FILED
United States Court of Appeals
Tenth Circuit

August 15, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DAVID SURO,

Plaintiff - Appellant,

v.

SUSAN M. TIONA, M.D.; DAVID P. GROSS, P.A.; CORRECTIONS CORPORATION OF AMERICA; CORRECTIONAL HEALTH PARTNERS, LLC,

Defendants - Appellees.

No. 18-1434
(D.C. No. 1:16-CV-02273-RM-NRN)
(D. Colo.)

ORDER AND JUDGMENT*

Before **LUCERO**, **MATHESON**, and **MORITZ**, Circuit Judges.

David Suro, Colorado inmate appearing pro se,[1] appeals the district court's grant of summary judgment to defendants Susan M. Tiona, M.D.; David P. Gross,

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Because Suro appears pro se, we construe his filings liberally, but do not serve as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

P.A.; Corrections Corporation of America (CCA); and Correctional Health Partners, LLC (CHP) on his claims that they (1) violated the Eighth Amendment's proscription of cruel and unusual punishment via deliberate indifference to his medical needs;[2] (2) committed medical negligence; and (3) breached a common law and contractual duty to provide medical care.[3] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

A semi-truck hit the Colorado Department of Corrections bus that was taking Suro to prison in August 2014. Suro went to the emergency room and the treating physician diagnosed him with a cervical strain and a closed head injury. But the doctor noted that the results of a CT scan of Suro's head and neck were "unremarkable," found "no evidence of a focal neurological deficit," and concluded that Suro was "stable to be discharged back to the care of law enforcement." R., Vol. 2 at 34.

A few days later, the Department of Corrections sent Suro to the Kit Carson Correctional Center (KCCC) to serve his sentence. At the time, defendant CCA owned and operated KCCC. CCA employed defendants Tiona and Gross as medical providers to the inmates at KCCC.

---

[2] Suro seeks to hold the defendants liable for violating his Eighth Amendment rights under 42 U.S.C. § 1983.

[3] Suro does not challenge the district court's grant of summary judgment on his state law claims, so we do not address them here. *See United States v. Williamson*, 746 F.3d 987, 993 n.1 (10th Cir. 2014).

Beginning with Suro's intake examination, CCA and its medical staff provided Suro with extensive medical care for his accident-related injuries. This care included (1) conducting numerous in-house physical exams; (2) arranging for several outside consultations with specialists, including a physical therapist, a neurologist, and a neurosurgeon; (3) coordinating advanced diagnostics via an MRI and an EMG; and (4) providing Suro with a range of treatments that included medication, therapeutic devices, and physical therapy.

Despite this abundant medical care, the parties agree that Suro "may never recover from his symptoms, especially the headaches, as some patients do not respond well to the available treatment for such symptoms." *Id.* at 11.

Among the manifold treatment options that Suro's medical team explored, in December 2015 the consulting physical therapist, Steven Vasquez, recommended a home exercise program and cervical spine mechanical traction therapy. The medical team at KCCC provided Suro with the wherewithal to implement the home exercise program but not the traction therapy. The record contains a letter from someone in the KCCC medical department to Suro wherein the author[4] notes: "I spoke with Steven Vasquez PT from Denver Heath. . . . He states you will be okay with the Home exercise program daily and we will not pursue traction at this time since it is not allowed in ~~our~~ any Facility." *Id.* at 80.

[4] The letter is signed, but the signature is not sufficiently legible for us to identify the author, who is not otherwise identified in the record.

The Department of Corrections moved Suro to the Sterling Correctional Facility in April 2016. The parties do not dispute that at Sterling Suro "was provided with traction which was helpful." *Id.*, Vol. 3 at 146.

Later that year, Suro filed this case. The defendants moved for summary judgment, and the district court granted the defendants' motions as to all claims.

II. Standard of Review

We review a district court's grant of summary judgment de novo. *Callahan v. Poppell*, 471 F.3d 1155, 1158 (10th Cir. 2006). Summary judgment is appropriate "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). To avoid summary judgment, a plaintiff must come forward with evidence and cannot rely on "speculation, conjecture, or surmise." *Self v. Crum*, 439 F.3d 1227, 1230 (10th Cir. 2006) (internal quotation marks omitted).

