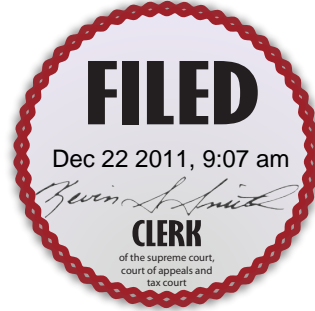


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

GARY J. HARRISON,)
)
Appellant-Plaintiff,)
)
vs.) No. 46A05-1101-PL-46
)
LINDA TURNER and DEBORAH HRIC,)
)
Appellees-Defendants.)

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Jennifer L. Koethe, Judge
Cause No. 46D03-0902-PL-084

December 22, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Plaintiff, Gary J. Harrison (Harrison), appeals the trial court's summary judgment in favor of Appellees-Defendants, Linda Turner (Nurse Turner) and Deborah Hric (Nurse Hric) (Collectively, the Nurses).

We affirm.

ISSUES

Harrison raises two issues for our review, which we restate as follows:

- (1) Whether the trial court erred when it granted summary judgment in favor of the Nurses; and
- (2) Whether the trial court abused its discretion when it denied Harrison's discovery requests.

FACTS AND PROCEDURAL HISTORY

Harrison was incarcerated at the Westville Correctional Facility in Westville, Indiana. Both Nurse Turner and Nurse Hric were nurses who worked at Westville Correctional Facility. Harrison was in the behavioral segregated unit and suffered from chronic hypertension. Harrison was prescribed HCTZ, Maxzide, and Lisinopril for his hypertension and excess fluid.

On September 13, 2008 at 5:00 a.m., Nurse Turner was on duty distributing medications to inmates. Nurse Turner gave Harrison a manila envelope containing medication prescribed for another inmate, Jared Harris. This medication consisted of two psychotropic drugs: Thorazine, a drug used for the treatment of schizophrenia, and

Artane, a drug used to manage the side effects of Thorazine. Harrison ingested both the Thorazine and Artane and allegedly began suffering side effects thereafter. At some point, it was determined that Nurse Turner administered the incorrect medication to Harrison.

Later that evening, around 8:03 p.m., Nurse Hric conducted a follow up examination and monitored Harrison's blood pressure, noting that Harrison's blood pressure was 130/78. Approximately three hours later, corrections officers found Harrison unconscious on the floor, lying in a pool of urine. Nurse Hric examined Harrison, noted that his blood pressure was 146/80, and found a small abrasion on the left side of Harrison's forehead. Dr. Ross was notified, and Harrison was ordered to receive neurological checks every fifteen minutes for two hours. The following day, September 14, 2008 at 2:41 a.m., Nurse Hric examined Harrison again, found him alert and oriented, and noted that Harrison had taken aspirin, which she had removed from Harrison's cell. Finally, Nurse Hric examined Harrison at 6:05 a.m. in response to Harrison's complaint of vomiting blood. Nurse Hric found Harrison's toilet water pink and took blood samples. Throughout these examinations, Nurse Hric noted that Harrison was "yelling, belligerent, demanding, out of control, and uncooperative with [her] attempts to assess him." (Appellee's App. pp. 56-57).

At approximately 11:22 a.m., a different nurse examined Harrison, and sent him to urgent care based upon Nurse Hric's prior reports. Harrison was placed on a liquid diet for twenty-four hours. Around 12:50 p.m., another nurse examined Harrison and noted

that Harrison said he had vomited five to six times in the prior twenty-four hours. The nurse called the Indiana Poison Center and was advised that any anti-psychotic medication would be out of Harrison's system. Thereafter, other medical professionals including nurses, a physician, and psychologists, continued to closely monitor and provide Harrison with treatment, including an electrocardiogram test, medication for nausea, as well as counseling for his hypertension, fear of ingesting incorrect medication, and distrust of the Nurses. Although Harrison refused to take his hypertension medication during Nurse Hric's visits, he later relented, and admitted to feeling better.

