Henricks v. Pickaway Correctional Institution et al Doc. 226

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| John Henricks, | : | |
| Plaintiff | : | Civil Action 2:08-cv-580 |
| v. | : | Judge Smith |
| Pickaway Corr. Inst., *et al.*, | : | Magistrate Judge Abel |
| Defendants. | : | |

**ORDER and**
**REPORT AND RECOMMENDATION**

Plaintiff John Henricks, a former State prisoner, brings this action under 28 U.S.C. §1983 alleging that defendants Ida Gonzalez, M.D. and Correction Officer Michael Maynard were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. This matter is before the Magistrate Judge in accordance the provisions of 28 U.S.C. §636(b)(1)(B) for a report and recommendation on defendants' May 29, 2013 motion for summary judgment (doc. 205); plaintiff John Henrick's July 1, 2031 motion to strike (doc. 209) and August 9, 2013 motion to strike (doc.221); and defendants' July 23, 2013 motion for leave to file an answer instanter (doc. 215).

## I. Allegations in the Complaint

On August 19, 2006, plaintiff reported to the Pickaway Correctional Institution ("PCI") medical bay with complaints of flu-like symptoms including nausea and vomiting. A nurse examined plaintiff for possible appendicitis, and eventually concluded that plaintiff was suffering from the flu. Compl. ¶ 1. The following day plaintiff returned to med-bay

Dockets.Justia.com

complaining of the same symptoms and also of severe abdominal pain. Plaintiff's condition had worsened significantly, and defendant PCI Medical Director Dr. Gonzales determined that he was in need of further medical attention due to the possibility of appendicitis. *Id.* at ¶ 2. Plaintiff was transferred to The Ohio State University ("OSU") Medical Center. However, upon arrival at the OSU Medical Center, defendant PCI Transportation Officer Maynard allegedly refused to remove plaintiff's restraints to permit the attending emergency room physician to evaluate plaintiff's condition. *Id.* at ¶ 3. The delay resulting from this disagreement endangered his life, as it was later determined that his appendix had already ruptured. *Id.* at ¶ 4.

Plaintiff suffered nerve damage as a result of the surgery. *Id.* at ¶ 7.

Upon his return to PCI, Dr. Gonzales refused to prescribe Henricks Neurontin, a painkilling medication which had been prescribed to him at OSU Medical Center. Instead, Dr. Gonzalez prescribed ibuprofen. *Id.* at ¶ 8.

**II. Motions to Strike and for Leave to File an Answer Instanter**

In response to defendants' motion for summary judgment, plaintiff filed a motion to strike the declarations of defendant Maynard and Eugen Hunyadi[1] and the affirmative defenses. Plaintiff objected to the declaration of Maynard because it was not dated, making it deficient under 28 U.S.C. 1746. Plaintiff also argues that the affirmative defenses of qualified immunity and failure to exhaust administrative remedies should be stricken

[1]Plaintiff subsequently withdrew his motion to strike with respect to the declaration of Mr. Hunyadi.

because they were not timely pled. Plaintiff noted that defendants Gonzalez and Maynard never filed an answer in this case.[2]

Defendants' current counsel, who entered the case more than two years ago (doc. 176), did not discover that previous counsel had not filed an answer until the motion to strike was filed. Defendants maintain they should be permitted to file their answer instanter. Under Rule 6(b)(2) of the Federal Rules of Civil Procedure, the time to complete an act may be enlarged after the expiration of that time upon a showing of excusable neglect. Defendants maintain that plaintiff will not be prejudiced if they are permitted to file an answer. Defendants asserted qualified immunity in their motion to dismiss, and plaintiff has known of defendants' intent to assert this defense. Defendants argue that they did not discover that plaintiff falsely stated that he had exhausted his administrative remedies until after the close of discovery and filing their motion for summary judgment. Defendants argue that to deny them this threshold defense due to the failings of their counsel goes against the interests of justice. Defendants maintains that any potential prejudice can be averted by reopening discovery on the issue of exhaustion.

