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**IN THE
COURT OF APPEALS OF INDIANA**

OSWALDO SANTOS,)	
)	
Appellant,)	
)	
vs.)	No. 02A05-1010-CT-654
)	
ALLEN COUNTY SHERIFF,)	
)	
Appellee.)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frederick A. Schurger, Special Judge
Cause No. 02D01-0711-CT-484

September 1, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Oswaldo Santos appeals the trial court's grant of summary judgment resulting in the dismissal of his claim against the Allen County Sheriff ("the Sheriff").¹ Santos' amended complaint alleged violation of his Eighth Amendment right to receive adequate medical care while incarcerated in the Allen County Jail. Santos presents four issues for review, which we restate as whether the trial court erred when it granted summary judgment in favor of the Sheriff and dismissed Santos' claims.

We affirm.

FACTS AND PROCEDURAL HISTORY

Santos was arrested and incarcerated in the Allen County Jail on August 18, 2006. Santos was intoxicated at the time of his booking. When asked during booking whether he had any pain, Santos answered in the negative, and booking officers noticed no visible trauma or other indication of injury.

During his incarceration, Santos received medical treatment for various conditions. On November 21, 2006, Santos for the first time complained of severe pain in his testicles. After Santos spoke with medical personnel at the jail, jail personnel transported him to the St. Joseph Hospital. Following an examination in the hospital emergency room, Santos was diagnosed with necrosis of the left testicle, likely due to torsion. Santos was returned to jail with a prescription for painkillers to be taken as needed and instructions to make a follow-up appointment.

¹ As discussed below, Santos also named several medical care providers in his Eighth Amendment complaint. The medical care providers were subsequently dismissed from the action, leaving the Sheriff as the sole defendant.

On November 29, jail personnel transported Santos to Fort Wayne Urology for the follow-up appointment. Following an exam, medical personnel in the urologist's office noted "prob[able] torsion," "[a]trophied testicle," and "[left] orchiectomy (SLP) pt [patient's] choice[.]"² Appellee's App. at 172. However, Fort Wayne Urology did not forward that surgical note to Allen County Jail Medical Services. Accordingly, the medical personnel at the Jail were not put on notice that removal of Santos' testicle was a treatment option.

Santos complained of testicular pain throughout his incarceration at the jail. On March 5, 2007, Allen County Jail Medical Services sent a facsimile to Fort Wayne Urology asking for a report from Santos' November 2006 appointment. And on March 28, prior to leaving the jail for the Indiana Department of Correction ("DOC"), Santos was returned to Fort Wayne Urology. At that appointment, medical personnel prescribed him medication for pain and recommended that Santos follow up with a urologist once he arrived at the DOC for removal of the testicle.

On November 21, 2007, Santos filed a complaint under 42 U.S.C. § 1983 against the Sheriff and various medical providers alleging that they had violated his Eighth Amendment rights by failing to provide adequate medical care for his torsed left testicle, specifically, surgery to remove the testicle. On November 16, 2009, the Sheriff filed his motion for summary judgment, designated evidence, and memorandum of law. On April 26, 2010, Santos filed his response to the summary judgment motion and designation of evidence. On September 27, the trial court granted the Sheriff's motion for summary

² An orchiectomy is a procedure in which a testicle is surgically removed.

judgment on the Eighth Amendment claims. On November 8, the parties filed a joint stipulation to dismiss the remaining claims in the complaint, and on November 22 the trial court entered a final order dismissing Santos' complaint in its entirety. Santos now appeals.

DISCUSSION AND DECISION

Santos contends that the trial court erred when it granted summary judgment in favor of the Sheriff on Santos' Eighth Amendment claims. We review a summary judgment order de novo. Bules v. Marshall County, 920 N.E.2d 247, 250 (Ind. 2010). The purpose of summary judgment is to end litigation about which there can be no factual dispute and which may be determined as a matter of law. Shelter Ins. Co. v. Woolems, 759 N.E.2d 1151, 1153 (Ind. Ct. App. 2001), trans. denied. We must determine whether the evidence that the parties designated to the trial court presents a genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); Bules, 920 N.E.2d at 250. We construe all factual inferences in the nonmoving party's favor and resolve all doubts as to the existence of a material issue against the moving party. Bules, 920 N.E.2d at 250. Summary judgment is a lethal weapon and courts must be mindful of its aims and targets and beware of overkill in its use. Heeb v. Smith, 613 N.E.2d 416, 420 (Ind. Ct. App. 1993), trans. denied.