On February 11, 2009, Harris filed his Complaint under 42 U.S.C. §1983 against the Nurses alleging that they had violated his Eighth Amendment rights by giving him the wrong medication and subsequently denying him medical treatment. On April 12, 2009, Harrison filed his requests for admission against both Nurses. On April 29 and May 27, 2009, Nurse Hric and Nurse Turner filed their Answers to Harrison's Complaint. On June 15, 2009, Harrison filed a motion to compel discovery responses which the trial court denied on June 17, 2009. On August 3, 2009, Harrison filed his responses to the Nurses' interrogatories with the trial court. On March 9, 2010, Harrison filed his second motion for production of documents. On April 7, 2010, Harrison filed his second motion to compel discovery of documents, which the trial court denied on April 15, 2010. On July 12, 2010, the trial court denied Harrison's second motion to compel. On September 22, 2010, Harrison filed his requests for *subpoena duces tecum* against third parties,

which the trial court ordered held until Harrison submitted proof of compliance with notice requirements under Ind. Trial Rule 34(C).

On October 8, 2010, the Nurses filed their motion for summary judgment. On October 27, 2010, Harrison filed his memorandum of law in opposition to the Nurses' motion for summary judgment. On November 2, 2010, the Nurses filed their reply. On November 17, 2010, Harrison filed a motion to strike the Nurses' reply. On December 16, 2010, the trial court conducted a hearing on the Nurses' summary judgment motion as well as Harrison's motions to compel and to strike. On January 7, 2011, the trial court issued its Order granting summary judgment in favor of the Nurses and denying Harrison's motions to compel and to strike.

Harrison now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Summary Judgment

A. Standard of Review

Harrison contends that the trial court erred when it granted summary judgment to the Nurses on Harrison's 42 U.S.C. § 1983 claim. Both federal and state courts possess concurrent jurisdiction over §1983 claims. *Higgason v. Stogsdill*, 818 N.E.2d 486, 488 (Ind. Ct. App. 2004), *trans. denied*. Although Harrison cites to federal decisions addressing Rule 56 of the Federal Rules of Civil Procedure for the applicable standard of review of summary judgment, "Indiana courts do not follow federal rules of procedure." *Minor v. State*, 641 N.E.2d 85, 89 (Ind. Ct. App. 1994), *trans. denied*; *see also* Ind. Trial

Rule 1. Moreover, Indiana’s summary judgment procedure “differs significantly” from summary judgment under the Federal Rules of Civil Procedure. *Tom v. Volda*, 654 N.E.2d 776, 782 (Ind. Ct. App. 1995), *trans. denied*. Thus, we review Harrison’s appeal of summary judgment under T.R. 56.

Under T.R. 56(C), summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. When reviewing the grant of summary judgment on appeal, we apply the same standards as the trial court in deciding whether to affirm or reverse summary judgment. *Leo Machine & Tool, Inc. v. Poe Volunteer Fire Dept., Inc.*, 936 N.E.2d 855, 858 (Ind. Ct. App. 2010), *aff’d on reh’g*. We must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Id.* When moving for summary judgment, the defendant must show that the undisputed facts negate at least one element of the plaintiff’s cause of action. *Id.* at 859. We consider all of the designated evidence in the light most favorable to the non-moving party. *Id.* at 858-59. The party appealing the grant of summary judgment has the burden to persuade us that the trial court’s ruling was improper. *Id.* at 859. If the record discloses an incorrect application of the law to the facts, then the grant of summary judgment must be reversed. *Id.*

Here, the trial court entered findings of fact and conclusions of law in support of its judgment. Special findings are not required in summary judgment proceedings and

are not binding on appeal. *Id.* However, such findings offer this court valuable insight into the trial court's rationale for its review and facilitate appellate review. *Id.*

T.R. 56(C) also requires each party to a summary judgment motion “to designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion.” Neither the trial court nor the reviewing court may look beyond the evidence specifically designated to the trial court to make a determination in a summary judgment proceeding. *Leo Machine & Tool, Inc.*, 936 N.E.2d at 859. Further, T.R. 56(H) specifically prohibits appellate courts from reversing a grant of summary judgment “on the ground that there is a genuine issue of material fact unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court.” On appeal, we can affirm summary judgment under any theory supported by the designated evidence. *Branham v. Celadon Trucking Services, Inc.*, 744 N.E.2d 514, 521 (Ind. Ct. App. 2001), *trans. denied*.

