98-20571

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October 1, 1998

Mr. Charles R. Fulbruge III, Clerk
United States Court of Appeals
For the Fifth Circuit
600 Camp Street, Room 102
New Orleans, Louisiana 70130

Re: ***Robert Arthur Hall v. Tommy B. Thomas, Sheriff, et al.;*** Fifth Circuit Appeal No. **98-20571** (Appeal from the Southern District of Texas, Houston Division, No. H-97-CV-874).

DEFENDANT-APPELLEE'S LETTER BRIEF

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

COME NOW Doctors Michael Seale, Marcus Guice, Cuong Trinh, Anthony Phi, Kham Luu, Mark Chassay, and Donald Klein, Defendants-Appellees, ("the Doctors") by and through their attorney, the Attorney General for the State of Texas, and submit this Letter Brief[1] in response to the brief filed by Plaintiff-Appellant Robert Arthur Hall, ("Hall"). In support thereof, the Doctors respectfully offer the following:

I.
STATEMENT OF THE ISSUE

Whether the district court properly granted summary judgment in favor of the Doctors.

[1] This letter brief is being filed in lieu of a formal brief. A formal brief will be filed should the Court so request. "R" will refer to the single volume record on appeal with reference to the docket entry number, followed by the page number of the specific document if necessary.

II.
STATEMENT OF THE CASE

Robert Arthur Hall, a prisoner confined in the Harris County Jail in Houston, Texas, filed this lawsuit pursuant to 42 U.S.C. § 1983 and the Americans With Disabilities Act (ADA) 42 U.S.C. § 12101 et. seq.[2] In this action, Hall claims that the Doctors were deliberately indifferent to his serious medical needs. Hall sued the Doctors in both their official and individual capacities.[3]

Hall's voluminous complaint asserts what is essentially four separate claims of deliberate indifference against the Doctors. First, Hall claims that the Doctors failed to provide him with adequate medical care for a chronic kidney condition. Second, Hall alleges that he did not receive all of his seizure medications from the medical cart nurses. Third, Hall asserts that he had a medical restriction against wearing leg restraints and that certain Doctors failed to prevent security personnel from forcing him to wear leg irons in violation of this medical restriction. Finally, Hall complains that an open sore was mis-diagnosed as "herpes" when in fact Hall was suffering from diabetes.

In their original answers, the Doctors denied Hall's allegations of deliberate indifference and asserted their entitlement to qualified immunity.

III.
ARGUMENT

This Court reviews a district court's grant of summary judgment under the same standard applied by the district court and in a light most favorable to the non-moving party. *Woods v. Edwards, et al.*, 51 F.3d 577, 580 (5th Cir. 1995). If the movant has shown that no genuine issue of material fact remains and that he is entitled to judgment as a matter of law, the non-movant must go beyond the pleadings and designate the specific facts showing that there is a genuine issue for trial. *Id.*

A. The ADA and Qualified Immunity

The appropriate standard for determining qualified immunity is the objective reasonableness of an official's conduct as measured by reference to clearly established law. *Anderson v. Creighton,* 483 U.S. at 641, 107 S. Ct. at 3040; *Bigford v. Taylor*, 896 F.2d 972, 974 (5th Cir. 1990); *Pfannstiel v. City of Marion,* 918 F.2d 1178, 1182 (5th Cir. 1990). This standard requires that a court first determine if the Hall has alleged a violation of a clearly established constitutional right, and if such

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[2] Hall was arrested on a federal parole violator warrant and placed in the Harris County Jail as a federal prisoner on February 21, 1995. R 65, p. 2.

[3] During the period of time relevant to Hall's allegations, the Doctors were employed by the University of Texas Health Science Center at Houston Medical School (UT-H MS) and were providing medical services to inmates in the Harris County Jail pursuant to a contract between UT-H MS and Harris County.

an allegation is found, then decide whether the public official's actions could reasonably have been thought consistent with the constitutional right. *Rankin v. Klevenhagen*, 5 F.3d 103 (5th Cir. 1993); *Enlow v. Tishomingo County, Mississippi*, 962 F.2d 501, 508 (5th Cir. 1992).

Hall has alleged a violation under 42 U.S.C. § 12132, the ADA. At the time of this suit, there was a split of authority among the Circuits as to whether the ADA applied to prison or jail inmates. At the time of the alleged incidents which form the basis of Hall's lawsuit, the Fifth Circuit and the Supreme Court had not yet addressed this issue. Thus, it was not "clearly established" that Hall, as an inmate, enjoyed any protection under the ADA.

The Fifth Circuit has directed the district courts to examine only Supreme Court and Fifth Circuit precedent in determining whether a right is "clearly established" for qualified immunity purposes. *Brady v. Fort Bend County*, 58 F.3d 173, 175-76 (5th Cir. 1995). Noting this disagreement among the circuits, and that the Fifth Circuit had not addressed the issue, the district court reasoned that "prisons do not clearly fall within the proscription of the ADA" and properly held that Hall did not clear the first hurdle under qualified immunity. R 65, p. 8.

