

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-50728
Summary Calendar

PEARLIE DAVIS, Individually and
as next friend of Orenthail Davis,
Jr., Lamonth Davis, April Marie
Davis, ET AL.,

Plaintiffs-Appellants,

VERSUS

WILLIAMSON COUNTY, TEXAS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas

(A-93-CA-186)

(June 13, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

In May 1991, Jeffrey Davis died in the Williamson County, Texas, jail. It was alleged that the cause of death was bilateral

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pneumonia, pneumocystis carinii or acquired immune deficiency syndrome (AIDS).

On April 12, 1993, Pearlie Davis, Jeffrey's mother, and Evelyn Leonora Davis, Jeffrey's widow (Plaintiffs), filed suit against jail personnel and treating doctors pursuant to 42 U.S.C. § 1983. Pearlie Davis sued in her individual capacity and as the next friend of Jeffrey Davis' children. Evelyn Leonora Davis, Davis' widow, sued in her individual capacity and on behalf of Jeffrey Davis' estate. Pearlie Davis did not make an application to be the administratrix of Davis' estate until June 18, 1993. Defendants Sheriff Ed Richards, Captain Tommy Simon and Dr. Stephen D. Benold moved for summary judgment. They contended that Pearlie Davis lacked standing to sue on behalf of Davis' estate because the two year Texas statute of limitations had run prior to her being appointed administratrix. They also contended that there was no evidence of neglect or refusal of proper treatment of Jeffrey Davis. In a hearing on the summary judgment motion, the Plaintiffs conceded that they had put forth no evidence in response to the Defendants' motion for summary judgment.

The magistrate judge dismissed Pearlie Davis' claims as administratrix on the grounds that they were barred by the applicable statute of limitations. The magistrate judge also held that the Plaintiffs failed to state a cognizable claim that the Defendants were deliberately indifferent to Davis' serious medical needs. The magistrate judge stated, "The Plaintiffs have failed to allege properly or provide any summary judgment evidence in support

of a claim of inadequate or improper medical treatment that amounts to more than mere negligence, neglect, or medical malpractice." The magistrate judge also found that the Plaintiffs "failed to provide any evidence to establish any relation between [Jeffrey Davis'] death and the policies of Williamson County beyond the fact that [Davis] died while in the custody of Williamson County."¹ The parties had consented to judgment by the magistrate judge in accordance with 28 U.S.C. § 636(c). This appeal is from the magistrate judge's judgment.

OPINION

Pearlie Davis argues that the magistrate judge erred in dismissing her claims as the administratrix of her son's estate. Congress has not provided a statute of limitations in § 1983 cases; therefore, federal courts borrow the forum state's general personal injury limitations period. See Owens v. Okure, 488 U.S. 235, 249-50 (1989) (equating § 1983 claims with personal injury actions because both remedy injuries to personal rights). In Texas, the pertinent limitation period is two years from the day the cause of action accrues. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon 1986) ("A person must bring suit for . . . personal injury . . . not later than two years after the day the cause of action accrues."); see also Rodriguez v. Holmes, 963 F.2d 799, 803 (5th

¹ The magistrate judge found that Benold and Simon were entitled to qualified immunity. Because the Plaintiffs failed to present any evidence of a constitutional violation, the qualified-immunity issue need not be reached.

Cir. 1992) (borrowing two year statute of limitations from Texas law for § 1983 case).

Pearlie Davis contends that--notwithstanding the expiration of the statute of limitations--her amendment naming her as administratrix "relates back" to her original complaint.

[A]n amendment relates back if the law providing the statute of limitations applicable to the action permits it. FED. R. CIV. P. 15(c)(1). The advisory committee notes accompanying the 1991 amendment to Rule 15(c)(1) explain that if the forum providing the statute of limitations "affords a more forgiving principle of relation back than the one provided in th[e] rule," the state rule should be used to save the amendment. FED. R. CIV. P. 15 advisory committee's note (1991 amendment). However, Texas law does not permit relation back of an amendment when, as here, the plaintiff attempts to add a new party after the expiration of the statute of limitations.

Clark v. Hawkins, No. 93-1704, slip op. at 6 (5th Cir. Nov. 24, 1994) (citing Kirkpatrick v. Harris, 716 S.W.2d 124, 125 (Tex. App.))Dallas 1986, no writ)).