Defendants further argue that the failure to raise an affirmative defense does not always result in waiver. Defendants contend that because plaintiff received notice of their

---

[2]In their motion for summary judgment, defendants argue that they are entitled to qualified immunity. Defendants also argue that plaintiff failed to exhaust his administrative remedies against defendant Dr. Gonzalez in accordance with the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(a). Defendants maintain that there is no evidence that plaintiff ever initiated a grievance against Dr. Gonzalez in 2006, when she purportedly discontinued the Neurotin medication. Henricks also failed to complete the second and third steps of the mandatory grievance process in 2008.

intent to raise the affirmative defenses either by way of the motion to dismiss or their recently filed motion for summary judgment, there is no prejudice. Defendants content that a defendant does not waive an affirmative defense if the defense is raised at a time when plaintiff's ability to respond is not prejudiced.

Under Rule 8(c), an affirmative defense is waived if it is not raised in a responsive pleading. Defendants have failed to demonstrate that they acted with diligence in pursuing their affirmative defenses. Defendants have not demonstrated that their failure to file an answer was the result of excusable neglect. Defendants' contention that any prejudice to plaintiff would be avoided by reopening discovery is mistaken. This case has been pending for over five years. There have been numerous delays. I recognize that defendants' current counsel was not the attorney of record at the time that defendants' answer should have been filed, but the failure to file an answer over a period of more than five years after the original complaint was filed–without any explanation of why no answer was filed--is not excusable neglect.

Motion to Strike Maynard's Declaration. Maynard's declaration is technically deficient and should not be considered in deciding defendants' motion for summary judgment. Unsworn declarations are permitted to be used as evidence only if "subscribed ... as true under penalty of perjury, *and dated*. . . ." 28 U.S.C. § 1746 (emphasis added); *see also Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1994)(excluding undated declarations that were subscribed under penalty of perjury based on the explicit language of the statute).

Plaintiff John Henrick's July 1, 2031 motion to strike (doc. 209)and his August 9, 2013 motion to strike (doc. 221) are GRANTED; defendants' July 23, 2013 motion for leave to an answer instanter (doc. 215) is DENIED.

## III. Arguments of the Parties

### A. Defendants Gonzalez and Maynard

Defendants argue that plaintiff cannot satisfy the objective component of his deliberate indifference claim. According to defendants, the recommended treatment for a femoral cutaneous nerve injury includes rest, wearing loose clothing, non-steroidal anti-inflammatory medication (NSAID) to reduce inflammatory pain, and a sleep aide. Defendants contend that there is no evidence suggesting that plaintiff's right femoral cutaneous nerve injury constitutes a serious medical condition. Furthermore, plaintiff received the recommended treatment for the injury. Defendants further argue that there is no evidence that Officer Maynard caused any delay with plaintiff's examinations, procedures, or treatments that were conducted on August 20, 2006 at OSU Medical Center. Defendants maintain that the undisputed evidence shows that Maynard made every attempt to comfortably assist plaintiff into the emergency department and to cooperate with all medical staff. Defendants argue that plaintiff has no evidence on the essential element of causation. According to defendants, plaintiff cannot show any evidence that Maynard's alleged delay caused any actual harm.

Defendants further argue that plaintiff cannot satisfy the subjective component of his deliberate indifference claim. Defendants maintain that plaintiff cannot point to any specific evidence demonstrating that defendants denied or delayed providing him appropriate care.

**B. Plaintiff Henricks**

Plaintiff argues that because defendants have failed to file an answer, the allegations in the complaint have been admitted pursuant to Rule of the Federal Rules of Civil Procedure.

