FILED
United States Court of Appeals
Tenth Circuit

September 9, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN W. PEROTTI,

Plaintiff - Appellant,

v.

R.N. KRISTINA SERBY;
R.N. MARK ANDREIS,

Defendants - Appellees.

No. 18-1391
(D.C. No. 1:15-CV-00534-RM-STV)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, **BACHARACH**, and **McHUGH**, Circuit Judges.

Mr. John Perotti suffered a broken arm as a federal prisoner. Despite his complaints of intense pain and a broken arm, two nurses (Kristina Serby and Mark Andreis) did not believe that the arm was broken and declined to give him pain medication. Officials ultimately learned that the

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* Mr. Perotti seeks oral argument, but it would not materially help us to decide this appeal We have thus decided the appeal based on the appellate briefs and the record on appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

arm was broken and provided treatment. Given the delay, however, Mr. Perotti sued the two nurses under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), alleging deliberate indifference to serious medical needs. The district court granted summary judgment to the two nurses, and we reverse.[1]

1. Mr. Perotti breaks his arm and seeks treatment.

Mr. Perotti suffered the broken arm when he was attacked by other inmates on September 10, 2011. According to Mr. Perotti, the arm was discolored and swollen. Guards saw that Mr. Perotti was injured and took him to the infirmary, where he was seen by a nurse, Mr. Mark Andreis. The parties disagree on whether Mr. Andreis conducted an examination. But Mr. Andreis noted at the time that Mr. Perotti was complaining of pain in his arm and wrist. Despite the complaints, Mr. Andreis did not provide any pain medication.

The next day, officials put Mr. Perotti in an unused office with a mattress on the floor. Ms. Kristina Serby, a nurse, saw Mr. Perotti and noted that his arm had swelled.

Ms. Serby allegedly thought that Mr. Andreis had arranged for an x-ray; in fact, he hadn't. Apparently thinking that an x-ray had been arranged, Ms. Serby states that she told Mr. Perotti that he would soon be

[1] Judge Holmes joins this order and judgment in full, *except for* Part 6. As to Part 6, he concurs only in the judgment.

getting an x-ray. But Ms. Serby did not think that the arm was broken, and she too declined to give Mr. Perotti any pain medication.

The sleeping arrangements didn't help. Mr. Perotti weighed roughly 320 pounds, and he suffered excruciating pain whenever he pushed himself up from the mattress. As he was painfully rising from the mattress on September 11, he saw Ms. Serby and Mr. Andreis passing out medication and asked them for something to relieve the intense pain. According to Mr. Perotti's evidence, Ms. Serby laughed, refused to provide pain medication, and told Mr. Perotti to come to the cell door for his previously authorized seizure medication. Mr. Perotti adds that both nurses refused to send him to an emergency room.

Mr. Andreis admits that he saw Mr. Perotti every day between September 11 and 13, that Mr. Perotti had seemed convinced that the arm was broken, and that he had asked for pain medication. But each day, Mr. Andreis declined to authorize any pain medication. On September 13, he requested an x-ray of Mr. Perotti's right arm, but continued to disallow any pain medication.[2] Two days later, another nurse finally prescribed pain medication (Tylenol).

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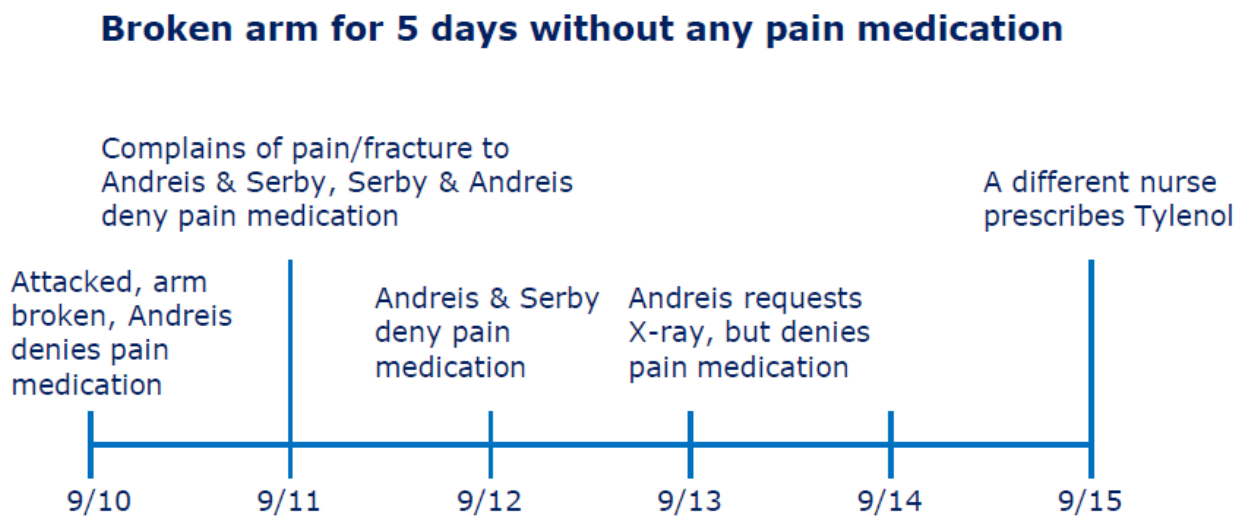
[2] Mr. Andreis stated under oath that he refused to prescribe pain medication because Mr. Perotti was repeatedly asking for narcotic pain medications and had abused narcotic pain medications in the past. The district court pointed out that Mr. Perotti had stated under oath that he never requested a narcotic pain medication, and the court observed that "there [was] not one shred of evidence in the record, other than Andreis'



