defendants, including Basile. Over Jackson's objections, the district court adopted the magistrate judge's report and recommendation.

II.

A.

Jackson asserts, for the first time on appeal, that the defendants violated their own written rules and procedures in allowing the cup to remain with the prisoner who attacked Jackson. This allegation may be a supporting assertion for Jackson's failure-to-protect claim. To the extent this assertion raises a new issue with factual questions for the first time on appeal,

however, this claim will not be considered. See Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991) (holding that issues raised for the first time on appeal are not reviewable unless they are purely legal questions and failure to consider them would result in manifest injustice).

"Summary judgment is reviewed 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, 323 (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).

Jackson alleged in his sworn complaint that on or about May 7, 1992, he attempted to stop a fight between two inmates, when a third inmate, Dwight Joseph, struck Jackson in the face with an object, without provocation, causing Jackson serious injury. Jackson alleged that he was denied even superficial medical care for more than seven days, despite repeated requests for assistance. Jackson maintained that after he was eventually evaluated, it was

determined that he was so seriously injured that local treatment was not adequate and he would have to be transported to a specialist. Jackson alleged that this treatment was delayed for more than five weeks and that during that time, Jackson was in considerable pain and fear of adverse consequences of the delayed treatment and had difficulty opening his jaw. Jackson alleged that he was finally treated on June 29, 1992, for a depressed right zygomatic arch¹ fracture. Finally, Jackson alleged that the defendants failed to protect him from the attack by failing adequately to supervise and/or segregate Joseph.

For a convicted criminal to establish an unconstitutional denial or delay of medical treatment, he must show that care was denied or delayed and that this delay constituted deliberate indifference to his serious medical needs. See Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); Varnado, 920 F.2d at 321. Also, to establish a failure-to-protect claim under the Eighth Amendment, a prisoner must show that prison officials were deliberately indifferent to his need for protection. Wilson v. Seiter, 501 U.S. 294, 302-03 (1991).

Deliberate indifference is a legal conclusion that must rest on facts evincing wanton actions on the part of the defendant. Walker v. Butler, 967 F.2d 176, 178 (5th Cir. 1992). "[S]ubjective recklessness as used in the criminal law" is the appropriate test for deliberate indifference. Farmer v. Brennan, 114 S. Ct. 1970,

¹ A zygomatic arch is the bony arch in vertebrates that extends along the side or front of the skull beneath the orbit. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1341 (1988).

1980 (1994). Thus, a prison official acts with deliberate indifference "only if he knows that inmates face a substantial risk of serious harm and [he] disregards that risk by failing to take reasonable measures to abate it." Id. at 1984.

A mere disagreement with one's medical treatment is not sufficient to state a cause of action under § 1983. Varnado, 920 F.2d at 321. Further, mere negligence will not suffice to support a claim of deliberate indifference. See Jackson v. Cain, 864 F.2d 1235, 1246 (5th Cir. 1989).

B.

Defendant Nurse Robin stated in an affidavit attached to the motion for summary judgment that according to Jackson's medical records, of which she was the custodian, Jackson did not make any request for medical attention until May 9, 1992, two days after the alleged incident. Robin stated that she examined Jackson on May 11 and noticed that he had a small amount of swelling on his right cheek. Robin asserted that in her opinion, Jackson's condition did not constitute a medical emergency or a serious medical condition. She ordered warm compresses and ibuprofen and recommended that he be seen by Basile on the doctor's next jail visit. Robin stated that she did not know that Jackson had a facial fracture until she was made aware of the results of the x-rays on Basile's May 27 visit with Jackson. She also stated that at no time was she advised that Jackson's condition constituted a medical emergency.

Jackson's medical records attached to the motion for summary

judgment demonstrated that Jackson requested medical attention on May 9, complaining that he was hit in the face with a cup. He also stated in the request that he had been requesting a doctor for three days. On May 13, Jackson was seen by Basile, who initially diagnosed Jackson with a facial contusion, and sent Jackson to Opelousas General Hospital for facial x-rays. Basile next saw Jackson on May 27, 1992, at which time he diagnosed Jackson as having a fracture of the right zygomatic arch, gave Jackson a prescription for Anaprox, and directed an appointment be made for Jackson with a specialist.

On May 28, Jackson was seen by physicians at University Medical Center. Jackson saw Basile on June 10 about medication for his migraine headaches and about when he would go to surgery. Basile told Jackson to use the Anaprox for the pain. On June 16 and 26, Jackson again saw the physicians at University Medical Center in connection with his surgery scheduled for June 29, when he had elective repair of the zygomatic arch fracture. He subsequently had a follow-up visit on July 9.

Basile stated in his affidavit attached to the motion for summary judgment that when he saw Jackson on May 13, Jackson informed him that he had been hit with a plastic cup. Basile stated that physical examination revealed minimal swelling in the right cheek and a complaint of tenderness to palpation. Basile stated that examination did not indicate a serious medical condition or a condition requiring immediate medical attention and that physical findings did not indicate a condition producing

substantial pain and that it did not appear that Jackson was experiencing substantial pain. Therefore, no pain medication was prescribed.

Basile also stated in his affidavit that when x-rays revealed that Jackson had a fracture of the right zygomatic arch, he saw Jackson on May 27 and directed an appointment be made for him at the University Medical Center so he would have the benefit of an elective procedure that could be offered. He also gave Jackson a prescription for Anaprox. Basile stated that at no time did Jackson have a serious medical condition, a condition that constituted a medical emergency, or a condition that would have been worsened by an absence of immediate medical attention.

Defendant Curtis Sam, the warden of the St. Landry Parish Jail, stated in his affidavit attached to the motion for summary judgment that Jackson did not request medical attention until May 9. Defendant Howard Zerrangue, the sheriff, stated in his affidavit attached to the motion for summary judgment that he had no personal knowledge of any facts surrounding any of Jackson's allegations regarding the alleged delay of medical treatment.

