NONPRECEDENTIAL DISPOSITION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 December 20, 2023*
Decided February 12, 2024

Before

DIANE S. SYKES, *Chief Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 23-1702

MATTHEW T. DOUGHTY,
Plaintiff-Appellant,

v.

THOMAS GROSSMAN,
Defendant-Appellee.

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

No. 19-cv-529-wmc

William M. Conley,
Judge.

* 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. *See* FED. R. APP. P. 34(a)(2)(C).

O R D E R

Matthew Doughty, a Wisconsin prisoner, challenges the summary judgment ruling in favor of the surgeon who performed his hip replacement. He argues that the district judge improperly decided contested facts and overlooked medical evidence that the surgeon acted with deliberate indifference in performing the surgery, which Doughty blames for a difference in the lengths of his legs. But Doughty furnished no admissible evidence that his condition resulted from the surgeon's deliberate indifference. He also contends that the district judge should have recruited counsel to represent him, but he did not renew his request for court-recruited counsel when faced with a motion for summary judgment, instead responding on the merits. We therefore affirm.

Because this is an appeal from a summary judgment decision, we recount the facts in the light most favorable to Doughty and draw all reasonable inferences in his favor. *See Donald v. Wexford Health Sources, Inc.*, 982 F.3d 451, 457 (7th Cir. 2020). In 2014, while housed at Waupun Correctional Institution, Doughty complained of left hip pain, and a nurse practitioner referred him for evaluation by an external orthopedic surgeon, Dr. Thomas Grossman. Dr. Grossman diagnosed Doughty with severe osteoarthritis in his left hip and early degenerative joint disease; the two agreed upon a treatment plan that included hyaluronic acid injections to address pain and swelling.

Doughty continued to visit Dr. Grossman for various related conditions, including left hip pain. Testing in April 2017 revealed significant osteophytic changes in Doughty's left hip, and Dr. Grossman diagnosed him with "end-stage osteoarthritis of the left hip." As result, Dr. Grossman advised Doughty of the possibility of performing a hip replacement surgery along with its risks and benefits. One risk (which Dr. Grossman remembers discussing with Doughty, but Doughty denies) is that the procedure could result in legs of differing lengths.

In September 2017, after obtaining Doughty's written consent, Dr. Grossman performed hip replacement surgery on Doughty's left hip. Dr. Grossman noted in a surgical report that Doughty's legs were clinically equal in length, and a post-surgery x-ray revealed normal alignment and no problems. Dr. Grossman discharged Doughty three days after the surgery, noting in the discharge summary that the surgery was uncomplicated and that Doughty had done well in his postoperative recovery.

One month later, Dr. Grossman examined Doughty and noted that an x-ray showed "good position and alignment" and "satisfactory appearance" of the left hip prosthesis. He recommended that the prison healthcare providers maintain hip rehabilitation protocols for Doughty. In addition, Dr. Grossman's notes from that visit states that Doughty had not reported any issues and was in "no distress." The notes contained no mention of any disparity in the length of Doughty's legs. That was the last time that Dr. Grossman examined Doughty; he retired in December 2017.

Doughty disputes the accuracy of the statements in Dr. Grossman's notes from the October postoperative appointment. According to him, he complained to Dr. Grossman about a discrepancy in his leg length which caused him to "wobble like a penguin" when he walked. Doughty states that Dr. Grossman assured him that the wobbling and leg-length discrepancy would subside in six months.

In early 2018, Doughty was transferred to New Lisbon Correctional Institution. There, Doughty complained of limping, intolerable lower-body pain, and a difference in the length of his legs. The prison's medical staff examined Doughty in June 2018 and noted that Doughty's left leg was one-half inch longer than the right, for which he was issued a quarter-inch shoe lift. X-rays at this time also revealed osteoarthritis in Doughty's right hip with narrowing of the joint space due to degenerative changes. (After reviewing this, Dr. Grossman opined that the narrowing of the joint space in Doughty's right hip likely caused the shortening of his right leg.)

In October 2018, another orthopedic surgeon, Dr. Eric Nelson, examined Doughty and noted the one-half inch difference between the left and right legs. X-ray images also showed that Doughty's new left hip was properly positioned and aligned with no complications.