Hall relies on *Pennsylvania Department of Corrections v. Yeskey*, for the proposition that prisoners enjoy protection under the ADA. Brief, p. 5. However, his reliance on this case is misplaced. Because *Yeskey* was decided in June of 1998, it does not support the notion that Hall had a clearly established right at the time of the alleged violation of his purported rights under the ADA. *Pennsylvania Department of Corrections v. Yeskey*, 118 S. Ct. 1952 (1998). Hall cannot rely on a retroactive application of this Supreme Court decision to overcome the Doctors entitlement to qualified immunity for claims brought under the ADA.

As the district court properly held, "Hall's rights were not so clearly established that a reasonable state prison official would have realized his actions constituted a violation of the ADA." R 65, p. 9-10. Because Hall failed to produce authority showing that he had clearly established rights under the ADA, the Doctors were entitled to qualified immunity against this claim. Therefore, summary judgment was appropriately entered on this issue.

B. Constitutional Claims Under 42 U.S.C. § 1983

It is well established that no recovery may be had under § 1983 absent proof of deprivation of a right secured by the Constitution or laws of the United States. *Baker v. McCollan*, 443 U.S. 137, 140 (1979). Thus, the first inquiry in any suit brought under 42 U.S.C. § 1983 is whether the Hall has been deprived of a federally secured right. *Baker*, 443 U.S. at 140.

To state a cognizable medical claim under § 1983 and the Eighth Amendment, a Hall must allege acts or omissions sufficiently harmful to evidence deliberate indifference to a serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976); *Cay v. Estelle*, 789 F.2d 318 (5th Cir. 1986). In *Farmer v. Brennan*, the Supreme Court stated that in a claim for deliberate indifference the proper test is whether a prison official knows of and consciously disregards an

excessive risk to the inmate's health or safety. 114 S. Ct. 1970, 1979 (1994). Further, the prison 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 that inference. *Id.*

In the case at bar, the Doctors' summary judgment evidence shows that Hall's complaints were thoroughly addressed with an abundance of medical evaluations and treatments. R 45, p. 27-34.[4] Hall has failed to come forward with any competent evidence to the contrary.[5]

Hall complained of a chronic kidney condition upon his intake into the Harris County Jail on February 22, 1995. That same day, Dr. Trinh ordered Hall be admitted to LBJ General Hospital, where an examination and urinalysis were performed, the results of which were negative for urinary or kidney problems. R 45, p. 73. Despite having several opportunities during subsequent medical examinations, Hall did not reassert his belief that he had a kidney condition until November 27, 1995, some nine months later. R 45, p. 60. Dr. Guice responded by ordering an x-ray to look for urinary tract stones, blood work to assess Hall's kidney function, and a urinalysis. *Id.* The results showed no indication of kidney or urinary conditions, but did reveal that Hall had diabetes. R 45, p. 57, 58, 60, 84, 87, 88. Thus, the medical records document that the Doctors were not deliberately indifferent to Hall's complaints. Rather, these claims were thoroughly evaluated by the medical staff.

Hall also failed to show a serious medical condition with respect to his claim that he was forced to wear leg irons in violation of his medical restrictions.[6] Neither Dr. Guice, nor any other health care provider at the Harris County Jail ever recommended that Hall not wear leg restraints. Hall's assertion that Dr. Chassay was deliberately indifferent because he missed seeing such a restriction in Hall's medical records is wholly without merit. There was no such restriction and this allegation is based on nothing more than Hall's misinterpretation of medical records. R 45, p. 32, 52.

Furthermore, there is no evidence to support Hall's contention that an open sore he claims was a symptom of diabetes, was mis-diagnosed by Dr. Guice as "herpes." Hall's symptoms and history were consistent with a sexually transmitted disease. R 45, p. 32. Hall did not exhibit any symptoms consistent with diabetes. As previously noted, Dr. Guice discovered Hall's diabetes as a result of blood work that the doctor had ordered to evaluate Hall's claim of urinary problems.

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[4] See also the Doctors motion for summary judgment for a detailed summary of Hall's medical evaluations and treatments. R 45, p. 5-13.

[5] Hall, in his brief, repeatedly points to his own complaint and affidavit as evidence to support his allegations. Brief, p. 4, 6-7, 8-9, 14, 15. However, Hall's subjective complaints and conclusory allegations as set forth in his pleadings are not competent summary judgment evidence. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998) *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256, 106 S. Ct. at 2514.

[6] Hall alleges in his brief that injury from wearing leg irons prevented him from "the free exercise of his religion," and "meaningful access to the courts." Brief, p. 10. To the extent that Hall purports to assert claims under the First and Sixth Amendments to the Constitution for the first time in this appeal, this Court has held that issues briefed on appeal which were not raised in the district court are not considered by the reviewing court. *U.S. v. Allegheny-Ludlum Industries Inc.*, 517 F.2d 826, 840 (5th Cir. 1975).