Under Ind. Appellate Rule 50(A)(2)(f), the appellant is required to provide an appendix containing all documents necessary to adjudicate the issues raised by the appellant. Although Harrison filed his Appendix containing the trial court's Order, the chronological case summary, and certain discovery requests and responses, essential documents required to adjudicate his appeal are noticeably absent. These include the Nurses' motion for summary judgment, memorandum in support, designated evidence, and reply; Harrison's opposition to the Nurses' motion for summary judgment,

memorandum in support, and designated evidence. *See Cortez v. Jo-Ann Stores, Inc.*, 827 N.E.2d 1223, 1234 (Ind. Ct. App. 2005), *reh'g denied*.

Although the Nurses filed their own Appendix consisting of only their designated evidence, their Appendix also lacks the motions and memoranda in support of their motion for summary judgment. By failing to supply us with such documentation, the parties have limited our ability to conduct a full review of the trial court's grant of summary judgment. *See id.* Nevertheless, because of our preference to decide cases on the merits, we will adjudicate Harrison's appeal based upon the designated evidence before us. *See Kelly v. Levandoski*, 825 N.E.2d 850, 856 (Ind. Ct. App. 2005).

B. Analysis

Harrison's claim under 42 U.S.C. §1983 alleged that Nurse Turner and Nurse Hric violated his Eighth Amendment rights under the United States Constitution. We note that 42 U.S.C. §1983 creates no substantive right of its own, but acts only as a vehicle to afford litigants a civil remedy for deprivation of their federal rights. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

The Eighth Amendment, applicable to the states by the Fourteenth Amendment, prohibits cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 101 (1976). Cruel and unusual punishment includes the unnecessary and wanton infliction of pain upon a prisoner. *Id.* at 103. Because denial of medical care constitutes unnecessary and wanton infliction of pain, the State has a duty to provide adequate medical care to prisoners under the Eighth Amendment. *Id.* When a prison official commits "acts or

omissions sufficiently harmful to evidence deliberate indifference to the serious medical needs of prisoners,” this constitutes unnecessary and wanton infliction of pain and therefore cruel and unusual punishment proscribed by the Eighth Amendment. *Id.* at 104-06.

Deliberate indifference is determined by two inquiries, one objective, and one subjective. *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005). Under the objective prong, the plaintiff must show that he had a serious medical condition “that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor’s attention.” *Id.* The subjective prong requires the plaintiff to prove the defendants’ culpable mental state of “deliberate indifference” to the plaintiff’s serious medical need. *Id.* Deliberate indifference may be shown by actual intent or reckless disregard. *Id.*

We note that “inadvertent error, negligence, or even ordinary malpractice” do not constitute deliberate indifference. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996), *cert. denied*, 520 U.S. 1230 (1997). Nor do mere delays in treatment, provided that the delay did not exacerbate the injury or needlessly prolong pain. *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010). Finally, no deliberate indifference exists when a defendant reasonably responds to a serious risk to inmate health, “even if the harm ultimately was not averted.” *Farmer v. Brennan*, 511 U.S. 825, 844 (1994).

For summary judgment purposes, the Nurses admitted that Harrison’s chronic hypertension constituted a serious medical condition. Although Nurse Turner admittedly

gave Harrison another prisoner's medication by mistake, the Nurses argue that Harrison has not shown their deliberate indifference to his serious medical condition. In particular, the Nurses contend that, at best, Nurse Turner acted negligently, and that Harrison received additional, adequate medical care from Nurse Hric and other medical personnel following Harrison's ingestion of the wrong medication. On the other hand, Harrison acknowledges that while Nurse Turner did not deliberately provide him with incorrect medication, both Nurses' "means of concealing or preventing investigation" or otherwise failing to respond constituted deliberate indifference to his plight. (Appellant's Reply Br. p. 3).

Here, Harrison did not designate any evidence to create a genuine issue of material fact that Nurse Turner acted with deliberate indifference, either by intending to harm him or acting in reckless disregard of his chronic hypertension. Instead, the designated evidence shows that Nurse Turner merely administered the wrong medication to Harrison. Nurse Turner stated that she mistakenly thought that she administered blood pressure medication to Harrison. Although Harrison indicated in a designated interrogatory response that the anti-psychotic medication adversely affected his chronic hypertension by causing panic attacks, both Nurses stated that anti-psychotic medications have "a very short half-life and should have had little effect on Harrison, expect perhaps to make him drowsy." (Appellee's App. pp. 12, 57). Rather than constituting deliberate indifference to Harrison's chronic hypertension, Nurse Turner's actions show that she intended to treat and was aware of Harrison's chronic hypertension and the effect that

anti-psychotic medication would have upon Harrison's condition. Accordingly, we find that Harrison has not shown a genuine issue of material fact regarding Nurse Turner's deliberate indifference to Harrison's medical condition, and therefore summary judgment was appropriate as to Nurse Turner.

