

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted September 11, 2023*

Decided September 14, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 21-2450

DONLEY MCINTOSH,
Plaintiff-Appellant,

v.

NANCY BOWENS and DILIP
TANNAN,
Defendants-Appellees.

Appeal from the United States District
Court for the Eastern District of
Wisconsin.

No. 18-CV-1610

William E. Duffin,
Magistrate Judge.

ORDER

Donley McIntosh, a Wisconsin prisoner who has experienced severe gastrointestinal discomfort, maintains that prison medical staff acted with deliberate indifference to his condition when they canceled his referral to a specialist. The district court granted the defendants' motion for summary judgment. We affirm.

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

We view the record and draw all reasonable inferences in the light most favorable to McIntosh, the nonmovant. *Lockett v. Bonson*, 937 F.3d 1016, 1022 (7th Cir. 2019). From 2015 to 2017, while housed at Oshkosh Correctional Institution, McIntosh reported to medical staff that he repeatedly was experiencing gastrointestinal symptoms, including abdominal pain, diarrhea, bleeding during bowel movements, constipation, and nausea. During this time, McIntosh frequently was treated by nurse practitioner Nancy Bowens and Dr. Dilip Tannan, who are both employees of the Wisconsin Department of Corrections. Medical tests indicated mild anemia and blood in McIntosh's urine but did not reveal the cause of his gastrointestinal problems. (At one point, Bowens seems to have thought McIntosh had irritable bowel syndrome; elsewhere in his record, Dr. Tannan suggested that McIntosh had peptic ulcer disease.) Medical staff tried various methods to treat his symptoms, including antacids, laxatives, and a gluten-free diet. Some treatments—particularly the gluten-free diet—provided temporary relief. McIntosh declined treatment on several occasions, and a few times he appears not to have taken his medication. In late 2016, after about 20 months of unsuccessful treatment, Dr. Tannan referred McIntosh to a gastrointestinal specialist.

Ten days after Dr. Tannan made the referral, Bowens noted in McIntosh's medical record that she saw McIntosh laughing and joking with peers, without exhibiting any pain. (She later testified that this entry in his record supported the notion that he was exaggerating his symptoms.) Based on that entry in McIntosh's file, Dr. Tannan canceled the referral. Later, at his deposition, Dr. Tannan said he canceled the referral because of Nurse Bowen's observations as well as his own suspicion that McIntosh was either exaggerating or fabricating his symptoms. He also testified that, earlier in the year, the absence of any findings from objective tests fed concerns that McIntosh was faking symptoms.

After his referral was canceled, McIntosh continued to complain of symptoms. In early 2017, Dr. Tannan again decided to refer McIntosh to a specialist.

In March 2017, McIntosh met with the specialist, who scheduled a colonoscopy and an upper endoscopy. The tests showed that McIntosh had "chronic active gastritis, moderate" and "Heliobacter-like organisms" (a reference to an *H. pylori* bacterial infection). McIntosh was then started on antibiotics, which eased his symptoms for a short while.

In 2018, McIntosh sued Bowens and Dr. Tannan (as well as additional defendants who were later dismissed) for deliberate indifference to his medical needs in violation of his rights under the Eighth Amendment. *See* 42 U.S.C. § 1983. Aided by court-recruited counsel, McIntosh retained an expert, Dr. David Blake, who opined that

McIntosh should have been referred to a specialist at least six months earlier than he was. He said that McIntosh had irritable bowel syndrome and that the endoscopy showed that McIntosh had an early-stage *H. pylori* infection that, if untreated, could have progressed to ulceration or worse. Dr. Blake described the decision to refer a patient to a specialist as a “judgment call” but concluded based on community standards that McIntosh should have been referred “much sooner.”

A magistrate judge, presiding with the parties’ consent, entered summary judgment for the defendants. The court concluded that McIntosh’s condition was objectively serious, but McIntosh had provided no evidence to suggest that either defendant acted with deliberate indifference. Regarding Bowens, the court explained that McIntosh offered no evidence to show that her reason for leaving the note in his medical file was blatantly inappropriate. As for Dr. Tannan, the court concluded that McIntosh failed to introduce evidence from which a reasonable jury could conclude that the doctor was not exercising his professional judgment in canceling the referral. The court also determined that McIntosh did not introduce evidence that his pain was prolonged unnecessarily by any delay in treatment caused by the canceled referral.

On appeal, McIntosh argues that Dr. Tannan’s decision to cancel the referral lacked any basis in medical judgment. He asserts that Dr. Tannan did not genuinely believe McIntosh was exaggerating his symptoms and that the decision to cancel a referral because of a single entry about McIntosh’s behavior was unreasonable.

As the district court concluded, however, McIntosh did not introduce evidence that the defendants knew of, and disregarded, the risk posed by his medical condition. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014). With regard to Bowens, nothing in the record suggests that she disregarded a known risk to his health by leaving the note in his medical file. Nor does McIntosh identify any record evidence to suggest that the care provided by Dr. Tannan ever crossed the line to deliberate indifference (recklessness). Though McIntosh’s expert testified that Dr. Tannan should have referred McIntosh to a specialist much sooner, a difference in opinion between medical professionals generally is insufficient to establish deliberate indifference, *Pyles*, 771 F.3d at 409, and the expert acknowledged that the determination whether to refer a patient to a specialist is a judgment call. To the extent McIntosh urges that Dr. Tannan did not believe he was exaggerating symptoms, he does not point us to anything in the record to meaningfully call into question the doctor’s exercise of his judgment to cancel the referral.

We have considered McIntosh’s remaining arguments; none merits discussion.

AFFIRMED