

IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-50391
(Summary Calendar)

ROBERT LITTLE, JR.,

Plaintiff-Appellant,

versus

CON KEIRSEY, Et Al.,

Defendants-Appellees.

Appeal from United States District Court
for the Western District of Texas
(A-91-CA-586-SC)

(October 6, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff, Robert Little, Jr., a Texas state prisoner, appeals the summary judgment entered in favor of the defendants, the Sheriff of Bastrop County and several guards at the Bastrop County Jail. We affirm in part, vacate in part and remand further proceedings.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS

Robert Little, Jr., a Texas state prisoner, filed this 42 U.S.C. § 1983 action against Con Keirse, the Sheriff of Bastrop County, Bastrop County Jail guards Robert Jones and Windell Hayes, and three unknown Bastrop County Jail employees. Little contended that the conditions of his confinement while he was a pretrial detainee in the Bastrop County jail were unconstitutional and that the defendants denied him medical care for his serious medical needs. Little's complaint, as amended, alleged that from June 22, 1990, until July 10, 1990, he was subjected to inhumane conditions of confinement and that the conditions caused nausea, repeated vomiting, a body rash, and weight loss.

Specifically, Little alleged that the floor of his cell was constantly covered with water, urine, and human excrement from the overflowing toilet in his cell. He further alleged that the lack of windows and inadequate ventilation caused a stench from this mixture, which, in turn, inhibited him from eating and induced him to vomit. Little alleged that his shoes were constantly soaked from this foul mixture and that he developed a body rash from the extreme heat in his cell. Little also alleged that he requested cleaning supplies but that the defendants gave him only a dirty mop which he was allowed to use for a few minutes in the morning but which was inadequate to clean his cell. Little alleged that he was not allowed to shower and was not provided with a change of clothing, soap, toothpaste, or toothbrush. Additionally, Little

alleged that he slept on a concrete slab until he complained and was provided with a mattress. Finally, Little alleged that the defendants denied his requests to telephone his terminally ill mother and that Hayes told Little that "`maybe death is the best thing [for your mother].'" According to Little, the defendants did not change the inhumane conditions and did not provide medical care for his physical ailments despite his repeated requests for medical attention.

The defendants asserted that they were entitled to qualified immunity. The magistrate judge entered summary judgment in favor of the defendants and dismissed Little's action with prejudice. Little filed a document entitled "Motion for New Trial" in which he asserted that the magistrate judge erred by not considering his affidavit as summary judgment proof. The magistrate judge entered an amended opinion and order denying the motion for new trial and detailing his reasons for granting the motion for summary judgment. The magistrate judge also entered another judgment pursuant to the amended opinion and order which again dismissed Little's § 1983 action with prejudice.

Little filed a motion for consideration of his sworn affidavit and another "Motion for New Trial" again contesting the court's failure to consider his signed, sworn affidavit. The magistrate judge granted the motion to consider Little's sworn affidavit, but denied the second motion for new trial, contending that the information contained in the sworn affidavit did not change the

court's decision.¹ Little filed a timely notice of appeal from the second judgment.²

The magistrate judge granted the motion of Little's court appointed attorney to withdraw from his representation of Little and granted Little's motion to proceed in forma pauperis (IFP) on appeal.

STANDARD OF REVIEW

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." Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991) (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.

¹Because we find that the sheriff is entitled to qualified immunity and that summary judgment was improper as to the other defendants, we do not address Little's challenge to the denial of his motions for new trial.

²Little's first "Motion for New Trial" is properly considered a timely filed Fed. R. Civ. P. 59(e) motion for reconsideration of the summary judgment. Little's second "Motion for New Trial" is considered a timely filed Rule 59(e) motion for reconsideration of the second judgment from the amended opinion and order. The amended opinion reconsiders and details the court's reasons for granting summary judgment. Therefore, Little's timely notice of appeal of the second judgment stemming from the amended opinion allows him to raise issues regarding the court's underlying grant of summary judgment for the defendants. See Fed. R. App. P. 4(a)(4).

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). This Court reviews de novo the magistrate judge's summary judgment determination. See Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 912 (5th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 98, 121 L.Ed.2d 59 (1992).