III. Discussion

A. Eighth Amendment Claims

"A prison official's deliberate indifference to an inmate's serious medical needs is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment." *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005). "'Deliberate indifference' involves both an objective and a subjective component." *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000). "Under the objective inquiry, the alleged deprivation must be sufficiently serious to constitute a deprivation of constitutional dimension." *Self*, 439 F.3d at 1230 (internal quotation marks omitted).

The parties do not dispute that Suro's medical needs are sufficiently serious to satisfy the objective component. We therefore evaluate only the subjective component. *See id.* at 1233 (analyzing only the subjective component where the parties agreed the objective component was met).

The subjective component of a deliberate indifference claim "requires the plaintiff to present evidence of the prison official's culpable state of mind." *Mata*, 427 F.3d at 751. An "official cannot be liable 'unless the official knows of and disregards 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 also draw the inference.'" *Self*, 439 F.3d at 1231 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). The deliberate indifference standard poses "a high evidentiary hurdle," *id.* at 1232, "akin to 'recklessness in the criminal law,' where, to act recklessly, a 'person must "consciously disregard" a substantial risk of serious harm,'" *id.* at 1231 (quoting *Farmer*, 511 U.S. at 837, 839).

In the context of a medical-treatment claim, two types of conduct may constitute deliberate indifference: "(1) a medical professional failing to treat a serious medical condition properly; and (2) a prison official preventing an inmate from receiving medical treatment or denying access to medical personnel capable of evaluating the inmate's condition." *Id.* Negligent diagnosis or treatment is not enough to demonstrate a constitutional violation. *Id.* at 1230. Indeed, the Eighth Amendment is not infringed "when a doctor simply resolves 'the question whether additional diagnostic techniques or forms of treatment is indicated.'" *Id.* at 1232

(quoting *Estelle v. Gamble*, 429 U.S. 97, 107 (1976)). And "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." *Farmer*, 511 U.S. at 838.

1. *Eighth Amendment Claims Against Tiona and Gross*

Suro needed medical attention to the injuries he sustained in the bus wreck. As the district court correctly noted, "[t]he record is replete with evidence of the medical care that [Suro] received" for these injuries. R., Vol. 3 at 157. Far from being indifferent to Suro's medical needs, Tiona and Gross advocated for, and secured, numerous medical consultations, tests, and treatments on Suro's behalf. Their course of treatment comported with Suro's symptoms. "[W]here a doctor orders treatment consistent with the symptoms presented and then continues to monitor the patient's condition, an inference of deliberate indifference is unwarranted under our case law." *Self*, 439 F.3d at 1232–33. The district court correctly concluded that an inference of deliberate indifference is unwarranted here.

On appeal, Suro homes in on the one type of therapy—traction—that the defendants did not provide and asserts that the defendants' decision not to provide that specific therapy constituted a constitutionally cognizable denial of care. Although we have recognized "that intentional interference with prescribed treatment may constitute deliberate indifference," the plaintiff retains the burden to prove that the interfering prison officials possessed the requisite culpable state of mind. *Ledoux v. Davies*, 961 F.2d 1536, 1537 (10th Cir. 1992) (finding evidence that inmate was

housed in upper level cell when recommended treatment included a permanent restriction on use of stairs, without more, did not support an inference of deliberate indifference). Suro did not present any evidence that in declining to provide traction therapy, Tiona or Gross intended to cause Suro harm or consciously disregarded a substantial risk of serious harm to him. Even the physical therapist who recommended the traction therapy in the first place believed that it was only "*possible* there may have been *some* benefits" from the traction therapy. R., Vol. 2 at 153 (emphasis added). The evidence does not show that either Tiona or Gross had a "sufficiently culpable state of mind," *Farmer*, 511 U.S. at 834 (internal quotation marks omitted), to be deliberately indifferent.

2. *Eighth Amendment Claim Against CCA*[5]

To survive summary judgment, Suro had to show that CCA violated the Eighth Amendment under principles of municipal liability. *See Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1216 (10th Cir. 2003) (extending principles of municipal liability to private § 1983 defendants). "We will not hold a municipality liable for constitutional violations when there was no underlying constitutional violation by any of its officers." *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1317–18 (10th Cir. 2002) (internal quotation marks omitted). Since Suro has not established any constitutional violations by any of CCA's employees, his claim against CCA fails.

[5] Suro waived his claims against CHP, noting that CHP "is no longer an Appellee or Defendant in this case." Aplt. Reply Br. at 9. We therefore affirm the district court's grant of summary judgment to CHP.

