STATE OF MICHIGAN

COURT OF APPEALS

STACY HAWKINS,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
April 27, 2001

No. 217678
Court of Claims
LC No. 97-016619-CM

Before: Cavanagh, P.J., and Markey and Collins, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order denying plaintiff's motion for reconsideration and the order granting summary disposition for defendant, concerning plaintiff's claim that defendant failed to properly diagnose and treat plaintiff's medical condition in violation of the state and federal prohibitions against cruel and unusual punishment. Plaintiff also appeals the trial court's denial of his motions to compel discovery and to appoint a medical expert and stenographer. We affirm.

First, plaintiff contends that the trial court should have evaluated his constitutional claim under the Michigan Constitution's more protective provision for freedom from cruel *or* unusual punishment. We review summary disposition decisions and constitutional questions de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998). A decision on a summary disposition motion under MCR 2.116(C)(10) determines whether there is enough factual support for a claim to warrant a trial. *Spiek*, *supra*. Throughout this case, plaintiff cited federal case law interpreting the federal cruel *and* unusual punishment provision, US Const Am VIII, while simultaneously arguing generally for an unidentified, more protective standard of care expanding Michigan's provision, Const 1963, art 1, § 16, beyond its federal counterpart. Plaintiff only first advocated the identifiable standard at the summary disposition hearing – Michigan's statutory exception for governmental immunity, the gross negligence standard found in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

In *Carlton v Dep't of Corrections*, 215 Mich App 490; 546 NW2d 671 (1996), we held that an inmate's cruel or unusual punishment claim for inadequate medical care, although filed under the Michigan Constitution, is governed by federal precedent where the inmate expressly relies on that precedent. *Id*. at 505-506, citing *Farmer v Brennan*, 511 US 825, 825-837; 114 S

Ct 1970; 128 L Ed 2d 811 (1994). Federal precedent utilizes the deliberate indifference standard: "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment," and deliberate indifference arises when the prison official "knows of and disregards an excessive risk to inmate health or safety." *Carlton*, *supra* at 506, quoting *Farmer*, *supra* at 828, 837. However, our Supreme Court has noted that in an appropriate case, the Michigan Constitution's prohibition against cruel *or* unusual punishment may be interpreted more broadly than the Eighth Amendment's prohibition against cruel *and* unusual punishment. *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992); see, also, *Carlton*, *supra* at 505.

Ultimately, there is no standard to apply to plaintiff's case other than the federal deliberate indifference standard. The "compelling reason test" that our Supreme Court has set out to expand interpretation of the Michigan Constitution concerns incarceration punishments and points this Court toward what the law currently is in the jurisdiction. See *Bullock*, *supra* at 29-30; *People v Antkoviak*, 242 Mich App 424, 438; 619 NW2d 18 (2000). Application of the compelling reason test by analogy, and our survey of the law in this jurisdiction, reveal that plaintiff has raised no compelling reason to apply any standard other than the federal "deliberate indifference" standard for cases like plaintiff's at this point in our jurisprudence. *York v Detroit (After Remand)*, 438 Mich 744, 757; 475 NW2d 346 (1991); *People v Lorentzen*, 387 Mich 167, 178-179; 194 NW2d 827 (1972).

Measuring the facts of plaintiff's case against the federal deliberate indifference standard, we conclude that defendant's actions do not rise to the level of cruel and unusual punishment.[1] Specifically, plaintiff claims that one of defendant's policies constitutes cruel and unusual punishment by limiting off-site medical evaluations for fiscal reasons. Defendant admits to having a policy of allowing an inmate to obtain second opinions off-site if the inmate pays for them, but plaintiff refused to do this. The record in this case reveals that defendant examined and evaluated plaintiff's symptoms on multiple occasions and suggested possible diagnoses and courses of treatment to pursue by process of elimination. As long as defendant examined plaintiff and treated his symptoms, defendant could not have been deliberately indifferent to a substantial risk of harm. Plaintiff is incarcerated and must accept the standard of medical care to which he is subjected as long as it is at a minimum constitutional. See, generally, *Estelle v Gamble*, 429 US 97, 105-106; 97 S Ct 285; 50 L Ed 2d 251 (1976). Deference is given to the judgment of prison officials and medical professionals regarding prisoners' constitutional rights and medical care. *Washington v Harper*, 494 US 210, 223-224, 233-235; 110 S Ct 1028; 108 L Ed 2d 178 (1990). While we sympathize with plaintiff's health concerns, we cannot do other than to conclude that it would have been in his best interest to cooperate with his physicians' prescribed courses of treatment.