The next day, x-rays showed a break in two places.

Mr. Perotti was later transferred to another prison, where he obtained surgery. He alleges continued pain in his right arm.

2. Mr. Perotti sues the two nurses and ultimately proceeds pro se.

Mr. Perotti sued the two nurses (Ms. Serby and Mr. Andreis), alleging that they had violated the Eighth Amendment through deliberate indifference to serious medical needs. According to Mr. Perotti, the nurses' indifference caused prolonged pain for the first five days and aggravation of the injury by delaying treatment.

During the litigation, the district court obtained an attorney for Mr. Perotti. But the attorney withdrew, citing disagreements with Mr. Perotti.

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declaration, that [Mr. Perotti] ever requested narcotic medication." R., vol. 1, at 239 n.6.

Mr. Perotti asked the district court to find a new attorney to take the case, but the court declined.

3. Mr. Perotti loses a motion for a temporary restraining order, a motion to amend the complaint, and a motion for summary judgment.

Mr. Perotti moved for

- a temporary restraining order and preliminary injunction to preserve his legal files at the Southern Ohio Correctional Facility (where he was imprisoned during the litigation) and
- an opportunity to amend the complaint to add a claim for failure to protect him from the attack on September 10.

The district court denied both motions. The two nurses moved for summary judgment, and the court granted the motion.

4. The challenge to the temporary restraining order and preliminary injunction is moot.

In this appeal, Mr. Perotti challenges the denial of his motion for a temporary restraining order and preliminary injunction. During the appeal, however, Mr. Perotti has been transferred from the Southern Ohio Correctional Facility. The transfer renders this part of the appeal moot because Mr. Perotti was seeking protection from conditions specific to the Southern Ohio Correctional Facility. *See Jordan v. Sosa*, 654 F.3d 1012, 1027–28 (10th Cir. 2011).

5. The district court did not err in denying leave to amend the complaint.

The complaint has been amended five times, but Mr. Perotti wanted to amend a sixth time. His proposed amendment would add a claim for failure to protect him from the attack on September 10, 2011. The district court denied leave to amend, and Mr. Perotti challenges this ruling.

In this part of the appeal, we apply the abuse-of-discretion standard. *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1247 (10th Cir. 2015). The court has discretion to disallow amendment when the claimant has waited too long and lacks an adequate excuse for the delay. *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1285 (10th Cir. 2006).

The district court acted within its discretion in denying amendment. Mr. Perotti waited to seek addition of this claim until over three years after he had started the suit. And the deadline for amending the pleadings had passed more than a year earlier.

Mr. Perotti points out that he had only recently been able to see a videotape of the attack. But he does not suggest that the videotape shows any involvement by prison officials. He knew on September 10, 2011, that he had been attacked, and he does not identify anything in the videotape that he needed to allege a failure to provide protection.

Mr. Perotti argues that

- he could not pursue this claim without the videotape because the claim would scar him as an informant and

- the past release of the videotape relieved him of this concern because authorities had already seen the videotape.

But Mr. Perotti did not present this argument to the district court. Thus, this argument was forfeited. *See Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1284 (10th Cir. 2013).

In these circumstances, the district court acted within its discretion in denying leave to amend.