DISCUSSION

Little argues that the magistrate judge erred in granting the summary judgment against his 42 U.S.C. § 1983 action. Subsumed within that argument is Little's contention that the magistrate judge used the wrong legal standard in granting summary judgment for the defendants. He contends that he was a pretrial detainee during the time in which his action arose, and therefore, he was entitled to have his claims analyzed under the Fourteenth Amendment. Instead, he argues, the magistrate judge incorrectly considered him to be a convicted prisoner and erroneously analyzed his claims under the Eighth Amendment.

We note that the defendants argue that Little does not contest the magistrate judge's grant of summary judgment for them in their official capacities, but instead, challenges only the magistrate judge's grant of summary judgment for the defendants in their individual capacities. The defendant's contention is supported by Little's insistence that the magistrate judge erred in granting summary judgment for the defendants only in their individual capacities. It appears that Little has abandoned the issue of any

error by the magistrate judge in dismissing the defendants in their official capacities. Issues that are not raised on appeal are abandoned. See Weaver v. Puckett, 896 F.2d 126, 128 (5th Cir.), cert. denied, 498 U.S. 966, 111 S.Ct. 427, 112 L.Ed.2d 411 (1990). This Court need not consider whether the defendants were liable in their official capacities.

A. DEFENDANT KEIRSEY

As an initial matter, we conclude that summary judgment was properly granted as to Sheriff Keirsey. 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). Little's allegations are that Keirsey should have known about the conditions of confinement and the lack of medical treatment; he does not allege any personal knowledge of, or direct action or omission by, the sheriff. Little never presented proper summary judgment evidence that contradicts Keirsey's evidence that he was unaware of Little's confinement condition or problems receiving medical treatment. The summary judgment evidence demonstrates at most a claim of vicarious liability against Keirsey. Thus, because vicarious liability does not support a claim under § 1983, Keirsey is entitled to summary judgment as a matter of law.

B. REMAINING DEFENDANTS

1. Conditions of Confinement

Little argues that the conditions of his confinement, as detailed above, violated his constitutional rights as a pretrial detainee. The magistrate judge treated Little as a convicted

prisoner and analyzed Little's complaint under the Eighth Amendment.

a. Status of the Prisoner

Little's status is unclear because he was arrested for a new crime while on parole for another offense. In Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993), this Court noted that the fact that Rankin was on parole from an earlier sentence and conviction at the time of his arrest "would seem to warrant review [as a convicted prisoner] under the Eighth Amendment's prohibition against cruel and unusual punishment." Id. However, Rankin did not conclusively determine this issue because Rankin involved an excessive force claim in which the standards were the same regardless whether the Eighth or the Fourteenth Amendment applied. Id.

We must, therefore, analyze the differences in the constitutional standards regarding Little's confinement and medical care. The Eighth Amendment affords prisoners protection against exposure to egregious physical conditions that deprive them of basic human needs. See Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). "[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Id.

On the other hand, if Little's claim is analyzed as if he were a pretrial detainee, the issue is whether conditions accompanying

pretrial detention "amount to punishment of the detainee . . . [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.

Although the standards regarding confinement and medical care are not the same under the Eighth and Fourteenth Amendments, we need not determine under which amendment Little's claims should be analyzed because Little's allegations are egregious enough to support a claim under either standard. We do not attempt to gloss over the pretrial/convicted distinction in the present case. We are not compelled to determine whether Little's "parole" qualifies him as a pretrial detainee or a convicted inmate because Little's allegations are serious enough to satisfy the more stringent Eighth Amendment standard and therefore simultaneously satisfy the lesser Fourteenth Amendment standard.³

b. Qualified Immunity Analysis

This Court "engage[s] in a bifurcated analysis" when assessing a claim of qualified immunity. Rankin, 5 F.3d at 105. The Court

³For a general discussion of the debate within this Circuit on the distinction between pretrial detainees and convicted inmates see the majority and dissenting opinions in Grabowski v. Jackson County Public Defenders Office, 47 F.3d 1386 (5th Cir. 1995), reh'g en banc granted, 47 F.3d 1386 (5th Cir. March 14, 1995). The Court also granted rehearing en banc in Hare v. City of Corinth, 36 F.3d 412 (5th Cir. December 8, 1994), which may decide whether the "reasonable care" standard applies outside of the context of a pretrial detainee's medical care.

first "determine[s] whether the plaintiff has `allege[d] a violation of a clearly established constitutional right.'" Id. (citation omitted). If so, this Court then decides whether the defendant is entitled to immunity from suit because his conduct was objectively reasonable in the light of the law as it existed at the time of the conduct in question. Id. at 105, 108. The law in effect at the time of the offense is used to evaluate the reasonableness of the defendants' conduct and to ascertain the defendants' eligibility for qualified immunity. Id. at 108.

