NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2992

BARRY JONES,
Appellant

v.

DR. PAUL NOEL;
DR. HARESH PANDYA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 3-19-cv-00004)
District Judge: Honorable Jennifer P. Wilson

Submitted Pursuant to Third Circuit LAR 34.1(a)
April 17, 2024
Before: SHWARTZ, RESTREPO, and FREEMAN, Circuit Judges

(Opinion filed: April 22, 2024)

OPINION[*]

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[*] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Barry Jones appeals the District Court's order granting Appellees' motion for summary judgment. For the reasons that follow, we will vacate the District Court's order and remand for further proceedings.

Jones, a Pennsylvania prisoner, filed a complaint alleging that Appellee Dr. Paul Noel, the Chief of Clinical Services for the Pennsylvania Department of Corrections ("DOC") and Appellee Dr. Haresh Pandya, the medical director at Jones's prison, were deliberately indifferent to his Hepatitis C. Jones alleged that Appellees failed to treat his Hepatitis C with direct-acting antiviral drugs ("DAADs") until he developed cirrhosis. Appellees filed motions for summary judgment which the District Court granted. Jones filed a timely notice of appeal.

We have jurisdiction under 28 U.S.C. § 1291 and review the District Court's order granting summary judgment de novo. Burns v. Pa. Dep't of Corr., 642 F.3d 163, 170 (3d Cir. 2011). A party moving for summary judgment must show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To determine whether the movant has satisfied this burden, "we view the facts and draw all reasonable inferences in the light most favorable to the nonmovant." Pearson v. Prison Health Serv., 850 F.3d 526, 533 (3d Cir. 2017). "Material facts are those that could affect the outcome of the proceeding, and a dispute about a material fact is genuine if the evidence is sufficient to permit a reasonable jury to return a verdict for the non-moving party." Id. at 534 (internal quotations omitted).

Jones states that he was diagnosed with Hepatitis C in 1990 and was previously treated with Interferon and Ribavirin. Unfortunately, the treatment was not effective and was discontinued. Jones alleged that he requested the DAADs when he learned of them but that Appellee Pandya told that him that the drugs were too costly. Instead, he was monitored, and eventually, after tests indicated that Jones had developed cirrhosis, he was approved for treatment with DAADs. That treatment was then delayed while Jones switched to a seizure medication that was compatible with the DAADs. Although the treatment was successful, Jones argued that he suffers from irreparable liver damage, has a higher risk of liver cancer, and has a continuing skin condition caused by Hepatitis C.

The District Court began its analysis by setting forth what it believed were the material facts. It noted that the FDA had approved the DAADs in 2011 and that the drugs were very effective with a 90-95 percent success rate but also very costly. It observed that the American Association for the Study of Liver Disease ("AASLD") and the Infectious Disease Society of America recommended in 2015 that nearly all patients with chronic Hepatitis C receive DAADs. The District Court described the protocols developed by the DOC to prioritize which prisoners with Hepatitis C would receive DAADs and the medical criteria used for this determination. Dr. Noel developed the DOC's protocols for the treatment of inmates with Hepatitis C and determined whether inmates were to be treated with the DAADs. If an inmate was not treated with DAADs, the inmate would be periodically monitored, examined, and tested. Dr. Pandya was one of Jones's treating physicians.

The District Court stated that there was no dispute that Dr. Noel followed the DOC's protocols. In response to Jones's argument that, under the protocols, a prisoner would never be treated if his disease never becomes severe enough, the District Court pointed out that the protocols had been updated and the criteria for treatment had changed to allow prisoners with less severe disease to receive treatment. The District Court concluded that Dr. Noel had not been deliberately indifferent to Jones's medical needs.

The District Court then turned to Jones's claim against Dr. Pandya. Noting Jones's argument that he should have been treated earlier based on the AASLD's recommendation, the court characterized his challenge as a disagreement with the particular course of treatment, which it believed was not a basis for a claim of deliberate indifference. The court concluded that Jones had not established that Dr. Pandya had been deliberately indifferent to his medical needs.

In order to establish a claim under the Eighth Amendment for denial of medical care, Jones needed to show that the Appellees were deliberately indifferent to his serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A medical need is serious if it is "one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." Monmouth Cty Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (citation omitted). The parties agree that Jones's Hepatitis C is a serious medical need. Thus, the issue is whether Appellees have met their burden of showing that there is no dispute of material fact and they were not deliberately indifferent as a matter of law. As explained below, they have not met that burden.

Officials are deliberately indifferent when they are actually aware of a substantial risk of serious harm to a prisoner and disregard that risk. See Farmer v. Brennan, 511 U.S. 825, 837 (1994). Simple disagreement regarding the appropriate medical treatment is not sufficient to establish deliberate indifference. Pearson, 850 F.3d at 535. "[W]hen medical care is provided, we presume that the treatment of a prisoner is proper absent evidence that it violates professional standards of care." Id. We have set forth several ways in which deliberate indifference to inmates' medical needs could be manifested, including delay of necessary medical treatment for non-medical reasons, opting for an easier and less efficacious treatment, or denying access to a physician capable of evaluating the need for such treatment. Lanzaro, 834 F.3d at 346-47. Because the inquiry turns on facts and circumstances specific to each case, whether a defendant's conduct amounts to deliberate indifference has been described as a "classic issue for the fact finder." See A.M. ex rel. JMK v. Luzerne Cnty. Juvenile Det. Ctr., 372 F.3d 572, 587-88 (3d Cir. 2004) (citing Armstrong v. Squadrito, 152 F.3d 564, 577 (7th Cir. 1998)).