6. The district court erred in granting summary judgment to the nurses on the Eighth Amendment claim.

As noted above, Mr. Perotti alleges that the two nurses violated the Eighth Amendment by waiting too long to provide pain medication and request an x-ray. According to Mr. Perotti, this delay resulted in excruciating pain and caused the break to worsen. The district court granted summary judgment to the nurses based on the absence of a constitutional violation.

We engage in de novo review, considering the summary-judgment record in the light most favorable to Mr. Perotti. *Mata v. Saiz*, 427 F.3d 745, 749 (10th Cir. 2005). The nurses contend that they enjoyed qualified immunity. Given this contention, Mr. Perotti had to identify evidence creating a genuine issue of disputed fact regarding the existence of a clearly established constitutional violation. *Id.*

Seeking to satisfy this burden, Mr. Perotti points to the Eighth Amendment, which protects against prison officials' unnecessary and wanton infliction of pain. *Al-Turki v. Robinson*, 762 F.3d 1188, 1192 (10th Cir. 2014). The Eighth Amendment is violated, however, only if Mr. Perotti shows a sufficiently serious medical need and the nurses' knowing disregard of an excessive risk to safety or health. *Id.*

The medical need can be sufficiently serious when the condition results in substantial pain. *Id.* at 1193; *see also Garrett v. Stratman*, 254 F.3d 946, 950 (10th Cir. 2001) (stating that the element is satisfied if the inmate experiences "considerable pain"). For example, when the pain lasts hours or days prior to treatment, the condition may be considered sufficiently serious. *See Al-Turki*, 762 F.3d at 1193; *Mata v. Saiz*, 427 F.3d at 754–55; *Sealock v. Colorado*, 218 F.3d 1205, 1210 (10th Cir. 2000).

The evidence, when viewed favorably to Mr. Perotti, would show substantial pain between September 10 and 15, 2011. His arm was broken in two places, and he described his pain as "intense" and "excruciating" in the first three days. R., vol. 1, at 162–63, 165. The pain led him to remain on his mattress, skipping meals and bypassing seizure medication rather than force himself up with his broken arm. From this evidence, the fact-finder could reasonably infer that Mr. Perotti was experiencing substantial pain in the five days between the attack and the first offering of pain

medication (Tylenol). A reasonable factfinder could justifiably regard this pain as sufficiently serious to trigger the Eighth Amendment.

The district court expressed skepticism that the pain was sufficiently serious to implicate the Eighth Amendment, stating that Mr. Perrotti had "provide[d] no detail as to what 'pain' means." R., vol. 1, at 246–47. The word "pain" is common and a fact-finder could reasonably understand what Mr. Perotti meant. Mr. Perotti

- complained that he could not move his right arm without experiencing intense pain,
- stated that he had excruciating physical pain, and
- said under oath that he had suffered this pain for the five days in which he was unable to obtain any pain medication.

The district court downplayed this evidence, reasoning that (1) it consisted only of Mr. Perotti's affidavit and (2) the pain complaints were not corroborated by photographs or Mr. Andreis's notes. But the affidavit constitutes evidence, and the court cannot disregard the affidavit simply because it comes from Mr. Perotti. *See United States v. Stein*, 881 F.3d 853, 857–58 (11th Cir. 2018) (en banc) (stating that affidavits may be used to defeat summary judgment even when they are self-serving); *see also Navejar v. Iyiola*, 718 F.3d 692, 697 (7th Cir. 2013) (stating that the district court erred in granting summary judgment by disregarding an inmate plaintiff's sworn account of a painful attack on grounds that the account was self-serving).

The district court not only minimized the evidentiary value of Mr. Perotti's affidavit but also relied on a part of Dr. Rick Gehlert's report. Dr. Gehlert wrote:

> Inmate Perotti did complain about pain in his right wrist from the outset. In fact, between September 10th to September 15th, there were several complaints of pain in the right arm and wrist. I am not aware of any treatment for the right wrist until Tylenol was prescribed on September 15th and an x-ray was obtained on September 16th documenting a distal ulna fracture. Inmate [Perotti] endured a minor increase in pain and suffering because of this period of absence of treatment.

R., vol. 1, at 78. From this passage, the court focused on Dr. Gehlert's opinion that Mr. Perotti had only "a minor increase" in pain because of the absence of any treatment in the five-day period following the break. But what about the pain that could have been reduced with medication during the first five days? The district court failed to consider this part of the claim.[3]

But Mr. Perotti had to show not only a sufficiently serious condition but also a culpable state of mind. *Mata*, 427 F.3d at 751. The nurses had a culpable state of mind if they recognized the facts creating a substantial risk of serious harm. *Id.*

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[3] The district court stated that Mr. Perotti was attributing his pain to a delay in ordering an x-ray. But Mr. Perotti was attributing the pain to the absence of any treatment, including the failure to provide Tylenol after he had complained for five days about a broken arm.

