Affirmed and Opinion filed May 4, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-01052-CV

ALLEN PAUL JONES, Appellant

V.

LUTHOR MASTERS and ROCHELLE MCKINNEY, Appellee

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 20,058

O P I N I O N

Allen Paul Jones (Appellant) appeals from the trial court's summary judgment, granted in favor of Luthor Masters and Rochelle McKinney (Appellees). Appellant, a prison inmate of the Institutional Division of the Texas Department of Criminal Justice and appearing before this Court *pro se*, brought this action against Appellees, asserting that they unlawfully denied medical treatment to him. In contending that the summary judgment was improperly granted by the trial court, Appellant alleges that (1) the affidavit relied upon by Appellees to support their motion for summary judgment was insufficient as a matter of law, and (2) the trial court erred in granting summary judgment in favor of Appellees on the grounds of official immunity, sovereign immunity, qualified immunity, or the statute of limitations. We affirm.

STANDARD OF REVIEW

The standard for reviewing a motion for summary judgment under Rule 166a is well- established: (1) the movant must show that no genuine issue of material fact exists and that it is entitled to summary judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and (3) every reasonable inference must be resolved in the non-movant's favor. *See* TEX. R. CIV. P. 166a; *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). Where, as here, the summary judgment does not specify the grounds upon which summary judgment was granted, we will affirm the judgment if any of the theories advanced in the motion are meritorious. *See State Farm Fire & Casualty Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993).

DISCUSSION

In his second original amended complaint, Appellant alleged three causes of action against Appellees. His first cause of action alleged that Appellees were negligent, grossly negligent and deliberately indifferent in denying medical treatment to him. He alleged that Appellee Masters, a medical doctor, breached his duty to refer Appellant to a medical specialist for the "proper diagnosis and treatment of the two knots or tumors" in the back of his neck and left shoulder. He further alleged that Appellee McKinney, an inmate grievance officer, breached her duty to undertake a meaningful review and investigation of grievances and to recommend that he be referred to a medical specialist. Appellant alleged that both Appellees "exhibited an entire want of care which would raise the belief that the failures of [Appellees] in this regard was the result of conscious indifference to the rights and welfare of [Appellant]." His second cause of action alleged that Appellees violated his First and Fourteenth Amendment rights by retaliating against him by refusing to refer him to a medical specialist. Appellant alleged that Appellees retaliated against him because (1) of his "repeated use of the prison grievance procedure to complain of the denial of medical treatment," and (2) he filed a federal civil rights suit against another prison medical official, alleging deliberate indifference to his medical condition. His third cause of action alleged that both Appellees acted deliberately indifferent to his medical condition, in violation of the Eight and Fourteenth

Amendments. Appellant sought $30,000 in monetary damages and injunctive relief, ordering Appellees to refer him to a medical specialist "at UTMB/John Sealy Hospital, at Galveston, Texas . . . ."

We observe that for an inmate to successfully establish a claim based upon "deliberate indifference" relative to the conduct of prison officials and prison medical personnel, as here, the inmate must show that the official knows of and disregards an excessive risk to the inmate's health and safety. *See Farmer v. Brennan*, 511 U.S. 835, 837, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811 (1994); *Estelle v. Gamble*, 429 U.S. 97, 105-07, 97 S.Ct. 285, 292-93, 50 L.Ed.2d 251 (1976). The inmate must also show that official was aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and that the official drew the inference. *See id.*, 114 S.Ct. at 1979; *Estelle*, 429 U.S. at 105-07, 97 S.Ct. at 292-93.

In their motion for summary judgment, Appellees contended that the summary judgment evidence showed that they were not negligent, grossly negligent, or deliberately indifferent to Appellant's medical condition, that the element of causation did not exist in Appellant's retaliation claim, and that Appellant's claims were otherwise barred by sovereign immunity, official immunity, qualified immunity, and the statute of limitations. To support their motion for summary judgment, Appellees attached copies of Appellant's medical records from April 1996 to June 1999, copies of Appellant's grievance records from January 1996 to March 1999, and an affidavit from Glenda M. Adams, M.D., M.P.H., C.C.H.P. Dr. Adams is the Eastern Regional Director for UTMB Correctional Health Care.

The affidavit by Dr. Adams was attached to Appellees' motion for summary to support their contention that they were neither negligent in treating Appellant nor deliberately indifferent in refusing to refer Appellant to a medical specialist. Dr. Adams' affidavit stated the following:

> BEFORE ME, the undersigned authority, personally appeared Glenda M. Adams, M.D., M.P.H., C.C.H.P, who being duly sworn, deposed as follows:
>
> "My name is Glenda M. Adams. I am over twenty-one years of age, of sound mind, capable of making this Affidavit, and personally acquainted with the facts herein stated. I am employed by the University of Texas Medical Branch (UTMB) contracted to the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID). I am a medical doctor with a Masters degree in Public Health working as the Eastern Region Medical Director for UTMB Correctional Managed Health Care. I am designated as an expert

witness in the cause of action entitled Allen P. Jones v. Luther Masters, et al., Civil Action No. 9820058. I am writing this Affidavit in response to allegations made by plaintiff Jones, TDCJ# 418672.

