No. 10-2089

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dallas Cobbs (State Prisoner no. 164276),

Plaintiff-Appellee,

v.

George Pramstaller,

Defendant-Appellant,

and

Craig Hutchinson, Marcella Clark, Gregory Naylor, Bency Mathai, Haresh Pandya, and Correctional Medical Services, Inc.,

Defendants.

Appeal from the United States District Court
Eastern District of Michigan at Detroit
Honorable Anna Diggs Taylor

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

Cobbs argues that he had a serious medical condition that Pramstaller was aware of. He argues that he had "(a) sub-capsular glare, (b) a huge disparity in vision, and (c) documented double vision in his left eye for six months as of July 2004." [Plaintiff's Brief, page 12]. In fact, there is no evidence that he suffered from glare, his definition of "disparity in vision" is separated from the medically relevant definition of that term, and any double vision present in July 2004 was corrected when the right-eye cataract surgery was performed. There was no serious medical need that Pramstaller ever became aware of.

Cobbs's arguments also extend beyond the scope of Pramstaller's actual involvement. Cobbs seeks to hold Pramstaller accountable for every action taken by healthcare staff, and he seeks to forcibly impart to Pramstaller knowledge of every complaint that he allegedly made to his treating physicians. By focusing instead on the actions of Pramstaller and looking only at the information actually presented to Pramstaller, it becomes clear that Pramstaller did not violate any clearly established right of which a reasonable person would have known.

ARGUMENT

I. Pramstaller is entitled to qualified immunity with respect to the October 26, 2004, non-approval of left-eye surgery.

In his response, Cobbs relies on anecdotal evidence from his declaration as well as his medical kites, all of which were never seen by Pramstaller. The focus here should be on the facts related to Pramstaller's involvement, and when looking at those facts, Cobbs's arguments are revealed as lacking in substance and unpersuasive.

Pramstaller was involved in the non-authorization of left-eye cataract surgery for Cobbs on two occasions: October 26, 2004, and April 25, 2006. Other than at those two meetings of the Medical Services Advisory Committee, Pramstaller had no involvement in the non-authorization of any treatment. Therefore, the focus should be on the circumstances of those two non-authorizations. The second non-authorization is discussed below in Issue II.

Cobbs argues that in October 2004, the "UR unit knew" that his left-eye vision was 20/70 and 20/400 with glare, and that he suffered from double vision. [Appellee's Brief, page 11]. First, as to Pramstaller's motion, it is not relevant what the "UR unit knew." Second, as of October 2004, Cobbs has already had successful surgery on his right eye, so he had good overall vision. In addition, he had no complaints of double vision – the only medical note indicating double vision at this time was from back in July, before the right-eye cataract surgery. [R.

106, Exhibit C, page 12]. There is no evidence that he suffered from double vision in October 2004, and there is no evidence that Pramstaller had knowledge of any such complaint. In addition, Pramstaller was never presented with evidence of any real-world glare at this time; the July 24, 2004, medical record indicated only that Cobbs's left-eye vision decreased with artificially-induced glare in the office setting. [R. 103, Exhibit I, page 64, lines 5-15; R. 106, Exhibit C, pages 12-13].

Cobbs also notes that a Utilization-Review nurse could have approved the left-eye surgery if he had glare, a great disparity in vision, or double vision. [Appellee's Brief, pages 11-12]. That neither the Utilization-Review nurse nor the Utilization-Review physician did approve the surgery is evidence that Cobbs did not meet those criteria. Additionally, Cobbs's interpretation of "great discrepancy in vision" has been consistently incorrect throughout this litigation. Double vision is great discrepancy in vision. [R. 106, ex I, page 30, lines 4-25, page 31, lines 1-16]. Cobbs believes that "discrepancy in vision" merely refers to the difference between the visual acuity of the two eyes. In fact, it refers to discrepancies in the visual cortex, i.e. double vision. [R. 103, Exhibit I, page 60, lines 3-25, page 61, lines 1-8, page 74, lines 4-8].

Prior to the October 26, 2004, Medical Services Advisory Committee meeting, a CHJ-407 form was submitted requesting surgery for Cobbs's left eye. [R. 106, Exhibit C, page 27]. That request form referred to an August 31, 2004,

progress note; that note recorded that Cobbs had 20/70 vision in his right eye *without correction.* [R. 106, Exhibit C, pages 22-23]. Neither the CHJ-407 nor the progress notes indicate any double vision or glare. Based on Cobbs's excellent overall vision and lack of any reported problems, Pramstaller did not authorize surgery on the left-eye at the October 26, 2004, Medical Services Advisory Committee meeting; the non-approval memorandum stated that the request should be resubmitted for reconsideration if new information became available. [R. 106, Exhibit C, page 29]. No clearly established law exists under which Cobbs could be found to have a serious medical condition at this time. And no clearly established law exists under which Pramstaller could be found to have violated any of Cobbs's rights at this time. Pramstaller is entitled to qualified immunity with respect to the October 26, 2004, non-approval.