The district court acknowledged that Mr. Perotti had satisfied this element for Ms. Serby. R., vol. 1, at 241 n.11. We agree. Mr. Perotti stated under oath that Ms. Serby had declined to provide help even after seeing him struggle to rise from the mattress, being told that his arm was broken, and seeing that the arm was swollen. And, according to Mr. Perotti, Ms. Serby even refused to give Mr. Perotti his seizure medication unless he rose from the mattress and came to the cell door. As the district court concluded, this combination of evidence created a reasonable inference of culpability on the part of Ms. Serby.

We also regard the evidence of culpability as sufficient for Mr. Andreis. Mr. Perotti stated under oath that

- he had repeatedly complained to Mr. Andreis of pain and a broken arm and
- Mr. Andreis had seen Mr. Perotti writhe in pain as he tried to lift himself from the mattress.

Despite Mr. Perotti's obvious distress, Mr. Andreis did not supply any pain medication and waited until September 13, 2011, to ask for an x-ray. This delay could lead a reasonable fact-finder to infer that Mr. Andreis had realized he was prolonging Mr. Perotti's pain:

> A broken arm can be an excruciating injury, and few people would freely choose to delay twenty-two hours or even eleven hours in seeking a doctor's care. Indeed, an indigent could reasonably expect faster treatment at a hospital emergency room. The unusual length of the delay provides a reasonable basis for the inference that there was deliberate indifference to [the prisoner's] serious medical needs.

Loe v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978).

Given the evidence of obvious pain, the district court erred in concluding that Mr. Perotti had failed to show a constitutional violation. Viewing the evidence and reasonable inferences in Mr. Perotti's favor, a factfinder could justifiably infer a constitutional violation. *See Conley v. Birch*, 796 F.3d 742, 747 (7th Cir. 2015) (holding that a genuine issue of material fact existed on "whether the provision of only painkillers and ice to an inmate suffering from a suspected fracture constitutes deliberate indifference"); *Boretti v. Wiscomb*, 930 F.2d 1150, 1154 (6th Cir. 1991) (concluding that a delay in treating a wound, providing dressings, or supplying pain medication created a triable fact issue under the Eighth Amendment, precluding summary judgment).

As noted above, Mr. Perotti must also show that the constitutional violation was clearly established. The district court did not reach this issue, and the preferred course is to leave this matter for the court to address on remand. *See Rife v. Okla. Dep't of Pub. Safety*, 854 F.3d 637, 649 (10th Cir. 2017) (stating that the clearly-established prong should be addressed on remand because the issue had been raised in district court but not decided). We thus remand for the district court to consider this issue.[4]

[4] In the complaint, Mr. Perotti alleged that the delay in treatment had caused not only intense pain but also worsening of his fracture. In district court, Mr. Andreis and Ms. Serby had characterized these allegations as a

7. The court did not err in declining to appoint new counsel.

Mr. Perotti also argues that the district court should have appointed counsel. But the court can't appoint counsel in civil cases; the court can only request an attorney to take the case. *Rachel v. Troutt*, 820 F.3d 390, 396 (10th Cir. 2016). In reviewing the district court's decision whether to make a request, we apply the abuse-of-discretion standard. *Id.* at 397. Given the limited supply of attorneys willing to accept these requests, the district court must exercise discretion in deciding when to seek representation. *See id.* The district court did not abuse its discretion here. (Given the remand, however, the district court can reconsider whether to request new counsel for Mr. Perotti.)

Entered for the Court

Robert E. Bacharach
Circuit Judge

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single Eighth Amendment claim. *See* R., vol. 1, at 83 ("Plaintiff asserts a single Eighth Amendment claim against each defendant."). We agree with this characterization and regard Mr. Perotti's allegations of pain and worsening of the fracture as two separate injuries from the same claim (deliberate indifference to serious medical needs based on the delay in treatment). Given a material factual dispute on one injury (the continuation of intense pain for five days), the grant of summary judgment cannot stand in the absence of qualified immunity. We thus have no occasion to decide whether a material factual dispute would remain on the second alleged injury (worsening of the fracture).