In preparing this Affidavit I have reviewed portions of the correctional medical records on plaintiff Allen P. Jones. The records reviewed were supplied by the Office of the Attorney General of Texas. It is my understanding that Plaintiff Jones is alleging the following:

1. He has pain in his neck and shoulder

2. The pain is caused by "tumors" called lipomas which restrict his movement

3. Dr. Masters and others have been "deliberately indifferent" in that they have failed or refused to refer Plaintiff Jones to John Sealy Hospital or another place for removal of the "tumors".

4. There are no policies or practices in place that would allow for Plaintiff Jones medical needs to be met.

Plaintiff Jones' medical record reveals that he first complained of left shoulder pain on January 25, 1994. He was examined by Dr. Masters on February 2, 1994. At that time, Dr. Masters noted that Mr. Jones was a power weight lifter with a "powerful muscular build" and "full range of motion of the left shoulder". Dr. Masters also noted that "visual exam is normal". He ordered x-rays of the shoulder which at the time were normal. However, later x-rays (1995 and 1997) have revealed that Plaintiff Jones has "arthritic changes" in his left shoulder. These "arthritic changes" have not prevented the plaintiff from continuing his weight lifting activities or from engaging in contact sports such as basketball (left ankle injury June 30, 1995). The medical record documents that Mr. Jones has been seen and provided various treatments for his shoulder pain including anti-inflammatory pain medications and even steroid injections. On May 28, 1996, Plaintiff Jones complained of "left shoulder pain for five years" indicating that his shoulder pain started about 1991.

In March of 1994, Plaintiff Jones complained of a painful "knot" next to his spine. Examination on March 25, 1994, revealed a small cyst or "tiny lipoma" in the left lower thoracic area (i.e. the left lower rib area). X-rays taken at the time were normal. Plaintiff Jones offered no further complaints of upper back pain until August of 1995 at which time he volunteered that he had had intermittent pain between his shoulder blades for "ten years". However, Mr. Jones did not complain of additional "knots" until July of 1997. During July and August of 1997, Mr. Jones was seen by Dr. Zima, physician assistant Bachman, and Dr. Masters at various times and diagnosed as having developed two additional small "lipomas" of the upper back - one at the level of the seventh cervical vertebra and one just medial to the left scapula (shoulder blade). The clinicians examining Mr. Jones have noted that the lipomas are small and nontender and that there is no indication for excision.

Based upon my education, training, and experience as a physician with eleven years in private practice and twelve years in correctional medicine, I offer the following opinions:

> Plaintiff Jones probably does have intermittent neck and should discomfort and has been diagnosed as having several small lipomas in the area of his upper back, however, the two findings are coincidental and not related to any cause effect association. Mr. Jones' neck and shoulder pain is most likely due to "arthritic changes" resulting from power lifting and other activities involving cumulative musculoskeletal trauma. The medical records reviewed indicate that Dr. Masters and other practitioners examined, x-rayed, and provided appropriate treatment for Mr. Jones' neck and shoulder discomfort. Lipomas are benign fatty tumors rarely causing symptoms and seldom removed except for cosmetic reasons. Contrary to Plaintiff Jones' allegations, the Texas Department of Criminal Justice and UTMB Correctional Managed Care do, in fact, have policies to assure that an offender's medical needs are met. However, these policies exclude surgery for purely cosmetic reasons except in exceptional cases. Such cases are those in which the lack of surgery might prevent the offender from being able to achieve gainful employment upon release from prison or in which severe social and psychological harm is likely to result or continue due to the lack of corrective surgery. UTMB Correctional Managed Care utilizes a review process and criteria developed by various clinical specialties to determine which patients are seen at John Sealy or other hospitals. The plaintiff's small lipomas do not meet the criteria for cosmetic surgery or for other specialty clinic referral. Hence, Dr. Masters and the other practitioners providing care to Mr. Jones have been conscientious and correct in the treatment(s) provided.

An expert's affidavit testimony will support summary judgment only if it is "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." *See* TEX. R. CIV. P. 166a(c); *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997). Conclusory statements by an expert are insufficient to support or defeat summary judgment. *See Wadewitz*, 951 S.W.2d at 466; *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991).