The Eighth Amendment to the United States Constitution proscribes cruel and unusual punishment. In Estelle v. Gamble, 429 U.S. 97, 104 (1976), the Supreme Court held that the Eighth Amendment prohibition, applicable to the states through the Due

Process Clause of the Fourteenth Amendment, imposes a duty on states to provide adequate medical care to prisoners.³ In the context of an incarcerated person’s claim of an Eighth Amendment violation for lack of medical care, the analysis has been described as follows:

“Prison officials violate the Eighth Amendment’s proscription against cruel and unusual punishment when they display ‘deliberate indifference to serious medical needs of prisoners.’ ” Greeno v. Daley, 414 F.3d 645, 652 (7th Cir. 2005) (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). In Greeno, we spelled out the two-part test that applies to these claims:

A claim of deliberate indifference to a serious medical need contains both an objective and a subjective component. To satisfy the objective component, a prisoner must demonstrate that his medical condition is “objectively, sufficiently serious.” Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (internal quotations omitted); see also Walker v. Benjamin, 293 F.3d 1030, 1037 (7th Cir. 2002). A serious medical condition is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor’s attention. See Foelker v. Outagamie County, 394 F.3d 510, 512-13 (7th Cir. 2005). To satisfy the subjective component, a prisoner must demonstrate that prison officials acted with a “ ‘sufficiently culpable state of mind.’ ” Farmer, 511 U.S. at 834 (quoting Wilson v. Seiter, 501 U.S. 294, 297, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991)). The officials must know of and disregard an excessive risk to inmate health; indeed they must “both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists” and “must also draw the inference.” Farmer, 511 U.S. at 837. This is not to say that a prisoner must establish that officials intended or desired the harm that transpired. Walker, 293 F.3d at 1037. Instead,

³ At all relevant times, Santos was a pretrial detainee in the Allen County Jail. “Although the Eighth Amendment applies only to convicted persons, pretrial detainees . . . are entitled to the same basic protections under the Fourteenth Amendment’s due process clause.” Minix v. Canarecci, 597 F.3d 824, 830 (7th Cir. 2010). Accordingly, we apply the same legal standards to deliberate indifference claims brought under either the Eighth or Fourteenth Amendment. Id. (citation omitted); Caiozzo v. Koreman, 581 F.3d 63, 72 (2d Cir. 2009).

it is enough to show that the defendants knew of a substantial risk of harm to the inmate and disregarded the risk. Id. Additionally, “a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” Farmer, 511 U.S. at 842.

Hayes v. Snyder, 546 F.3d 516, 522 (7th Cir. 2008). As discussed below, we conclude that Santos has not established a genuine issue of material fact as to the subjective components of the Eighth Amendment test.⁴

Santos contends that he has shown the existence of a genuine issue of material fact as to whether the Sheriff was deliberately indifferent to Santos’ testicular condition. Again, deliberate indifference means that the prison official “must know of and disregard an excessive risk to inmate health; indeed [he] must ‘both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists’ and ‘must also draw the inference.’” Id., 546 F.3d at 522 (citation omitted). The standard for determining deliberate indifference by a non-medical defendant also was described in

Hayes:

“[i]f a prisoner is under the care of medical experts . . . a non-medical prison official will generally be justified in believing that the prisoner is in capable hands. This follows naturally from the division of labor within a prison. Inmate health and safety is [sic] promoted by dividing responsibility for various aspects of inmate life among guards, administrators, physicians, and so on. Holding a non-medical prison official liable in a case where a prisoner was under a physician’s care would strain this division of labor.”

546 F.3d at 527 (quoting Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004)) (omission in original).

⁴ Because we conclude that Santos has not shown a genuine issue of material fact regarding deliberate indifference, we need not consider whether he has shown an issue of fact regarding a serious medical condition under the objective part of the analysis.