Plaintiff also argues that genuine issues of material fact preclude summary judgment on plaintiff's claim against Dr. Gonzalez. Plaintiff maintains that defendants' reliance on a Wikipedia entry for their assertion that plaintiff's right femoral cutaneous injury does not equate to a serious medical condition is improper. Wikipedia is not a valid legal authority; it is an online encyclopedia which can be written and edited by any user. Plaintiff argues that the Sixth Circuit has repeatedly recognized that a prisoner's constitutional rights are violated when medical personnel allow the him to suffer in pain. Needlessly permitting a prisoner to remain in pain creates a fact issue that must be resolved by a jury. A plaintiff may prove by circumstantial evidence that a defendant was aware of an inmate's pain but disregarded that condition. A plaintiff is not required to demonstrate that medical personnel knew what the results would be. Instead, the plaintiff only must demonstrate that the medical personnel was aware, or should have been aware, of the medical condition.

Plaintiff maintains that he has lateral femoral cutaneous nerve damage in his right leg, which is a very painful condition causing a burning sensation. From a medical standpoint, the damage cannot be corrected. When plaintiff reported his medical condition to Dr. Gonzalez, she referred him to a neurologist, who recommended that plaintiff be treated with Neurontin. Dr. Gonzalez discontinued the Neurontin that the neurologist prescribed. Plaintiff maintains that Dr. Gonzalez allowed him to suffer in pain for a year

and only prescribed ibuprofen even though she knew it would not resolve his pain. Dr. Gonzalez acknowledged that Henricks had an attitude and acted like a jerk. He raised his voice to her and was rude.

Plaintiff further argues that Dr. Gonzalez's stated reasons for denying Neurontin are a pretext to hide her deliberate indifference to his pain. Plaintiff contends that Dr. Gonzalez knew that he was in pain and that the Motrin was not relieving his pain. Dr. Gonzalez contends that she did not prescribe Neurontin because it had not received FDA approval for treating plaintiff's condition and because it could have been harmful to plaintiff's heart condition. Plaintiff maintains, however, that initially Dr. Gonzalez did prescribe him Neurontin despite these facts. Plaintiff further argues that every other doctor who saw him, including the neurologist who specializes in the treatment of nerve injury pain recommended that he be treated with Neurontin. Dr. Gonzalez admitted that she never contacted the neurologist prior to discontinuing the medication.

Plaintiff maintains that Dr. Gonzalez knew that the Motrin that she was prescribing did not relieve his pain. The medical records do not reflect that Dr. Gonzalez discontinued the Neurontin based on her concerns about his heart condition. Dr. Gonzalez also did not communicate any alleged concerns about his cardiac condition to the doctors who prescribed plaintiff Neurontin.

Plaintiff argues that genuine issues of material facts also preclude summary judgment on his claim against Officer Maynard. Maynard's declaration is directly contradicted by the declaration of Henricks. Henricks alleged that Maynard kept him

restrained and interfered with the emergency room physician's ability to treat him from 6:32 am.m when he entered the emergency room until approximately 7:23 a.m. The timeline presented by defendants is consistent with plaintiff's version of events. Despite arriving at the hospital with a ruptured appendix, he received no medical attention after triage for over a half an hour and no treatment from a physician until 7:23 a.m.

Plaintiff maintains that Maynard was deliberately indifferent to his serious medical needs, and Maynard admitted that plaintiff appeared to be in pain. It is not necessary to show actual harm as a result of the delay. When a plaintiff's claims arise from an injury so obvious that even a lay person would recognize it, verifying medical evidence is not required. It is sufficient to show that plaintiff actually experienced the need for medical treatment and that the need was not addressed within a reasonable time frame.

**IV. Summary Judgment**

Summary judgment shall be granted "if the movant shows 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). A party asserting the absence or presence of a genuine dispute must support that assertion by either "(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials"; or "(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

A party may object that the cited material "cannot be presented in a form that would be admissible in evidence," and "[t]he burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated." Fed. R. Civ. P. 56(c)(2); Fed. R. Civ. P. 56 advisory committee's note. If a party uses an affidavit or declaration to support or oppose a motion, such affidavit or declaration "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

While the court must consider the cited materials, it may also consider other materials in the record. Fed. R. Civ. P. 56(c)(3). However, "[i]n considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party." *Revis v. Meldrum*, 489 F.3d 273, 279 (6th Cir. 2007) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "The central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Id.*, 489 F.3d at 279–80 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986)).