Dr. Nelson examined Doughty again in November 2021, approximately three years after the surgery. Doughty's x-ray images showed that his left hip prothesis remained properly situated and intact and a one-centimeter disparity between his left and right legs.

Believing that Dr. Grossman had "botched" his surgery and caused his leg-length discrepancy, Doughty turned to federal court for relief. He sued Dr. Grossman, Waupun Memorial Hospital, Agnesian Health Care, and two unidentified employees of the Department of Corrections under 42 U.S.C. § 1983 for exhibiting deliberate indifference to his medical needs. He also sued Dr. Grossman for medical

negligence under Wisconsin law. The district judge screened the complaint pursuant to its obligation under 28 U.S.C. § 1915A and allowed Doughty to proceed on the claims against Dr. Grossman.

Doughty twice moved for court-recruited counsel, *see* 28 U.S.C. § 1915(e)(1), asserting both times that the case was too complex and that he had limited resources and knowledge of the law. A magistrate judge denied the first motion, which Doughty filed contemporaneously with the complaint. The district judge denied Doughty's second request at the outset of discovery, reasoning that Doughty had demonstrated, up to that point, an ability to adequately represent himself and that pro bono lawyers were scarce.

During discovery, Doughty also moved for the appointment of a neutral expert pursuant to FED. R. EVID. 706(a), arguing that such an expert would assist the judge to understand the surgery in question. In addition, Doughty mentioned the need for a "judicial investigation." Without addressing the latter request, the magistrate judge declined to appoint a neutral expert because it was not apparent that one was needed for Doughty to survive summary judgment. The magistrate judge also noted that it would be difficult to find a willing expert and that Doughty would have to share the cost of obtaining such an expert.

After the completion of discovery, Dr. Grossman moved for summary judgment, and the district judge concluded that, based on the record, no reasonable jury could find that Dr. Grossman exhibited deliberate indifference in the way he performed Doughty's hip replacement surgery. In reaching this conclusion, the judge noted the multiple doctors who found no problems with Doughty's left hip, as well as Dr. Grossman's own observation that the difference in leg lengths could be attributable to the degenerative changes in Doughty's *right* hip that occurred after the surgery. By contrast, Doughty's only evidence consisted of his lay opinion that Dr. Grossman must have botched the surgery, as well as various online articles, medical articles, and patient reviews of Dr. Grossman, which the court found inadmissible.

In the end, the district judge ruled in favor of Dr. Grossman on the Eighth Amendment claim and relinquished supplemental jurisdiction over the state-law medical negligence claim. Doughty now appeals, challenging the summary judgment decision and the rulings on his requests for recruited counsel and a neutral expert.

With respect to the Eighth Amendment claim, Doughty first objects to the district judge's refusal to admit as evidence the various materials Doughty had submitted to support his claim. We review such rulings for abuse of discretion. *See Prude v. Meli*, 76 F.4th 648, 661 (7th Cir. 2023). Here, Doughty offered online articles from Wikipedia and other websites, excerpts from various medical books, notes of Doughty's daughter's conversations with other orthopedists, as well as online reviews by Dr. Grossman's former patients. But, as the district judge properly concluded, these documents are hearsay: they are out-of-court statements offered for the truth of their content, and Doughty does not attempt to fit them within a hearsay exception. *See* FED. R. EVID. 801(c); *Prude*, 76 F.4th at 661. As such, they are inadmissible and may not be considered on summary judgment. FED. R. CIV. P. 56(c)(2); *see Cairel v. Alderden*, 821 F.3d 823, 830 (7th Cir. 2016).

Based on the undisputed and admissible evidence, we agree with the district judge that no reasonable jury could find that Dr. Grossman acted with deliberate indifference to Doughty's serious medical needs in violation of the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Deliberate indifference is "more than negligence or even malpractice," *Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014); the practitioner must consciously disregard a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 839–40 (1994). Doughty provides no evidence that meaningfully challenges the treatment records indicating that the hip replacement surgery was successful and without any complications. Nor is there any evidence in the record to support his assertion that the difference in his legs was a result of Dr. Grossman's conscious disregard of a substantial medical risk, rather than the narrowing of the joint space in Doughty's right leg or a known side effect from hip replacement surgery.