Nevertheless, a change in the suing capacity of the plaintiff after a limitations period has expired is acceptable. Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666, 668 n.3 (11th Cir. 1991) (citing Longbottom v. Swaby, 397 F.2d 45, 48 (5th Cir. 1968)). "[A]mendment in the description of the party plaintiff, and relation back, is allowed after limitations have run if what is involved is mere change in the description of the capacity in which plaintiff sues." Longbottom, 397 F.2d at 48. Although state law governs the rules of capacity, "relation back" under Rule 15(c) is a matter of federal procedure. Glickstein, 922 F.2d at 671 n.9.

Thus, the magistrate judge erred in concluding that Pearlie Davis' claims as administratrix were barred by the Texas statute of limitations. Nevertheless, remand is not required. See Rhyne v. Henderson County, 973 F.2d 386, 388, 391 (5th Cir. 1992) (directed verdict in favor of defendant; plaintiff's capacity irrelevant because plaintiff was not entitled to go to the jury on the underlying constitutional claim).

Summary judgment is reviewed de novo under the same standards the trial court applies when determining whether summary judgment is appropriate. 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 nonmovant, "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.; FED. R. CIV. P. 56(c). "Furthermore, the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (internal quotation and citation omitted). If the movant cannot meet this initial burden, the motion must be denied irrespective of the response of the nonmoving party. However, if the movant does meet this burden, the nonmoving party "must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." Id.

The Defendants brought forth the following summary judgment evidence. At the time of his death, Davis was serving a sixty day

sentence for failure to pay child support and failure to appear for a child support hearing. The commitment order specified that Davis was to be confined for sixty days or until an arrearage of \$1,200 was paid toward the child support. Davis began serving his sentence on April 23, 1991. A medical history was taken at the time that Davis was booked into prison, but Davis denied any drug addiction, HIV infection or other health problems.

Pearlie Davis testified that Jeffrey called her on April 24, but he did not mention any health problems. Pearlie Davis stated that she visited Jeffrey on April 27 and that Jeffrey told her that he did not feel well. During that visit, Jeffrey requested some Roloids for an upset stomach. Pearlie Davis also testified that Jeffrey reported a pain in his chest. Davis' father testified that he did not notice whether Jeffrey was sick before he went to jail. He also testified that Jeffrey complained of chest pains and had a mild fever.

Nelda Sue Baker, an officer in the jail's medical department, stated in an affidavit that she first saw Davis on May 1. On that date, Davis was running a fever of 102.6 degrees. Officer Baker had Davis moved to the infirmary and ordered that Davis be treated with Tylenol to reduce the fever. Officer Baker told infirmary attendants to transport Davis to the emergency room if his temperature reached 103 degrees. Baker examined Davis later that day. Davis specifically denied ever having used intravenous drugs. Baker stated that by the following day Davis' fever was down to 100.6 degrees and his blood pressure was within the normal range.

Dr. Stephen D. Benold stated in an affidavit that he examined Davis during the scheduled doctor's call on May 3, 1991. During the examination, Davis complained of fever, headache, malaise and other flu-like symptoms. Dr. Benold stated that he performed a physical examination which consisted of an examination of Davis' nose, mouth and throat; palpation of his neck; auscultation of the lungs; and a general observation of Davis' physical appearance and orientation. Dr. Benold noted no abnormal symptoms. Dr. Benold concluded that Davis' symptoms were consistent with an upper respiratory viral infection. Dr. Benold prescribed 500 milligrams of Ampicillin to be administered four times a day for ten days; he also continued the treatment of Davis' fever with Tylenol.

On May 4, Davis' mother and sister visited him at the infirmary. Davis' sister testified at a deposition that Jeffrey stated that he felt better at that visit. Officer Baker stated in an affidavit that on May 4 Davis' temperature was down to 98.6 degrees and that Davis did not complain of discomfort or health problems.

Pearlie Davis stated that Jeffrey called her on the evening of May 8 and complained of being ill. Pearlie Davis stated that she called the jail and that Captain Tommy Simon told her that he would take Jeffrey to the hospital. Pearlie Davis complained that Officer Tommy Simon was not nice on the phone and that he did not see that her orders were carried out.

Officer Baker stated that on May 8 Jeffrey complained that the medication he was taking was upsetting his stomach and he requested

to be returned to a liquid diet. She stated that the medication log reflected that Jeffrey refused his medication at 1:30 and 6:00 p.m. that day. At about nine o'clock that evening, Davis' temperature had elevated to 103.4 degrees and his blood pressure dropped. Shortly thereafter, Davis was transported to the emergency room at the Georgetown Hospital.