Summary judgment was also appropriate for Harrison's claim against Nurse Hric. Harrison alleged that Nurse Hric was deliberately indifferent by refusing to treat Harrison following his ingestion of the wrong medication. Harrison's medical records show just the opposite. Nurse Turner's affidavit shows that she gave Harrison the wrong medicine at 5:00 a.m. on September 13, 2008, and Harrison's medical records show that he received no less than fourteen visits and treatments from various medical providers, including four visits from Nurse Hric, in the 72 hours following Harrison's ingestion of the wrong medication. Although the medical records note Harrison's loss of consciousness, being found in a pool of urine, and vomiting blood, Harrison has not provided evidence countering Nurse Hric's, or for that matter any subsequent medical provider's, responses, all of which establish that Harrison received substantial medical treatment following the medicine mix-up. Based upon the record before us, we cannot say that Harrison has shown that a genuine issue of material fact exists that Nurse Hric was deliberately indifferent to Harrison's serious medical condition. Accordingly, the trial court did not err when it granted summary judgment in favor of Nurse Hric.¹

¹ Harrison raises ancillary issues in connection with the grant of summary judgment including the trial court's failure to strike the Nurses' reply and his constitutional right to a jury trial under T.R. 38(B).

II. *Discovery Requests*

Finally, Harrison argues that the trial court abused its discretion by denying, prior to the summary judgment hearing, his motion to compel additional discovery responses from the Nurses and by ordering the clerk to hold his eight *subpoena duces tecum* to various corrections officers until Harrison demonstrated that he complied with T.R. 34(c)'s notice requirement. Given "the fact-sensitive nature of discovery matters," trial court rulings on discovery matters are "cloaked in a strong presumption of correctness on appeal." *Mutual Sec. Life Ins. Co. by Bennett v. Fidelity and Deposit Co. of Maryland*, 659 N.E.2d 1096, 1103 (Ind. Ct. App. 1995), *trans. denied*. Thus, we review the trial court's ruling on discovery issues for an abuse of discretion, which consists of a trial court decision that is clearly against the logic and effect of the facts of the case. *Hudgins v. McAtee*, 596 N.E.2d 286, 289 (Ind. Ct. App. 1992).

The trial court's Order denying Harrison's motion to compel noted that Harrison had received sufficient responses from the Nurses and determined that a hearing on Harrison's motion would be a waste of judicial resources. We note that Harrison has not provided us with a copy of his motion or the underlying discovery sought, and that he fails to explain how the trial court abused its discretion, other than to assert the incompleteness of the Nurses' responses. We find no abuse of discretion by the trial court here.

Because we find that the trial court did not err by granting summary judgment in favor of the Nurses, we will not address these arguments.

Further, evidence sought by Harrison through his eight *subpoena duces tecum* would have not provided Harrison with evidence sufficient to produce a genuine issue of material fact. Although summary judgment is normally inappropriate prior to the close of discovery, where discovery is unlikely to produce additional evidence giving rise to an issue of material fact, summary judgment is appropriate nonetheless. *Mutual Sec. Life Ins. by Bennett*, 659 N.E.2d at 1103. Had the trial court directed the clerk to issue Harrison's *subpoena duces tecum*, Harrison might have received evidence in the form of video recordings and incident reports which would have been probative of the Nurses' deliberate indifference following Harrison's ingestion of the anti-psychotic medication. However, such evidence, at best, would have simply affirmed that Harrison was given incorrect medication and that those responses by medical staff and corrections officers resulted in a delay of Harrison's medical treatment. As noted above, negligent conduct by medical providers and delays in treatment are insufficient to prove deliberate indifference. Accordingly, because the evidence sought by Harrison was unlikely to generate a genuine issue of material fact, we find no abuse of discretion by the trial court when it denied Harrison's discovery requests.

CONCLUSION

Based on the foregoing, we find that the trial court did not err when it granted summary judgment in favor of the Nurses. We also find that the trial court did not abuse its discretion when it denied Harrison's discovery requests.

Affirmed.

FRIEDLANDER, J. and MATHIAS, J. concur