For his part, Doughty insists that the very existence of the length differential establishes that Dr. Grossman had performed the surgery poorly. But there is no evidence that this was the case. And, even if it were, the record is devoid of any evidence that Dr. Grossman consciously disregarded a substantial risk of serious harm, which is required to demonstrate deliberate indifference. *See Wilson v. Adams*, 901 F.3d 816, 822 (7th Cir. 2018); *see also Farmer*, 511 U.S. at 839–40.

Next, Doughty argues that the district judge and magistrate judge erred by denying his motions for recruited counsel and motion for appointment of a neutral expert witness. We review these decisions for an abuse of discretion. *Pruitt v. Mote*, 503

F.3d 647, 658 (7th Cir. 2007) (en banc) (recruitment of counsel); *Martin v. Redden*, 34 F.4th 564, 569 (7th Cir. 2022) (appointment of expert witness).

In deciding whether to recruit counsel, a judge must weigh the complexity of the pro se litigant's claims and the litigant's competence to represent himself. *Pruitt*, 503 F.3d at 655. "The inquiries are necessarily intertwined; the difficulty of the case is considered against the plaintiff's litigation capabilities, and those capabilities are examined in light of the challenges specific to the case at hand." *Id*. Here, Doughty argues that the complexity of the medical issues in this case and his difficulty with obtaining discovery entitled him to recruited counsel. But the magistrate judge and the district judge both applied the correct standard and reached reasonable decisions based on the information available to them at the time of the requests. *See id.* at 658–59.

The initial request came early in the case—before screening; thus, the magistrate judge reasonably decided that it was premature to assess whether counsel would be needed. S*ee id.* at 659. And when the district judge addressed the second request, he determined that Doughty's litigation performance up to that point demonstrated his competence. Indeed, Doughty's filings were clear and applied the relevant legal standards. *See Jackson v. Kotter*, 541 F.3d 688, 700 (7th Cir. 2008). The district judge's decision to deny the second motion was well within his discretion.

If Doughty believed that he was incapable of effectively responding to the summary judgment motion, he could have filed a response under Rule 56(d), asking the court to deny the motion because he lacked the ability to present facts to support his claims (whether it be expert testimony or otherwise). *See, e.g.*, *Wanko v. Bd. of Trustees of Indiana Univ.*, 927 F.3d 966, 969–70 (7th Cir. 2019). What is more, he could have filed another motion asking the court to recruit counsel given the issues defendant raised in the motion. *See Bracey v. Grandin*, 712 F.3d 1012, 1018 (7th Cir. 2013). He did not do so. To the extent that Doughty believes that the district court had an obligation to recruit counsel for him sua sponte as the case proceeded, this is incorrect. While a district court certainly may exercise its discretion to do so in appropriate circumstances, we have never recognized an obligation to do so absent a motion. Instead, it is the responsibility of the pro se litigant to bring the need for counsel to the judge's attention as a case progresses. *See Mapes v. Indiana*, 932 F.3d 968, 971 (7th Cir. 2019); *Bracey*, 712 F.3d at 1018. Both the magistrate and district judges made clear that Doughty could renew his requests; the burden was on Doughty to do so.

Further, the magistrate judge appropriately exercised his discretion in determining that a court-appointed expert was unnecessary. A judge may appoint an expert if one would help clarify the evidence or decide a key fact. *See* FED. R. EVID. 706(a); *Martin*, 34 F.4th at 569. Doughty argues that the judge abused his discretion because an expert was needed to survive summary judgment. We disagree. Rule 706 is used to appoint a neutral expert to interpret complex information for the trier of fact, not to assist one party or the other, as Doughty appears to believe. *See Martin*, 34 F.4th at 569. Here, the magistrate judge reasonably concluded that an expert was not needed to interpret the medical evidence in the record. And the judge left the door open for Doughty to file a motion requesting the recruitment of a retained expert if the case progressed to the point when one was needed. Again, Doughty could have filed such a motion, but he failed to do so. *See Bracey*, 712 F.3d at 1018.

Finally, Doughty argues that the magistrate judge erred by failing to address his request for a "judicial investigation" so that the judge could better understand the facts of the case. To the extent this request is distinct from his request for appointment of an expert under Rule 706(a), Doughty's argument is undeveloped and, therefore, waived. *See* FED. R. APP. P. 28(a)(8); *Yasinskyy v. Holder*, 724 F.3d 983, 989 (7th Cir. 2013).

AFFIRMED