[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10892
Non-Argument Calendar

D.C. Docket No. 5:15-cv-00360-MTT-MSH

CHRISTOPHER STEWART,

Plaintiff - Appellant,

versus

SHARON LEWIS,

Defendant,

WAYNE WELLS,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(October 22, 2019)

Before MARCUS, ROSENBAUM, and EDMONDSON, Circuit Judges.

PER CURIAM:

Plaintiff Christopher Stewart appeals the district court's grant of summary judgment in favor of Dr. Wayne Wells in Plaintiff's civil action, filed pursuant to 42 U.S.C. § 1983. Plaintiff contends that Dr. Wells was deliberately indifferent to Plaintiff's medical needs when Dr. Wells denied a request for surgical treatment of Plaintiff's hammer toe. No reversible error has been shown; we affirm.

This appeal arises out of these facts, viewed in the light most favorable to Plaintiff.[1] Dr. Wells is a medical director for the Utilization Management ("UM") Department of the Georgia Department of Corrections ("GDOC"). When it appears that an inmate might require medical attention beyond what can be provided at the inmate's correctional facility, the facility's medical staff can submit a consult request to UM for the inmate to receive medical care outside the institution. UM is then responsible for making decisions about "whether, where, and what other treatment will be provided."

[1] Plaintiff contends the district court failed to consider properly evidence Plaintiff produced in opposition to Dr. Wells's motion for summary judgment. In reviewing the district court's grant of summary judgment, we view the evidence and make all reasonable factual inferences in Plaintiff's favor. See Maniccia v. Brown, 171 F.3d 1364, 1367 (11th Cir. 1999).

Plaintiff was incarcerated at the GDOC beginning in December 2012. In 1984, Plaintiff suffered previously a compound fracture of his right leg. As treatment for his injury, Plaintiff had an 18-inch steel rod surgically inserted from his knee to his ankle. Plaintiff says the placement of the rod "created a hammer toe problem" in his right foot, the symptoms of which began before 1990. Plaintiff received no specific medical treatment for his hammer toe before his incarceration. Instead, he says he had to "live [his] life around my injury" by limiting his physical activities and by wearing "oversized shoes with extra pads."

When Plaintiff arrived at the GDOC, the toe on his right foot were already in hammer toe condition. Plaintiff testified that his hammer toe remained the same -- and got no worse -- while he was in prison. Plaintiff began experiencing pain, however, when he was issued "state boots" shortly after his arrival at Macon State Prison ("MSP") in mid-2013. In August 2013, Plaintiff reported his pain to Dr. Chiquita Fye, the general practitioner at MSP. Plaintiff was then permitted to wear flip-flops.

In December 2013, Plaintiff visited podiatrist Dr. Mark Wiggins. Dr. Wiggins recommended that Plaintiff undergo surgery to correct his hammer toe. Based on Dr. Wiggins's recommendation, Dr. Fye submitted to UM a consult request for Plaintiff to have outpatient surgery.

On 6 January 2014, Dr. Wells denied the consult request for Plaintiff's surgery. Dr. Wells advised, instead, that Plaintiff receive conservative treatment for his hammer toe. Dr. Wells testified that conservative treatment for hammer toe could include prosthetic shoes and pain medication. Dr. Wells said he recommended conservative treatment because hammer toe often respond positively to such treatment and, in his medical opinion, invasive surgery should be reserved for cases in which more conservative treatment fails.

Dr. Wells testified that -- in considering the first request for surgery -- he had information about Plaintiff's prior surgery and Plaintiff's complaints of foot pain, but did not remember whether he reviewed Plaintiff's medical records. Dr. Wells did not consult with Dr. Wiggins in making his decision and could not remember whether he had spoken with Dr. Fye about Plaintiff's condition.

In June 2014, Dr. Wells denied a second request for Plaintiff to undergo surgery for his hammer toe. On the request form, Dr. Wells wrote "Please check GDC coverage for this procedure." The Georgia Department of Corrections Summary of Healthcare Benefits ("GDOC Healthcare Benefits") lists surgical treatment of hammer toe as an excluded healthcare service, subject to "review[] for circumstances that are exceptions to the general guidelines."

In July 2014, UM (but not Dr. Wells) reviewed and approved a consult request for Plaintiff to be fitted with orthopedic shoes. Plaintiff's first pair of

orthopedic shoes did not fit properly; so Plaintiff was then refitted for new shoes. Plaintiff received the adjusted shoes in late October 2014. The shoes contained thick padding custom-made for treating hammer toe. Plaintiff said the orthopedic shoes provided him with relief compared to the flip-flops he had been wearing.

In June 2015 -- after Plaintiff was transferred to a privately-run correctional institution -- Dr. Wiggins performed surgery on Plaintiff's hammer toe. Plaintiff considered the surgery to have been successful.

Plaintiff filed this civil action against Dr. Wells, alleging that the denial of the recommended surgery constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The district court granted summary judgment in favor of Dr. Wells.

We review a district court's grant of summary judgment de novo. Maniccia v. Brown, 171 F.3d 1364, 1367 (11th Cir. 1999). We view the evidence and all reasonable factual inferences in the light most favorable to the nonmoving party. Id. Summary judgment is appropriate when 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). A "genuine" factual dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Ave. Clo Fund, LTD v. Sumitomo Mitsui Banking Corp., 723 F.3d 1287, 1294 (11th Cir. 2013).