**V. Discussion**

The Eighth Amendment forbids prison officials from "unnecessarily and wantonly inflicting pain" on an inmate by acting with "deliberate indifference" toward the inmate's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). To demonstrate an Eighth Amendment deprivation, a prisoner must show that a prison official acted with deliberate indifference to his serious medical needs. *Estelle*, 429 U.S. at 103-04. Prison officials are

liable only if they know of and disregard "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 draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "An official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838. Mere negligence does not constitute deliberate indifference. *See, Estelle*, 429 U.S. at 106. Further, a prisoner does not state a claim merely by pleading that he disagrees with the diagnosis or treatment. *Estelle*, 429 U.S. at 107-08; *Westlake v. Lucas*, 537 F.2d 857, 860 n. 5 (6th Cir. 1976).

John Henricks' declaration. Plaintiff Henricks submitted a declaration stating that on August 19, 2006, while incarcerated at Pickaway Correctional Institution ("PCI"), he reported complaints of nausea, vomiting and severe abdominal pain. Doc. 210-1 at ¶¶ 2-3. By the following day, his condition had worsened. *Id.* at ¶ 4. The PCI physician ordered that plaintiff be transported to the Ohio State University Medical Center emergency room. *Id.* at ¶ 5. Defendant Maynard, one of the correction officers assigned to transport him to the hospital, refused the physician's request to remove my belly chain, handcuffs and shackles to permit him to properly examine plaintiff. *Id.* at ¶ 6. Officer Maynard argued with the emergency room physician for approximately 45 minutes about whether Maynard should remove the restraints so that the doctor could determine if plaintiff should be admitted. *Id.* at ¶ 7. Throughout the 45 minutes, Henricks was writhing in pain. *Id.* at ¶ 8. The delay in treatment caused the need for more invasive surgery to remove the toxins that had

accumulated in Henricks' abdominal cavity. *Id.* at ¶ 9. Plaintiff had ruptured appendix that had become gangrenous. *Id.* at ¶ 10.

The declaration further states that during plaintiff's surgery, he suffered an injury to the femoral cutaneous nerve. *Id.* at ¶ 14. The injury was extraordinarily painful for him. *Id.* at ¶ 15. Dr. Gonzalez referred plaintiff to a neurologist for his condition. *Id.* at ¶ 16. The neurologist recommended that Neurontin be prescribed to treat Hendricks' pain. *Id.* at ¶ 17. Although Dr. Gonzelez initially prescribed Neurontin, she later discontinued it. *Id.* at ¶¶ 18-19. Without Neurontin, plaintiff suffered intense pain for over a year. *Id.* at ¶ 20. Dr. Gonzalez prescribed ibuprofen, which did not provide him any relief from the unbearable pain in his leg from the nerve damage. *Id.* at ¶¶ 21-22. Dr. Gonzalez refused to prescribe him Neurontin. *Id.* at ¶ 23. An OSU neurologist informed plaintiff that no amount of ibuprofen or any other conventional NSAID would be effective in controlling his pain. *Id.* at ¶ 25. On at least four occasions, neurologists ordered Neurontin for plaintiff, but Dr. Gonzalez refused to allow it. *Id.* at ¶ 26. Plaintiff repeatedly reported to Dr. Gonzalez that the ibuprofen was not providing him relief. *Id.* at ¶ 29. Dr. Gonzalez never indicated that she was concerned about his cardiac condition or the risks of heart problems while taking Neurontin. *Id.* at ¶¶ 30-31.

Alleged 45 minute delay in treatment at OSU Medical Center emergency room. In his declaration,[3] defendant Maynard stated that at no time did he refuse to cooperate with hospital staff or cause a delay in plaintiff's examinations or treatment. Doc. 205-3 at ¶ 8.

[3]Although the Magistrate Judge has stricken Maynard's declaration as technically deficient, even if it were considered, a genuine issue of material fact remains.