In his first point of error, Appellant contends that the Dr. Adams' affidavit was insufficient to defeat his claims as a matter of law. Specifically, Appellant contends that the "affidavit of Glenda Adams, the defendant's expert witness, is cursory, self serving, made in bad faith and is not made on personal knowledge as to the specific medical condition of Plaintiff's and adverse effects by the Plaintiff." We disagree.

We find that Dr. Adams' affidavit is clear, positive, and direct. We also find that her affidavit is free of contradictions and inconsistencies and could have been readily controverted by an opposing exert. *See Wadewitz*, 951 S.W.2d at 466. If a party presents an affidavit by an expert sufficient to support the motion for summary judgment, the opposing party must produce its own expert testimony to controvert the

summary judgment proof. *See Williams v. Huber*, 964 S.W.2d 84, 86 (Tex.App.–Houston [14th Dist.] 1997, no pet.). A party's motion for summary judgment may be properly granted where the court has been presented with no competent, controverting evidence by the opposing party. *See id.*; *see also Boren v. Bullen*, 972 S.W.2d 863, 865-66 (Tex.App.–Corpus Christi 1998, no pet.).

The uncontroverted summary judgment evidence presented by Appellees refutes the allegations contained in Appellant's first and third causes of action that Appellees breached any duty owed to Appellant by any negligent act or omission or by conduct amounting to deliberate indifference.[1] Dr. Adams concluded in her affidavit that Appellees "have been conscientious and correct in the treatment(s) provided [to Appellant]." Dr. Adams stated that x-rays were taken by Appellee Masters, that he prescribed anti-inflammatory medication and gave Appellant steroid injections because of pain caused by "arthritic changes" in Appellant's neck and left shoulder area. She stated that there are "small lipomas" located in Appellant's upper back area but that they are not related to the pain Appellant complains of. She stated that the neck and shoulder pain Appellant is presently complaining of is probably "due to [the] 'arthritic changes' resulting from power lifting and other activities [Appellant is involved in] involving cumulative musculoskeletal trauma." Dr. Adams stated that lipomas are "benign fatty tumors rarely causing symptoms" and are removed for only cosmetic reasons. She stated that because Appellant's small lipomas did not meet the UTMB Correctional Managed Care criteria for removal, Appellees were not deliberately indifferent in refusing to refer Appellant to a specialist for further treatment.

Accordingly, we conclude that the trial court was correct in granting summary judgment in favor of Appellees on Appellant's causes of action relating to Appellees' alleged negligence and deliberate indifference. Our determination necessarily results in a finding that Appellees' decision to not refer Appellant to a medical specialist was not based upon Appellees' desire to retaliate against Appellant because of previous lawsuits or grievances filed by Appellant; rather, Appellees' decision was based upon their assessment that Appellant's condition would not result in a "substantial risk of serious harm" to him

[1] As alleged in his second amended original complaint, Appellant's third cause of action appears to be nothing more than a recast of his first cause of action. Both actions allege that Appellees were deliberately indifferent to his medical condition by not referring him to a medical specialist for further treatment.

and that his condition did not meet the criteria established by the UTMB Correctional Managed Care for additional medical treatment. Thus, the trial court's summary judgment in favor of Appellees on Appellant's retaliation cause of action was proper.

Further, to the extent that Appellant alleged an action in his amended complaint based upon simple negligence or medical malpractice against Appellee Masters, we conclude that summary judgment was properly granted on that cause of action because the record shows that Appellant failed to file an expert report to support his action in compliance with article 4590i. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(a)(3) (Vernon Supp. 2000). Section 13.01(e) of article 4590i provides that if a claimant fails to file an expert report to support a claim against a physician, the court may, *inter alia*, dismiss the claimant's action with prejudice. *See id.* at § 13.01(e). Finally, to the extent that Appellant alleged a cause of action against Appellee McKinney based upon negligence, we likewise conclude that summary judgment was properly granted. Appellant's medical records and the records of the grievances filed by Appellant, attached to Appellees' motion for summary judgment, affirmatively refute Appellant's allegation that Appellee McKinney breached any duty owed by her to Appellant to provide a meaningful review and thorough investigation of Appellant's complaints relating to the refusal of prison medical personnel to refer him to a specialist for additional medical treatment. *See McCord v. Maggio,* 910 F.2d 1248, 1251 (5th Cir. 1990). We overrule Appellant's first point of error.

Because of our disposition of Appellant's first point of error, we need not address his remaining point of error. *See State Farm Fire & Casualty Co.*, 858 S.W.2d at 380.

The judgment is affirmed.

PER CURIAM

Judgment rendered and Opinion filed May 4, 2000.
Panel consists of Justices Yates, Fowler, and Edelman.
Do Not Publish — TEX. R. APP. P. 47.3(b).