As noted above, the District Court concluded that there was no genuine dispute that Dr. Noel followed the protocols and that Jones received monitoring in accordance with the protocols. However, at issue is not whether Drs. Noel and Pandya followed the protocols but whether the medical attention Jones's received was constitutionally adequate. As discussed below, there are genuine issues of material fact regarding this issue.

The parties disagree as to the appropriate standard of care for persons with Hepatitis C. Jones pointed to the recommendation of the AASLD in 2015 that nearly all

patients with chronic Hepatitis C receive DAADs. Appellee Dr. Noel argued that Hepatitis C takes 20-40 years to progress to cirrhosis, and that it is not medically necessary to treat all inmates with Hepatitis C with DAADs. However, the question is whether it was within professional standards of care to not treat Jones with DAADs. Appellees do not point to any evidence in the record that simply monitoring Jones, who had had Hepatitis C for approximately 25 years at the time, until the test results showed cirrhosis—instead of treating him with an effective medication—constituted care within the professional standards for Hepatitis C.

We have held that medical attention in the form of evaluations by specialists does not always constitute acceptable care. In Durmer v. O'Carroll, 991 F.2d 64, 68 (3d Cir. 1993), the physical therapy needed by the inmate plaintiff would only be effective within eighteen months of the strokes he had suffered. The defendant prison doctor instead sent the inmate to be evaluated by a neurologist, a neurosurgeon, and a physiatrist. By the time the inmate saw the physiatrist, physical therapy was not recommended because too much time had elapsed since the strokes and the therapy would not be effective. The inmate alleged that he lost substantial use of his left leg and foot. We reversed the District Court's grant of summary judgment in favor of the doctor. We concluded that there was evidence suggesting that the doctor had a motive for deliberately avoiding physical therapy due to the expense and burden it would place on the prison. Id. We also noted that "[d]iagnosis is not equivalent to treatment; a defendant might be deliberately indifferent to a prisoner's specific medical needs regardless of how many doctors he

sends him to for diagnosis." Id. at 68 n.9. Thus, in some circumstances, simply diagnosing or monitoring a condition is not sufficient.

As noted above, a fact is material if it could affect the outcome of the proceeding and the factual dispute is genuine if a reasonable jury could return a verdict for the non-moving party. Pearson, 850 F.3d at 534. Here, drawing all reasonable inferences in the light most favorable to Jones as the nonmovant, there is a genuine material factual dispute as to whether Appellees' choice to monitor Jones's Hepatitis C, using the methods they chose, instead of treating it with DAADs, constituted adequate care.

There is also a genuine factual dispute regarding whether there were non-medical reasons for the delay in Jones's receiving treatment. Jones asserts that there were no medical reasons to delay approving him for treatment with DAADs and states in an affidavit that Dr. Pandya told him that the DAADs were too costly. Thus, he argues, the cost of the DAADs was a non-medical reason that his Hepatitis C treatment was delayed.

Dr. Noel contends that the protocols prioritized treating the sickest inmates first. He asserts that he exercised professional judgment in allocating limited resources. However, he does not suggest that there was limited availability of the DAADs; rather, it appears that the limited resources to which he refers were the funds available to pay for the DAADs. Jones observes that Dr. Noel never stated that cost was not a consideration.

Dr. Pandya argues that "any perceived delay in treatment was a result of disqualifying factors of Mr. Jones' health which were taken into account by his doctors when exercising their medical judgment in deciding he was not a candidate for treatment at that time." Br. at 21. However, besides the need to change Jones's seizure medication,

it is not clear what "disqualifying factors" delayed the approval for Jones's treatment. Moreover, Appellees do not argue that they were not aware that Jones would need time to change seizure medications. They do not explain why, if they knew that there would be an additional delay before treatment could start, they still waited until he had cirrhosis to approve him for DAADs.

Appellees were not entitled to summary judgment on Jones's claims. Viewing the totality of the undisputed facts in the light most favorable to Jones as the nonmoving party, we conclude that Appellees did not establish, as a matter of law, that they were not deliberately indifferent to Jones's serious medical needs.[1] Accordingly, we will vacate the District Court's grant of summary judgment and remand the matter for further proceedings. The District Court shall appoint counsel for Jones on remand, unless he expresses to the District Court that he wishes to continue pro se.

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[1] In response to the motions for summary judgment, Jones cited to District Court decisions addressing the DOC's protocols. See Chimenti v. Wetzel, No. CV 15-3333, 2018 WL 3388305, at *8-12 (E.D. Pa. July 12, 2018) (describing evidence of cost considerations in the development of the protocols, the extrahepatic complications of Hepatitis C, and the inaccuracy of monitoring); Abu-Jamal v. Wetzel, No. 3:16-cv-2000, 2017 WL 34700, at *10 (M.D. Pa. Jan. 3, 2017) (concluding that the standard of care for Hepatitis C is treatment with DAADs). We need not consider evidence from these other cases to determine that Appellees are not entitled to summary judgment here, but we note that the evidence certainly bolsters Jones's claims. While Dr. Noel argues that the evidence is not part of the record, he does not dispute it; e.g., he does not argue that he would give different answers if deposed by Jones. We leave it to the District Court on remand to determine, if necessary, whether it may consider such evidence. See, e.g., Fed. R. Evid. 201(b) (describing facts that may be judicially noticed); Home Depot USA, Inc. v. Lafarge N. Am., Inc., 59 F.4th 55, 63 (3d Cir. 2023) (describing requirements for issue preclusion).