Plaintiff's subsidiary argument that the trial court did not consider all his documentary evidence is unfounded. Because this Court's review of this matter is de novo, this claim is of no consequence to our decision. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d

[1] Our analysis includes consideration of the report of Gregg Patter, M.D., which became part of the record pursuant to our granting of plaintiff's motion to expand the record.

776 (1998). Nothing on the record before us shows that the trial court abdicated its duty to consider all affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties. MCR 2.116(G)(5). In fact, in its oral opinion, the trial court specifically stated that it had reviewed the undisputed written policies submitted by defendant in making its decision. The evidence plaintiff insists is so persuasive only establishes that his symptoms may be similar to sleep apnea disorder, not that defendant inflicted cruel and unusual punishment on him. This evidence cannot create the specific, genuine issue of fact that defendant's actions were unconstitutional. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Therefore, we find that the trial court properly weighed all the evidence before it, as we are also bound to do.

Plaintiff's second claim of error is that the trial court failed to rule on or improperly denied his combination motion for a court-appointed medical expert and stenographer, together with his motion to compel discovery. This claim is similarly without merit.[2] These rulings are reviewed under an abuse of discretion standard. *Michigan Millers Mut Ins Co v Bronson Plating Co*, 197 Mich App 482, 494; 496 NW2d 373 (1992), aff'd on other grds 445 Mich 558; 519 NW2d 864 (1994); *In re Attorney Fees of Klevorn v Michigan*, 185 Mich App 672; 463 NW2d 175 (1990).

Plaintiff had no constitutional right in this case to a court-appointed medical expert or stenographer, nor did the trial court abuse its discretion in denying plaintiff's repetitive motions to compel discovery. A trial court has discretion to appoint an expert on its own or on a party's motion under MRE 706, usually to assist the trier of fact in complex litigation, and the parties may pay for the expert's expenses. *Applegate v Dobrovir*, 628 F Supp 378, 383 (D DC, 1985), aff'd 809 F2d 930 (1987) (parties usually pay for appointed experts on the court's own motion in civil cases pursuant to FRE 706, on which MRE 706 is based). While MRE 706 does not specify whether it is a civil or criminal rule of evidence, the case on which plaintiff relies, *People v Jacobsen*, 448 Mich 639; 532 NW2d 838 (1995), is a criminal case. In contrast, indigent civil plaintiffs rarely have a right to court-appointed counsel, let alone an expert. See *Mead v Batchlor*, 435 Mich 480, 495-497; 460 NW2d 493 (1990) (actual implication of indigent incarceration is the key for counsel appointment in civil contempt cases). Moreover, an expert appointment could not have strengthened plaintiff's case because a medical expert could not answer the legal question whether defendant's medical judgments rose to the level of cruel and unusual punishment.

Likewise, the motion for a court-appointed stenographer is unprecedented. Because the trial court found, as we have, that no further discovery would assist plaintiff in creating a genuine issue of material fact for trial, the appointment of a stenographer was unnecessary. *Dep't of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 447; 443 NW2d 420 (1989). Nor did the trial court abuse its discretion in denying plaintiff's most recent motion to compel

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[2] While it appears from the record that plaintiff properly filed this motion, the trial court's order is absent, although a notation on the docket sheet states that the combination motion was denied. Thus, this issue is preserved for appeal. *Carson Fischer Potts and Hyman v Hyman*, 220 Mich App 116, 119; 559 NW2d 54 (1996).

discovery. Plaintiff filed repeated discovery motions to compel responses to his interrogatories, requests to admit, and requests for production of documents. The trial court granted one of plaintiff's motions to compel a response to his request to admit, and defendant properly responded, but plaintiff was not satisfied. The trial court correctly found that defendant had complied with MCR 2.312(B)-(C), requiring specific denials, reasons for objections, and reasons for statements of no admission or denial. Thus, the record does not reveal that the trial court abused its "considerable discretion" in denying the motion to compel. *Peters v Gaggos*, 72 Mich App 138, 149; 249 NW2d 327 (1976).

We affirm.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Jeffrey G. Collins