Defendants Antoine Arceneaux and Floyd Soileau, deputy sheriffs and jailers, stated in their affidavits attached to the motion for summary judgment that at no time did they deny or refuse Jackson needed medical care or attention. Arceneaux and Soileau stated that after the incident, they asked Jackson whether he wished to have medical attention but that Jackson said he was fine. Arceneaux and Soileau stated that they observed a small amount of

swelling and discoloration on Jackson's cheek. Arceneaux stated that he gave Jackson an ice pack and ibuprofen and checked on him later that night, whereupon Jackson again stated that he was fine.

Jackson stated in his opposition to the motion for summary judgment that when he told Arceneaux and Soileau about the incident and requested a doctor, he was in substantial pain. Additionally, Jackson stated that Arceneaux called Sam and asked if Jackson should be taken to the hospital. Jackson asserted that Sam stated that Jackson did not need to go to a hospital and that Sam would take care of it when he came in to work the next morning.

However, Jackson did not attach to his opposition any sworn affidavits or other proper summary judgment evidence supporting his assertions or state that he was making his assertions under penalty of perjury. Jackson did attach to his objections to the magistrate judge's report and recommendation an unsworn affidavit of a fellow inmate supporting Jackson's assertions. However, the affidavit did not state that it was made under penalty of perjury, although it did say "declare under oath."

Unsubstantiated assertions are not competent summary judgment evidence. Abbott v. Equity Group, Inc., 2 F.3d 613, 619 (5th Cir. 1993), cert. denied, 114 S. Ct. 1219 (1994). Additionally, an unsworn affidavit or a declaration without an assertion that it was made under penalty of perjury is incompetent to raise a fact issue precluding summary judgment. See Nissho-Iwai Am. Corp. v. Kline, 845 F.2d 1300, 1306 (5th Cir. 1988) (holding that unsworn affidavit not asserting that it was made under penalty of perjury is not

considered proper summary judgment evidence); see also 28 U.S.C. § 1746. Therefore, Jackson's assertions in the opposition to the summary judgment motion and his fellow inmate's unsworn affidavit attached to Jackson's opposition to the magistrate judge's report and recommendation were not proper summary judgment evidence that could be considered by the district court.

Jackson did attach to his opposition to the magistrate judge's report and recommendation copies of the surgery report and his medical requests for May 9, May 27, and May 28, which were already submitted by the defendants with their motion for summary judgment. Jackson contended that the medical requests demonstrated a twenty-one-day delay from the time of the incident to the time they sent him to the University Medical Center in his receiving adequate medical attention.

Looking at the evidence in the light most favorable to Jackson, the non-movant, there does not appear to be a genuine issue of material fact whether the defendants were deliberately indifferent. The evidence demonstrated that Jackson did not have a serious medical condition and that the surgery he underwent for the condition was purely elective.

Even if Jackson had presented sufficient evidence of a serious medical need, he did not present any proper summary judgment evidence evincing wanton actions on the part of the defendants demonstrating deliberate indifference to his serious medical need. Although Jackson may not have initially received the kind of treatment he would have preferred, the defendants did adequately

treat his serious medical need. Jackson was given an icepack and ibuprofen immediately after the alleged incident, received medical attention from a nurse and doctor shortly thereafter, was diagnosed with the fracture in short order, and was offered elective surgery procedures to correct his condition. The district court did not err in granting summary judgment for the defendants on Jackson's assertion of unconstitutional delay of medical treatment.

C.

Warden Sam stated in his affidavit that at no time prior to May 7, 1992, when Joseph allegedly hit Jackson in the face with a plastic cup, did Jackson advise him that he was being threatened by anyone or that he was in fear of his personal safety. Additionally, Sam stated that he had no knowledge that Jackson requested to anyone that he be transferred or moved from his cell block. Sam further stated that at no time prior to the alleged incident was he aware of problems between Joseph and Jackson. Sam also stated that the jail has written policies concerning the classification and cell assignment of prisoners and that the primary concern of cell assignment is the safety of the inmate and the security of the jail. A copy of the jail's procedures was attached to the motion for summary judgment.

Sheriff Zerrangue stated in his affidavit that, prior to the alleged incident of May 7, 1992, he was not aware of any problems between Jackson and Joseph or that Jackson was threatened by anyone, was in fear for his safety, or had made any requests for

transfer out of his cell block. Deputy Sheriffs Arceneaux and Soileau stated in their affidavits that Jackson informed them on May 7 that Jackson had fallen in the shower. However, Arceneaux and Soileau stated that upon continued questioning, Jackson changed his story and said that he was struck in the face with a plastic cup by Joseph. Arceneaux and Soileau stated that at no time before May 7 were they aware that there were any problems between Jackson and Joseph, that Jackson was threatened by anyone, that he was in fear of his safety, or that he had requested a transfer out of his cell block.

Looking at the evidence in the light most favorable to Jackson, there does not appear to be a genuine issue of material fact whether the defendants were deliberately indifferent to Jackson's need for protection. The evidence presented to the district court demonstrated that none of the defendants were aware that Jackson faced any substantial risk of serious harm from Joseph.

Although Jackson stated in his opposition to the magistrate judge's report and recommendation that Sam knew that cups were being used as weapons, Jackson did not present any proper summary judgment evidence demonstrating this assertion. Even if Jackson had presented proper evidence of this fact, it would still not have demonstrated that Sam or the other defendants were aware that Jackson faced substantial risk of serious harm from Joseph. The district court did not err in granting summary judgment for the defendants on Jackson's failure-to-protect claim.

AFFIRMED.