Maynard further stated that if any of the hospital staff believed that he was causing any detriment to a patient, they would have immediately contacted a superior officer located in the Ohio State University Medical Center ("OSUMC") Corrections Medical Center ("CMC"). *Id.* at ¶ 10.

In their reply in support of the motion for summary judgment, defendants submitted the affidavit of Timothy Chalender, a Captain with the Ohio Department of Rehabilitation and Correction at the OSUMC in Security Operations. Doc. 219-3 at ¶ 2. Captain Chalender acts as a liaison between correctional staff and medical providers in the OSUMC emergency department. *Id.* at ¶ 3. Chalender asserts that plaintiff's allegation that a correctional officer prevented an emergency room physician from conducting a physical examination for 45 minutes is impossible, unrealistic and unfeasible. *Id.* at ¶ 4. He asserts that OSU's healthcare staff members would have immediately contacted a Security Operations lieutenant or Chalender if any correctional officer had interfered with the provision of treatment. *Id.* at ¶ 6. Chalender further states "[i]n the history of Security Operations, no such event as described herein has ever taken place." *Id.* at ¶ 8.

Plaintiff has stated under penalty of perjury that Corrections Officer Maynard argued with the emergency room doctor and delayed him from examining plaintiff for approximately 45 minutes. Officer Maynard, on the other hand, maintains that no such delay occurred and that he readily complied with the doctor's request to have the belly chain removed. Captain Chalender states his belief that OSU physicians have never and never would permit a corrections officer to interfere with treatment. However, neither party

submitted a declaration from the emergency doctor or other potential witnesses. Although defendants rely on the time line established by the hospital records, the time line is not dispositive. Either set of facts is plausible. Because the finder of fact will have to hear the testimony and make credibility assessments, summary judgment is not appropriate.

Failure to prescribe Neurontin. On February 23, 2007, Henricks was seen by a neurologist. In the consultation report of the neurologist states: "Neurontin is wholly appropriate in this patient. Motrin will not work. Please start Neurontin at 30 mg TID. Dose should be titrated to effect up to max of 1200 mg TID." On February 26, 2007, Dr. Gonzalez signed the consultation report. (Doc. 208-11.)

Here, there is a question of fact as to whether Dr. Gonzalez was deliberately indifferent to plaintiff's serious medical needs. Although Dr. Gonzalez maintains that she was concerned about the off label use of Neurontin and its effect on plaintiff's heart condition, plaintiff maintains that she purposefully denied him pain relief even though she was aware that he was in significant pain. Dr. Gonzalez acknowledged that she did not follow the recommendation of plaintiff's treating neurologist, nor did she contact him to share her concerns with him. Instead, she ignored his recommendation and continued to prescribe ibuprofen despite the neurologist's statement that ibuprofen would not be effective in controlling plaintiff's pain. Here, the finder of fact will have to hear the testimony and make credibility assessments.

## VI. Conclusion

For the reasons set out above, the Magistrate Judge **RECOMMENDS** that defendants Ida Gonzalez, M.D. and Correction Officer Michael Maynard's May 29, 2013 motion for

summary judgment (doc. 205) be DENIED. Plaintiff John Henrick's July 1, 2031 motion to strike (doc. 209) and his August 9, 2013 motion to strike (doc.221) are GRANTED. Defendants' July 23, 2013 motion for leave to an answer instanter (doc. 215) is DENIED.

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days, file and serve on all parties a motion for reconsideration by the Court, specifically designating this Report and Recommendation, and the part thereof in question, as well as the basis for objection thereto. *See* 28 U.S.C. §636(b)(1)(B); Fed. R. Civil. P. 72(b).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to *de novo* review by the District Judge and waiver of the right to appeal the judgment of the District Court. *Thomas v. Arn*, 474 U.S. 140, 150-152 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Small v. Secretary of Health and Human Services*, 892 F.2d 15, 16 (2d Cir. 1989).

s/Mark R. Abel
United States Magistrate Judge