Affidavits from Keirse, Jones, Hayes, and a plumber directly contradict Little's allegations. Keirse's affidavit indicates that he never noticed a stench or strong odor emanating from Little's cell. Keirse also said that no toilet in the old jail, including Little's commode, was allowed to constantly run over or leak. Plumbing problems were addressed by trustees or an outside plumbing company in a timely manner. Keirse further stated that on or about June 25, 1990, a plumber came to the jail and repaired the commode in cell #117, where Little was confined.

Keirse also stated in his affidavit that all inmates, including Little, were supplied with clean towels and sheets on a regular basis. Inmates had access to facilities to wash their own clothes. Additionally, all inmates were provided with soap, toothpaste, toothbrushes, and razors upon request. In fact, Little used one of the razors provided by the jail as a weapon in escaping from the jail on July 10, 1990. Little cut Hayes with the knife during his escape, and Hayes needed stitches to close the wound.

Keirsesey's affidavit also explained that jail policy allowed inmates to use the telephone once each week. However, the jail records indicated that on May 22, 1990, Little refused to make a telephone call. Hayes, a jailor at the Bastrop jail during Little's confinement, stated that he could not recall any time when Little asked to call his mother or said that his mother was ill.

Jones, a corrections officer during the time Little was confined in the Bastrop County Jail, added that urine and feces were not allowed to remain on the cell floors. Mops and cleaning equipment were provided to inmates if there was an overflowing toilet, and inmates were moved to another cell until the problem was corrected. Jones stated that he never had to remove Little from his cell due to flooding problems and that Little never complained to Jones that his cell was flooded, that there was fecal matter on the floor, or that he needed cleaning materials for his cell. Similarly, Hayes reiterated that inmates were given materials to clean their cells during Little's stay in the jail, and the areas were inspected when the cleaning supplies were retrieved. Hayes also stated that although he and others did not do "white glove" inspections, they did not tolerate filth.

Additionally, Hayes explained that although the employees did not force Little to shower, Little had regular opportunities to shower. Further, Jones added that Little had a sink in his cell to clean himself if he did not shower.

Roger Osborn, the owner of Osborn Plumbing, Inc., stated in his affidavit that his company was employed by Bastrop County to

correct plumbing problems in the old jail. Osborn stated that on June 25, 1990, he was called out to repair the commode in cell # 117. The bill indicates that he provided one hour of service in cell # 117. Osborn stated that although the jail's plumbing was old, he was always able to take care of the immediate problem.

Little stated in his deposition that his cell contained a commode, a wash basin, and a concrete slab for the bunk area. Little's statements in his sworn affidavit maintained his allegations in his complaint that the floor of his cell was constantly soaked with a mixture of water, urine, and excrement, and that the resulting stench and heat from the inadequate ventilation caused him nausea, vomiting, a body rash, and lack of sleep. Little's statements also maintained his allegations that he was not supplied with adequate cleaning materials, clean clothes, soap, toothpaste, a toothbrush, or the ability to shower. Little stated in his affidavit that he complained daily about the inhumane conditions in his cell to Hayes, Jones, and other jail employees and was informed that his complaints had been relayed to Keirse. Further, Little said that Keirse should have known of the conditions of Little's cell because Keirse's office was close to his cell and because Little had informed seven or eight employees of his cell conditions.

Looking at the evidence in the light most favorable to Little, the non-movant, and looking at both the Eighth and the Fourteenth Amendments' standards of review, there appears to be a genuine issue of material fact whether Little was confined in conditions

that were either cruel and unusual or amounted to punishment prior to an adjudication of guilt. Little's sworn affidavit presents evidence directly contradicting the defendants' evidence. Whether the defendants' evidence is more credible than Little's is not a proper question at the summary judgment phase. The disputed issues make it impossible to analyze either prong of the qualified immunity test because it is not clear whether the defendants have violated Little's constitutional rights. Accordingly, the defendants cannot demonstrate that as a matter of law, they are entitled to a judgment in their favor. Therefore, under the summary judgment standard, Little demonstrated a genuine issue of material fact as to his cell conditions, and the magistrate judge erred in granting summary judgment on this claim.