We also note that regardless of whether any of CCA's employees committed a constitutional violation, Suro has shown no basis for municipal liability here.

> To establish municipal liability, a plaintiff must show (1) the existence of a municipal custom or policy and (2) a direct causal link between the custom or policy and the violation alleged. . . . Ordinarily, proof of a single incident of unconstitutional activity is not sufficient to impose municipal liability. In the case where a plaintiff seeks to impose municipal liability on the basis of a single incident, the plaintiff must show the particular illegal course of action was taken pursuant to a decision made by a person with authority to make policy decisions on behalf of the entity being sued.

Jenkins v. Wood, 81 F.3d 988, 993–94 (10th Cir. 1996) (alterations, citations and internal quotation marks omitted).

Suro argues on appeal that CCA had a custom or policy of denying traction therapy. Although he was represented by counsel at the time, Suro did not clearly make this argument to the district court. CCA contended in its motion for summary judgment that Suro "failed to identify any custom or practice of CCA that has a direct causal link to the alleged constitutional violations." R., Vol. 1 at 207 (internal quotation marks omitted). Suro's opposing summary judgment papers did not overtly respond to CCA's point with arguments or evidence; indeed, they lacked the words "custom," "policy," and "practice." *See id.* at 284–99; *id.*, Vol. 2 at 3–22; *id.*, Vol. 3 at 4–17.[6] As a result, we need not consider Suro's newfound argument. *See*

[6] Suro's complaint made the vague assertion, without evidence, that unidentified "[p]olicies and procedures caused or contributed to the delay in providing medical care for Mr. Suro's serious medical needs." R., Vol. 1 at 59. But Suro did not repeat or support this contention with evidence in response to CCA's motion for summary judgment. *See Branson v. Price River Coal Co.*, 853 F.2d 768, 771–72 (10th Cir. 1988) ("To avoid summary judgment, a party must produce *specific*

Bancamerica Commercial Corp. v. Mosher Steel of Kan., Inc., 100 F.3d 792, 798–99 (10th Cir. 1996) ("Where a litigant changes to a new theory on appeal that falls under the same general category as an argument presented at trial or presents a theory that was discussed in a vague and ambiguous way the theory will not be considered on appeal." (alterations and internal quotation marks omitted)), *amended on other grounds*, 103 F.3d 80 (10th Cir. 1996).

In any event, an unknown author wrote the only document in the record that arguably supports Suro's allegation.[7] While it did state that traction "is not allowed in ~~our~~ any Facility," R., Vol. 2 at 80, Suro does not point to supporting evidence that the document reflected a policy adopted or ratified by a policymaker at CCA, or that any other inmates had ever been denied traction therapy. *See Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability . . . unless proof of the

---

facts showing that there remains a genuine issue for trial . . . ." (internal quotation marks omitted)).

[7] In his opening brief, Suro purportedly quotes other documents—Ambulatory Health Records from December 16, 2015, and January 20, 2016, a December 22, 2015, letter from Gross, a CCA Medical Report Form from March 24, 2016, and pages from Gross's deposition transcript—to support his argument. Aplt. Opening Br. at 7–8, 15–16. Suro does not provide citations to the record or district court docket. We have not been able to locate copies of any of these documents in the record or on the docket in the district court case and therefore we do not consider these documents. *See Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 648 (10th Cir. 2008) ("We will not review evidence that was not before the district court when the various rulings at issue were made." (alterations and internal quotation marks omitted)).

incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.").

The district court correctly concluded that Suro did not present sufficient evidence of a CCA custom or policy that led to a violation of his Eighth Amendment rights.

3. *Factual Dispute About Suro's Condition*

In connection with his Eighth Amendment claims, Suro also argues that the district court's summary judgment ruling should be reversed because the parties dispute whether his condition worsened over time. Because Suro's Eighth Amendment claims fail for reasons that do not relate to whether his condition worsened, this alleged factual dispute is not material to our determination and does not undermine the district court's ruling on summary judgment. *See Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1361 (10th Cir. 1993) ("Factual disputes about immaterial matters are irrelevant to a summary judgment determination.").

III. Conclusion

Suro's motion to proceed without prepayment of costs and fees is granted. He is reminded that he must continue making partial payments until the filing and docketing fees are paid in full.

The district court's order granting summary judgment in favor of the defendants is affirmed.

Entered for the Court

Nancy L. Moritz
Circuit Judge