

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41341
Summary Calendar

CLIFFORD CHESTER SIAS, JR.,

Plaintiff-Appellant,

versus

STAT CARE and UP PROCTOR, Dr.,

Defendants-Appellees.

Appeal from the United States District Court
for the
Eastern District of Texas
(1:94-CV-451)

(April 26, 1995)

Before JOHNSON, BARKSDALE , and PARKER, Circuit Judges.

JOHNSON, Circuit Judge:¹

Clifford Chester Sias, Jr. ("Sias") brought this section 1983 suit, alleging that Stat Care and Dr. UP Proctor ("Dr. Proctor") violated his civil rights by being deliberately indifferent in providing him with prison medical care. After allowing Sias an opportunity to amend his complaint so as to clarify his section 1983 claims, the district court dismissed the suit against both

¹Local 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 Pursuant to this Rule, the Court has determined that this opinion should not be published.

defendants on the ground that Sias lacked an arguable basis in fact or law for his section 1983 claims. Because we believe that the district court did not abuse its discretion in dismissing the claims as frivolous, we affirm.

I. Facts and Procedural History

At the time of the incidents giving rise to this suit, Sias was a state prisoner in the Jefferson County Jail in Beeville, Texas. While in the prison's recreation area on March 12, 1994, Sias injured his foot. Sias went to the prison infirmary,² and the duty nurse treated his foot with ice and told him that he would see the doctor on March 14, 1994. March 14th came and went without Sias seeing a doctor. Sias filled out requests to see the doctor everyday after the fourteenth until another nurse called upon him in his cell on March 22, 1994 and scheduled him to see the doctor on the following day. On March 23, 1994, Sias went to see Dr. Proctor about his foot injury. Dr. Proctor looked at his foot, diagnosed the injury as a sprain, gave Sias an ace bandage with which to wrap his foot, and instructed Sias to take the pain-killer Motrin for a period of one week.

Sias claims that his pain was not relieved and that he made daily requests to again see the doctor until April 28, 1994 when a nurse again called on him and again scheduled him to see the doctor. On April 29, 1994, Sias went to see Dr. Gupta who ordered x-rays for Sias' foot. The x-rays revealed that Sias had a

²All prison medical care is provided under the authority of defendant Stat Care. The nurses of whom Sias is complaining in this case worked for Stat Care.

fractured fifth metatarsal. As a result of the x-rays, Sias received a cast for his foot on May 4, 1994.

Sias filed this section 1983 suit, claiming that both Dr. Proctor and Stat Care violated his civil rights by being deliberately indifferent in providing him with health care. Sias claims Dr. Proctor was deliberately indifferent in failing to order x-rays immediately upon the March 23, 1994, visit. Sias claims Stat Care was deliberately indifferent both by failing to provide him with a doctor's examination on March 13, 1994 and by failing to provide him with a second doctor's examination after Dr. Proctor misdiagnosed his injury.

After having Sias file a more definite statement under FED. R. CIV. P. 12(e) by answering several specific questions, the magistrate judge recommended dismissing Sias' complaint as frivolous because the alleged conduct of Stat Care and Dr. Proctor amounted to negligence and not to deliberate indifference. After conducting a de novo review of the record, the district court followed the magistrate judge's recommendation and dismissed the suit as frivolous pursuant to 28 U.S.C. § 1915(d). Sias now appeals that dismissal.

II. Discussion

This Court will only vacate a district court's section 1915(d) dismissal if the district judge has abused his or her discretion in dismissing the case. *Booker v. Koonce*, 2 F.3d 114, 115 (5th Cir. 1993). An in forma pauperis complaint may be dismissed as frivolous pursuant to section 1915(d) if it lacks an arguable basis

in law or fact. See *id.*

A prison inmate can obtain relief under 42 U.S.C. § 1983 on the ground of denial of medical care if the inmate can prove that there was deliberate indifference to his serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995). Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. *Estelle*, 429 U.S. at 104-05. The Supreme Court has recently adopted "subjective recklessness as used in the criminal law" as the appropriate definition of deliberate indifference under the Eighth Amendment. *Reeves v. Collins*, 27 F.3d 174, 176 (5th Cir. 1994) (quoting *Farmer v. Brennan*, 114 S. Ct. 1970, 1980 (1994)).

[A] prison official cannot be found liable under the Eighth Amendment . . . 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, 114 S. Ct. at 1979. Under exceptional circumstances, a prison official's knowledge of a substantial risk of harm may be inferred by the obviousness of the substantial risk See *id.* at 1981-82 and n.8. A mere disagreement with one's medical treatment is not sufficient to state a section 1983 cause of action. *Varnado v. Lynaugh*, 920 F.2d 320, 31 (5th Cir. 1991).

Under the facts alleged by Sias against Dr. Proctor and Stat Care, the deliberate indifference standard is not met. Sias' claims against Dr. Proctor are based on the doctor's diagnostic and examination techniques. Dr. Proctor's decision not to touch Sias'

foot nor to order x-rays as part of the examination process cannot serve as the basis for an Eighth Amendment claim.

Neither do Sias' claims against Stat Care rise to the level of a constitutional violation. There is absolutely nothing in the record to indicate that Stat Care *intentionally* delayed its response to the medical needs of Sias or any other inmate. Without such subjective recklessness, the negligence alone of Stat Care nurses in failing to ensure that Sias promptly saw a physician cannot serve as the grounds for a section 1983 claim.

III. Conclusion

Under the circumstances of this case, we are unwilling to find that the district court abused its discretion in dismissing Sias' section 1983 claims. Therefore, we affirm the dismissal.

AFFIRMED.