2. Lack of Medical Care

Little argues that his conditions of confinement caused serious medical needs and that the defendants acted with deliberate indifference to these medical needs by failing to provide adequate medical care.

a. Status of the Prisoner

As explained earlier, it is unclear whether Little's paroled status placed him in the category of a pretrial detainee or of a convicted prisoner. Under the Fourteenth Amendment, "[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, 835 F.2d at 85; Fields v. City of South Houston, 922 F.2d 1183, 1191 (5th Cir. 1991); Bell, 441 U.S.

at 539. Under the Eighth Amendment, prison officials owe a duty of care to imprisoned convicts that is similar to the Fourteenth Amendment's duty to pretrial detainees. Cupit, 835 F.2d at 85. This duty is similar to the conditions of confinement standard of care. As observed by the United States Supreme Court:

[T]he medical care a prisoner receives is just as much a "condition" of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates. There is no indication that, as a general matter, the actions of prison officials with respect to these nonmedical conditions are taken under materially different constraints than their actions with respect to medical conditions.

Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321, 2326-2327, 115 L.Ed.2d 271 (1991) (citations omitted). Here, Little's allegations, when viewed in the light most favorable to him, the non-movant, are serious enough to present a violation under the more stringent constitutional standard and hence the lesser standard is also satisfied. Thus, we decline the invitation to resolve the issue of Little's status because it is not necessary to address the medical care issue before us.

b. Qualified Immunity Analysis

The same bifurcated analysis as explained above applies to Little's lack-of-medical-care claim in face of the defendants' assertion of qualified immunity. See Rankin, 5 F.3d at 105, 108.

Keirsey stated in his affidavit that he was unaware of the alleged denial of requests for medical attention for Little because neither his employees nor Little informed him of any requests or denials. Keirsey indicated that it was his policy to

be advised of inmates who complain repeatedly and to provide access to medial treatment even if the need was doubtful. Additionally, Keirsey stated that Little did not report any medical, health, or other physical problems on the forms that he completed each time he was transferred to Caldwell County. The dates of the forms range the entire time complained of by Little, and all of the forms indicate a negative response to questions of any illness or injury or any need for medical aid.

Jones stated in his affidavit that he was not aware that Little ever requested medical attention. Hayes stated in his affidavit that it was his duty to transport inmates to the doctor or to the hospital. On numerous occasions, Jones took inmates to the emergency room in the middle of the night even when the situation did not appear to be urgent. Hayes said that to his knowledge, Little never requested to be taken to a doctor. Also, Hayes never saw Little show any symptoms of being sick, never saw him vomit, and never heard that he had an upset stomach.

Little stated in his affidavit and in his complaint that while he was enduring the conditions of his confinement, he developed a skin rash over his body, nausea and vomiting, inability to eat, mental and physical fatigue, and depression. Little further contended that the defendants acted with deliberate indifference to his serious medical needs and ignored his repeated requests for medical attention. Little contended in his response to the defendants' interrogatories that he specifically informed Jones and Hayes on several occasions. Little also stated that when he was

transferred to the Texas Department of Corrections, a doctor prescribed hydrocortisone for his rash and that he was counseled by various prison chaplains regarding his depression.

Looking at the evidence in the light most favorable to Little, the non-movant, and looking at the Fourteenth Amendment standard of review, there appears to be a genuine issue of material fact whether Little received reasonable medical care and whether the defendants were operating under a legitimate governmental objective. The defendants' version of the facts directly contradicts Little's version. As stated earlier, the credibility of the evidence is not decided under the summary judgment standard. Because the disputed issues prevent an evaluation of the two-prong qualified immunity test, the defendants have not proved that they are entitled to judgment as a matter of law. Therefore, the magistrate judge erred in granting the defendants' motion for summary judgment.

CONCLUSION

For the foregoing reasons, we AFFIRM the summary judgment entered in favor of defendant Keirse, we VACATE the summary judgment entered in favor of defendants Jones and Hayes, and we REMAND the case for further proceedings on Little's claims against Jones and Hayes.