Santos asserts the Eighth Amendment claim against the Sheriff in his official capacity under § 1983. An official capacity claim against an individual defendant constitutes a claim against the government entity itself. See Gossmeier v. McDonald, 128 F.3d 481, 494 (7th Cir. 1997). But there is no respondeat superior liability under § 1983. Gayton v. McCoy, 593 F.3d 610, 622 (7th Cir. 2010). Instead, to establish a claim in an official capacity suit, a plaintiff must show that the actions on which liability is predicated took place pursuant to a government policy or custom. Hadi v. Horn, 830 F.2d 779, 782 (7th Cir. 1987). A local governmental entity may be held liable under § 1983 for violating the civil rights of a person because of its policy in three instances: (1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority. Santos' Eighth Amendment claim is based on customary practices regarding medical treatment for jail inmates at the Allen County Jail.

Santos first alleges that his Eighth Amendment rights were violated because the Sheriff allowed or maintained a custom under which medical personnel at the jail provided treatment only pursuant to doctors' orders. He asserts that he was exposed to a substantial risk of harm because the jail's medical personnel were not required to investigate "ambiguous doctor's recommendations or orders" or inquire into whether the the ordered treatment was adequate. Appellant's Brief at 21. To survive summary judgment, Santos had to show a genuine issue of material fact as to whether the Sheriff,

by maintaining or allowing that custom at the jail, knew of a substantial risk of harm to the inmates arising from the custom and disregarded that risk. We conclude that Santos has not made that showing.

At the heart of Santos' claim is the notation made in his medical records by the nurse practitioner at the urologist's office that one treatment option for Santos' condition was a left orchiectomy. Specifically, following Santos' November 29 exam, the nurse practitioner noted that a left orchiectomy was "pt. choice." Appellant's App. at 82; Appellee's App. at 172. Santos also relies on the nurse practitioner's notes mentioning the orchiectomy on the November 29 jail transport form and on a November 29 facsimile transmission from the urologist's office to the jail. The facsimile transmission does not mention the orchiectomy but notes that if Santos "wishes to proceed with procedure that was discussed by [the nurse practitioner] this morning he would need to pay \$226.25 in advance." Appellant's App. at 85; Appellee's App. at 201. Pam Thornton, the jail's nurse, stated in her deposition that the jail did not receive the exam notes or the jail transport form until March 2007, days before Santos was to be transferred to the DOC.

Based on these records, Santos refers to the orchiectomy as "medically necessary." Appellant's Brief at 17. But the standard is not medical necessity. Rather, the standard is whether the custom subjected him to a substantial risk. Moreover, Santos provides no support in the record for his assertion that the orchiectomy was medically necessary, nor has our review of the record found any. The jail's nurse stated that the jail had not received the urology nurse practitioner's exam notes or the jail transport form, neither of which ordered a left orchiectomy, until shortly before Santos' transfer to the DOC. Also,

the notation regarding the orchiectomy was qualified by the notation “pt. choice” on the exam notes. Appellant’s App. at 82; Appellee’s App. at 172. In other words, it was an elective procedure. And the facsimile transmission does not order an orchiectomy but merely mentions a “procedure” that he would have to partially pay for in advance. Even the emergency room personnel told Santos on his November 21, 2006, visit that his condition was not an emergency. None of this evidence supports Santos’ contention that the orchiectomy was medically necessary, nor does it show that the failure to schedule an orchiectomy subjected him to a substantial risk of harm.

Santos did designate expert medical evidence to show that the failure to provide the orchiectomy subjected him to “a small but very real risk of torsion of the remaining testicle” and, as a result, sterility. Appellant’s App. at 136. But, again, the standard is whether the course or lack of treatment subjected Santos to a substantial risk of serious harm. See id. Demonstrating that the custom at issue may have resulted in a “small but very real risk” of serious harm does not demonstrate a “substantial risk” of serious harm.⁵

Incarcerated persons are not entitled to demand specific care or the best possible care. Forbes v. Edgar, 112 F.3d 262, 267 (7th Cir. 1997); cf. Monmouth county Corr. Inst’l Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (“Prison officials may not, with deliberate indifference to the serious medical needs of the inmate, opt for ‘an