Finally, Hall's claim of deliberate indifference based on the complaint that he did not receive all of his seizure medication is without merit. The Doctors' summary judgment evidence shows that if Hall did not receive all of his medication, it was because Hall failed to respond to the medical cart nurses as they made their rounds.[7] In fact, the medical records document twenty-eight instances of Hall refusing medication from the nurses. R 45, p. 97-210. Doctors Chassay and Luu increased Hall's dosages to compensate for the low level of medication in Hall's bloodstream in an attempt to counter Hall's own refusal to take his medication. R 45, p. 18-19.[8] These adjustments were appropriate in the professional medical judgment of the Doctors and reasonable under the circumstances. There is no basis for Hall's assertion that he was over medicated as result of the Doctors attempt to compensate for Hall's own refusal to take his medication.

The documented medical records of the Doctors examining, diagnosing, and providing appropriate treatment to Hall negates a showing of deliberate indifference to serious medical needs. *Bass v. Sullivan,* 550 F.2d 229 (5th Cir. 1977); *see also McCord v. Maggio,* 910 F.2d 1248, 1251 (5th Cir. 1990) (neither deliberate indifference to medical needs nor wanton infliction of pain is shown when there exist medical records documenting assessment and treatment of an inmate's medical complaints); *Martinez v. Griffin,* 840 F.2d 314 (5th Cir. 1988) (dismissal appropriate where evidence reflected that prisoner received adequate medication and treatment). Moreover, any disagreement that Hall might have with the Doctors' diagnoses and treatment of his medical complaints is not actionable under § 1983. *Banuelos v. McFarland,* 41 F.3d 232, 235 (5th Cir. 1995)(disagreement between inmate and his physician concerning whether certain medical care was appropriate is actionable under § 1983 only under exceptional circumstances).

Even assuming *arguendo* that the Doctors were somehow negligent in providing Hall with medical care, claims of negligence are not actionable under § 1983. *Daniels v. Williams,* 474 U.S. 326, 331-34, 106 S. Ct. 662, 664-7 (1986); *Davidson v. Cannon,* 474 U.S. 344, 347-48, 106 S. Ct. 668, 670-71 (1986). There is no basis for Hall's self-serving, conclusory allegations of deliberate indifference. As evidenced by Hall's voluminous medical records, the Doctors and other medical personnel at the Harris County Jail provided Hall with an abundance of medical care.

The district court correctly stated that its function is not to question the professional medical judgment of Doctors who treat inmates, but to enforce the dictates of the Constitution. R 65, p. 13. Relying on *Estelle,* the district court properly held that, "Hall's complaints do not amount to the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment and as such, must be dismissed." 429 U.S. at 105-06. *Id.* Therefore, because the summary judgment evidence established there was no genuine issue of material fact for trial, the district court properly granted the Doctors' motion for summary judgment.

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[7] Even if the nurses purposefully refused to administer Hall's medication, a claim that is refuted by the medical records, the Doctors would not be responsible for the nurses' actions. Hall has not produced any evidence that the Doctors condoned this alleged practice.

[8] This fact also appears in the Doctors' summary judgment evidence. Exhibit A, Affidavit of Dr. Michael Seale, at 5.

In addition, the Doctors are entitled to qualified immunity from Hall's claims of constitutional deprivations. The competent summary judgment evidence shows the Doctors' actions did not violate "clearly established constitutional or statutory rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. It is Hall's burden to come forward with evidence, not mere conclusory allegations, that the diagnoses and treatment by the Doctors was objectively unreasonable. *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992) (Halls have the burden to come forward with summary judgment evidence sufficient to create a genuine issue as to whether the defendant official's conduct was objectively unreasonable in light of clearly established law) *citing Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990). Hall presented no evidence to defeat the Doctors entitlement to qualified immunity and the district court therefore properly granted summary judgment.

IV.

CONCLUSION

For the reasons set forth above, the Doctors request that the Court affirm summary judgment in their favor.

Respectfully submitted,

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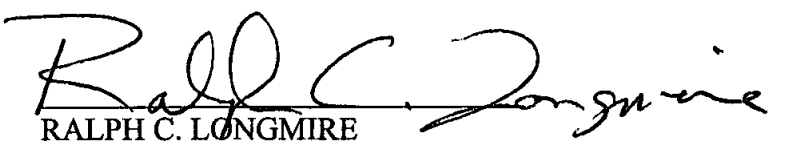

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CERTIFICATE OF SERVICE

I, RALPH C. LONGMIRE, Assistant Attorney General, do hereby certify that a true and correct copy of the above and foregoing **Defendant-Appellee's Letter Brief** has been served by placing same in the United States mail, postage prepaid, on this the 1st day of October, 1998, addressed to:

Robert Arthur Hall, # 38261-079
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