II. Pramstaller is entitled to qualified immunity with respect to the April 25, 2006, non-approval of left-eye surgery

Pramstaller's second non-approval came on April 25, 2006. At this time, Cobbs had excellent vision in his right eye; only risk of glaucoma and poor vision were reported with respect to the left eye. And the glaucoma risk was nominal; Pramstaller even ordered that it be monitored. Pramstaller did not violate any clearly established law.

Once again, the request for left-eye surgery was initiated by a CHJ-407 form. Cobbs discusses the CHJ-407 that was submitted on March 6, 2006, again

requesting left-eye surgery; he quotes most of it, but he omits the portion that is damaging to his claim: he had 20/20 vision in his right eye at this time. [Plaintiff's Brief, page 16; R. 106, Exhibit C, page 36]. With 20/20 vision in his right eye, he had excellent overall vision. [R. 103, Exhibit I, page 73, lines 8-11].

The requesting physician stated that the left-eye surgery was needed to prevent the risk of glaucoma: "surgery advised to prevent secondary glaucoma." [R. 106, Exhibit C, pages 36, 38]. The document was sent to the Medical Services Advisory Committee on April 3, 2006. [R. 106, Exhibit C, page 39]. On April 17, 2006, the physician appears to have updated the request noting that "hypermature cataract surgery is more complicated." [R. 106, Exhibit C, page 39]. The Medical Services Advisory Committee does not appear to have received this updated version, as its response appears in the same box on its copy of the form. [*Cf.* R. 106, Exhibit C, pages 39, 40].

On April 25, 2006, Pramstaller upheld the CMS non-approval of the left-eye surgery. [R. 106, Exhibit C, page 41]. Pramstaller did not ignore the concerns of the requesting physician. The physician was concerned about glaucoma, and Pramstaller addressed that risk by writing, "monitor closely for increase in interocular pressure and resubmit if pressure increases." [R. 106, Exhibit C, page 41]. Developing glaucoma would be very rare, and monitoring the pressure was an appropriate safeguard. [R. 103, Exhibit I, page 57, lines 11-15]. Even the

requesting physician admits that developing glaucoma would be very rare – he's never even seen it happen; he just thinks that the literature indicates that it's a possibility. [R. 106, Exhibit F, page 67, lines 24-25, page 68, lines 1-4].

Pramstaller responded to exactly what information was presented to him. The requesting physician indicated a concern for Glaucoma, so Pramstaller and the Medical Services Advisory Committee considered and addressed that risk. Had different information been presented, such as glare or double vision, then those concerns would have been addressed through surgery or any other appropriate course of treatment. Pramstaller was well aware that there was minimal risk to Cobbs in this case. [R. 103, Exhibit I, page 81, lines 1-6].

Cobbs attempts to create fact questions through his declaration and alleged kites. He knows that he needs to show that he suffered from some risk or injury and that Pramstaller was aware of such and ignored it. But the medical records do not support Cobbs's attempt. If there was important information relevant to the medical condition for which the physicians were requesting treatment, then it was on those physicians to present that information with their requests. Pramstaller relied on the information presented in the surgery-request documents. Based on those records, no clearly established law exists under which Cobbs could be found to have a serious medical condition at this time. And no clearly established law exists under which Pramstaller could be found to have violated any of Cobbs's

rights at this time. Pramstaller is entitled to qualified immunity with respect to the April 25, 2006, non-approval.

Finally, Cobbs argues that this Court should not rely on "unpublished *pro se* cases to set the boundaries of important Eighth Amendment rights." [Plaintiff's Brief, page 39]. This argument misses the point. This case is not about setting boundaries – it is about recognizing existing boundaries and determining whether Pramstaller's conduct violated any existing boundary. It did not. And the cases cited by Pramstaller are dispositive to the qualified-immunity analysis here. Pramstaller himself was a defendant in one of those cases for the exact same conduct as here – chairing the Medical Services Advisory Committee during the non-approval of a cataract surgery.[1] Cobbs has failed to come forth with any authority holding Pramstaller's actions to be unconstitutional. He has therefore failed to meet his burden, and Pramstaller is entitled to qualified immunity.

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[1] *Stevenson v. Pramstaller, et al.*, no. 07-cv-14040, 2009 U.S. Dist. LEXIS 25495 at *2 (E.D. Mich. 2009) (Exhibit D to Appellant's Brief).

CONCLUSION

Defendant-Appellant Pramstaller respectfully requests that this Court overrule the District Court's Order denying Pramstaller's motion for summary judgment based on qualified immunity

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more that 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 1,585 words.

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PROOF OF SERVICE

I certify that on November 29, 2010, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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