Dr. James Curtis Pettit, Jr. testified at a deposition that he treated Jeffrey Davis on the evening of May 8, 1991. Dr. Pettit testified that Jeffrey stated that he had been sick for about a week. A jailer or an ambulance worker informed the doctor that Davis had been ill for about a week, that he had a fever, that he had been treated by the jail doctor with Ampicillin, that the fever had improved and that Davis had stopped taking his Ampicillin for a couple of doses and the fever had returned. Dr. Pettit examined Davis, noted that his temperature was 103.6, and prescribed Tylenol to lower his temperature. Dr. Pettit testified that a chest X-ray did not look significant and that Davis' white cell count was 8,100, which was within a "pretty normal distribution." Dr. Pettit agreed with the previous diagnosis of an upper respiratory infection or bronchitis. By the time Davis was discharged his temperature had lowered to 101. Dr. Pettit gave Davis a shot of penicillin because of Davis' refusal to take oral medication. Dr. Pettit released Davis, but called him back because there was some question about Davis' blood sugar level. An evaluation was done, but it turned out that Davis' blood sugar level was fine.

Dr. James Mark Shepherd testified at a deposition that he performed the blood sugar test. Shepherd testified that the nurse who re-admitted Davis noted that Davis had a ten year history of drug abuse, including intravenous drug use. Dr. Shepherd requested a completed blood count, thyroid panel, a hepatitis profile and an AIDS test. Dr. Shepherd testified that it appeared that Davis was suffering from the flu or a chest cold. Dr. Shepherd stated that an X-ray revealed that Davis had a very minimal haziness in his lower left lung. Dr. Shepherd prescribed Erythromycin and Tylenol for the fever. When Davis was released to the jail later that day, his fever was 101.9. Davis died later that night.

The key elements under § 1983 that the Plaintiffs must establish are that a constitutional violation occurred and that the named Defendants were responsible for the violation. Under the Eighth Amendment, prison officials owe a duty of care to imprisoned convicts that is similar to the Fourteenth Amendment duty to pretrial detainees. Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987). "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). Deliberate indifference is established by the delay or denial of appropriate medical care or through the unnecessary infliction of pain. Id. at 104. The denial of recommended care may, in some situations, reflect deliberate indifference. Payne v. Lynaugh, 843 F.2d 177, 178 (5th Cir. 1988).

"The Supreme Court 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, 1979-80 (1994)). A prison official is not deliberately indifferent "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." Reeves, 27 F.3d at 176 (citing Farmer, 114 S. Ct. at 1981-82 and n.8). Mere negligence will not suffice to support a claim of deliberate indifference. See Jackson v. Cain, 864 F.2d 1235, 1246 (5th Cir. 1989). Adequate medical record evidence of sick calls, examinations, diagnosis and medication may rebut allegations of deliberate indifference. See Mendoza v. Lynaugh, 989 F.2d 191, 193 (5th Cir. 1993).

The fact that a particular treatment is unsuccessful does not of itself give rise to a § 1983 action. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). That a prisoner disagrees with the course of treatment does not make the treatment improper. Id.

The submitted evidence demonstrates that the Defendants met their burden of showing that Davis received reasonable medical care and that prison officials were not deliberately indifferent to

Davis' serious medical needs. Little, 37 F.3d at 1075. Thus, the Defendants shifted the burden to the Plaintiffs to "designate specific facts showing that there is a genuine issue for trial." Little, 37 F.3d at 1075.

The Plaintiffs, as nonmovants, submitted no affidavits, depositions, answers to interrogatories or admissions in response to the Defendants' motion for summary judgment. Instead, the Plaintiffs "adopted and incorporated" the summary judgment evidence of the Defendants, listed the medical treatment Davis received and made a conclusory allegation that an issue of fact was evident. At a hearing on the motion for summary judgment, the Plaintiffs conceded that the only evidence before the magistrate judge was pleadings and an allegation that the Defendants' affidavits were self-serving.

A nonmoving party may not rest upon mere allegations or denials in the pleadings, but must designate specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, 477 U.S. 242, 256-57 (1986). The mere allegation of a factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id. at 248-50, 256-57. The Defendant's summary judgment evidence, particularly the prison medical records, demonstrate continuous and legitimate treatment. The Plaintiffs have failed to identify any specific facts that could lead to a conclusion that the Defendants were deliberately indifferent to Davis' medical needs or that the Defendants failed to provide reasonable medical treatment. The

Defendants were entitled to judgment as a matter of law; the magistrate judge's grant of summary judgment is AFFIRMED.