⁵ Showing a substantial risk of harm is part of the subjective component of the Eighth Amendment analysis and should not be confused with the objective component of showing a serious medical condition. A serious medical condition is one that has been diagnosed by a physician as mandating treatment or one so obvious that even a lay person would perceive the need for a doctor’s attention. Gayton, 593 F.3d at 622. A substantial risk of serious harm, on the other hand, may arise from the treatment of or failure to treat a medical condition but is not synonymous with the medical condition itself. See Forbes, 112 F.3d at 267 (incarcerated persons are entitled to reasonable measures to avoid a substantial risk of harm).

easier and less efficacious treatment' ” of the inmate’s condition.”). Rather, incarcerated persons are entitled to reasonable measures to avoid a substantial risk of serious harm to them. Forbes, 112 F.3d at 267. It is undisputed that the jail’s medical personnel customarily carry out doctors’ orders, but there was no doctor’s order in this case. Santos does not allege that it was the Sheriff’s custom or practice to prohibit medical professionals from inquiring further into an inmate’s medical condition, only that the Sheriff did not require such action. But, again, non-medical prison officials are generally justified in believing that the prisoner is in capable hands under the care of the prison’s medical personnel. Hayes, 546 F.3d at 527. Santos has not shown the existence of a genuine issue of material fact whether the custom of following doctors’ orders, and not requiring jail personnel to investigate alternative treatment options, subjected him to a substantial risk of harm. Therefore, he cannot demonstrate a genuine issue of material fact regarding deliberate indifference based on that practice.

Next Santos contends that there is a genuine issue of material fact as to whether the jail’s practice of requiring Santos to pay for the orchiectomy demonstrated deliberate indifference to Santos’ condition. Similarly, he also contends that there was “no protocol in effect requiring a Jail nurse to notify the Director of Medical Services or similar medical administrator[] when the nurse reviewed a prisoner’s medical request form[] and found that the prisoner requested surgery for a chronic but non-life[-]threatening medical condition, but lacked the money for the operation.” Appellant’s Brief at 20.

But, again, there was no doctor’s order for the orchiectomy, only a notation that that procedure was a treatment option and Santos’ choice. The jail’s medical personnel

informed the urologist's office that Santos was the party financially responsible for his treatment, and the urologist's office indicated the prepayment of \$226 would be required for the orchiectomy. Santos has not shown that the Sheriff required him to pay for any other medical care. And in her deposition the jail's nurse, Thornton, stated that "[n]ormally, if we have a doctor's order for any patient, whether they have money or not, that they need something done, then we follow that order." Appellee's App. at 191. Santos has not shown that he was denied or delayed in receiving medical treatment in a manner that subjected him to a substantial risk of serious harm when the jail would not pay for his orchiectomy. As such, he has not demonstrated a genuine issue of material fact whether the custom of requiring payment by an inmate for an elective procedure demonstrates a genuine issue of fact as to the Sheriff's deliberate indifference.

Finally, Santos contends throughout his brief on appeal that the medication he was provided while an inmate at the jail was inadequate to address his pain. But Santos has designated no evidence to show that that treatment regimen resulted from a jail custom or policy other than one requiring the jail's medical personnel to follow doctors' orders. Nor has he shown or even alleged that the Sheriff was not justified in relying on the professional decisions of the jail's medical personnel. See Hayes, 546 F.3d at 527. Thus, Santos has not shown a genuine issue of material fact as to whether the medical treatment provided in the jail to Santos for his torsed left testicle demonstrates the Sheriff's deliberate indifference to Santos' medical needs.

Conclusion

Santos has not shown a genuine issue of material fact as to whether he was subjected to a substantial risk of serious harm by the jail's customary practices, namely, the practice of following doctors' orders and the practice of requiring Santos to pay for an elective procedure. Santos also has designated no evidence to show that the treatment he received, which was allegedly inadequate, was the result of a written policy or customary practice of the jail. As a result, Santos has not shown a genuine issue of material fact whether the Sheriff, through policies or customary practices, was deliberately indifferent to a serious medical condition. Therefore, Santos has not shown that the trial court erred when it granted summary judgment in favor of the Sheriff on Santos' Eighth Amendment claim.

Affirmed.

ROBB, C.J., and CRONE, J., concur.