Although a court must draw all reasonable inferences in favor of the non-moving party, "an inference based upon speculation and conjecture is not reasonable." Id.

A prisoner's Eighth Amendment right against cruel and unusual punishment by prison officials includes the right to be free from deliberate indifference to serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). To succeed on a claim of deliberate indifference in the medical context, a plaintiff must satisfy an extremely high standard. A plaintiff must demonstrate -- among other things -- that defendant's response to an objectively serious medical need "was poor enough to constitute an unnecessary and wanton infliction of pain, and not merely accidental inadequacy, negligence in diagnosis or treatment, or even medical malpractice actionable under state law." Taylor v. Adams, 221 F.3d 1254, 1258 (11th Cir. 2000) (quotations omitted); see Estelle, 429 U.S. at 105-06 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."). "[A] simple difference in medical opinion between the prison's medical staff and the inmate as to the latter's diagnosis or course of treatment" will not support a claim for deliberate indifference. Harris v. Thigpen, 941 F.2d 1495, 1505 (11th Cir. 1991).

We have recognized that a prison official might act with deliberate indifference by denying or delaying medical care or by providing "medical care which is so cursory as to amount to no treatment at all." Nam Dang v. Sheriff,

Seminole Cty., Fla., 871 F.3d 1272, 1280 (11th Cir. 2017). We have often written that deliberate indifference in the context of a claim of cruel and unusual punishment under the Constitution is marked by care "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." Id. (citing Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986)); Harris, 941 F.2d at 1505; see also Estelle, 429 U.S. at 105-06 (medical treatment rises to the level of an Eighth Amendment violation when the care is "repugnant to the conscience of mankind" or would "offend 'evolving standards of decency.'").

Dr. Wells's conduct constituted no deliberate indifference. Dr. Wells explained that he denied the first request for surgical correction of Plaintiff's hammer toe because hammer toe often responds to more conservative treatments and surgery should be reserved for cases in which conservative treatments have been unsuccessful. We cannot say that Dr. Wells's recommendation for conservative treatment even approached the high standard necessary to demonstrate an Eighth Amendment violation. Plaintiff himself had managed his hammer toe condition through conservative means -- for example, by wearing orthopedic shoes -- for over twenty years before his incarceration. Nothing evidences that Plaintiff's condition became more severe or urgent while he was in prison or that the delay in receiving surgery worsened Plaintiff's condition. Other

than the pain associated with Plaintiff's having to wear "state boots" for a short period, Plaintiff testified that his condition remained the same as it had been before he was in prison.

When Dr. Wells denied the second request for surgery in June 2014, Plaintiff had not yet been fitted for or received his custom-made orthopedic shoes.[2] Thus, Dr. Wells's earlier recommendation to treat first Plaintiff's hammer toe with more conservative methods had not yet been pursued or deemed unsuccessful.

That Dr. Wells's recommended course of treatment differed from that of Dr. Wiggins or Dr. Fye is insufficient to support a claim for deliberate indifference. We have said that whether defendants "should have employed additional diagnostic techniques or forms of treatment is a classic example of a matter for medical judgment and therefore not an appropriate basis for grounding liability under the Eighth Amendment." Adams v. Poag, 61 F.3d 1537, 1545 (11th Cir. 1995) (quotation omitted) (concluding that a dispute between two medical doctors about the adequacy of medical treatment provided -- not about whether treatment was provided at all -- suggested only medical negligence and was no grounds for section 1983 liability). That Plaintiff believed he should have had surgery earlier than he did is also no grounds for deliberate indifference. See Harris, 941 F.2d at 1505.

[2] Nothing evidences that Dr. Wells was responsible for the delay in Plaintiff's receipt of orthopedic shoes.

Plaintiff contends that Dr. Wells denied his surgical request based on impermissible non-medical reasons. The record does not support this claim. In denying Plaintiff's second request for surgery, Dr. Wells referenced GDOC's Healthcare Benefits, which typically exclude coverage for surgical treatment of hammer toe. Nothing evidences, however, that Dr. Wells's decision was based solely on the availability of medical coverage for the procedure. The record demonstrates that coverage was available for surgical treatment of hammer toe if -- in Dr. Wells's professional judgment -- circumstances existed that would warrant an exception to the general guidelines.

Even to the extent that Dr. Wells's failure to see Plaintiff as a proper candidate for surgery might have constituted negligence or even malpractice, that situation would not be enough for a good claim of deliberate indifference. See Taylor, 221 F.3d at 1258. We have said that "[s]ome delay in rendering medical treatment may be tolerable depending on the nature of the medical need and the reason for the delay." Adams, 61 F.3d at 1544. Nothing evidences that Plaintiff's chronic hammer toe condition was in such urgent need of surgery that a delay in surgery -- while Plaintiff continued to receive more conservative treatment for his condition -- was so intolerable that it violated the Constitution.

Viewing the evidence in the light most favorable to Plaintiff, Dr. Wells's conduct constituted no deliberate indifference. We affirm the district court's grant of summary judgment.

AFFIRMED.