IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

KENNETH T. DEPUTY,)
Plaintiff,)) C.A. No. N12C-05-163 MMJ
V.)
DD COM AN)
DR. CONLAN,)
Defendants.)

Submitted: April 29, 2013 Decided: August 6, 2013

On Defendant Dr. J. Conlan's Motion to Dismiss

MEMORANDUM OPINION

Kenneth T. Deputy, Pro Se, Plaintiff

Scott G. Wilcox, Esquire, Whiteford, Taylor & Preston, LLC, Wilmington, Delaware, Attorneys for Defendant

JOHNSTON, J.

THE 2007 LAWSUIT

On January 18, 2007, plaintiff brought suit against "Dr. Conlon, James Welch and Thomas Carroll," claiming that he received inadequate care and defendants acted with "deliberate indifference" towards his injury.¹

On March 3, 2007, the Superior Court dismissed the case, finding that the complaint was legally frivolous and that Deputy failed to file an Affidavit of Merit, as require by 18 *Del. C.* § 6853. Plaintiff appealed. On October 22, 2007, the Supreme Court vacated the order and remanded the case to the Superior Court to address plaintiff's 8th and 14th Amendment claims. On remand, the Superior Court reinstated Deputy's 8th and 14th Amendment claims. On August 21, 2009, plaintiff filed a motion for summary judgment.

On September 23, 2010, the Court issued an opinion denying plaintiff's motion. To succeed with a deliberate indifference claim, plaintiff had to show: (1) from an objective standpoint, his medical need is sufficiently serious;² and (2) the prison official had the culpable state of mind of "deliberate indifference" towards the plaintiff's health.³ A medical need is sufficiently serious if a physician

¹Deputy v. Conlon, C.A. No. 07C-01-202 MMJ.

²Farmer v. Brennan, 511 U.S. 825, 834 (1994); Wilson v. Seiter, 501 U.S. 294, 298 (1991).

³Farmer, 511 U.S. at 834; Wilson, 501 U.S. at 297.

diagnoses it as requiring treatment, or the injury is so obvious that a layperson could identify it as requiring medical attention.⁴ "Deliberate indifference" requires that a prison 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.⁵ Choosing a treatment plan other than what has been requested by an inmate, however, does not amount to deliberate indifference, provided that the treatment plan is reasonable.⁶

The Court found that plaintiff's injury was sufficiently serious as a matter of law. It is undisputed that a physician diagnosed plaintiff's injury as requiring treatment. However, the Court found that genuine issues of material fact regarding whether defendants acted with "deliberate indifference" precluded summary judgment. Viewing the facts in the light most favorable to defendants, it appeared that they believed that surgery was elective based on Dr. DuShuttle's October 21, 2009 letter. Further, the Court found that genuine issues of material

⁴Hyson v. Correctional Med. Serv. 's, 2004 WL 769362, at *3 (D. Del.); Monmouth County Correctional Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987).

⁵*Farmer*, 511 U.S. at 837.

⁶Diaz v. Carroll, 570 F.Supp.2d 571, 578 (D. Del. 2008) (citing Harrison v. Barkley, 219 F.3d 132, 138-40 (2d Cir. 2000)); see also Stilner v. Rhay, 371 F.3d 420, 421 (9th Cir. 1967) (Prison officials have "wide discretion" in providing medical treatment to inmates.).

⁷See, e.g., Hyson v. Correctional Med. Serv. 's, 2004 WL 769362, at *3 (D. Del).

fact exist as to the reasonableness of plaintiff's medical treatment. The Court denied plaintiff's Motion for Summary Judgment.

On September 30, 2010, plaintiff filed a Motion for Reargument. Plaintiff contended that CMS's medical treatment – the x-ray, MRIs, ibuprofen, and cortisone shot – afforded no relief. Plaintiff asserts that he received a *single* cortisone injection. The Court, however, in its opinion, stated that CMS administered more than one. Accordingly plaintiff argued that the Court misapprehended the law and the facts and his motion for reargument should be granted.

The Court ruled that it did not overlook plaintiff's assertions that CMS's medical treatment afforded him no relief. The Court considered that CMS administered x-rays, MRIs, ibuprofen, and cortisone shots. The Court found that genuine issues of material fact existed as to whether defendants provided reasonable medical treatment, precluding summary judgment.

The Court held that plaintiff had failed to demonstrate that the Court overlooked a controlling precedent or legal principle, or misapprehended the law or facts in a matter which would affect the outcome of the decision. The Court denied plaintiff's Motion for Reargument of the Court's September 23, 2010 Decision Denying Plaintiff's Motion for Summary Judgment.

Between 2007 and 2011, Plaintiff filed numerous motions, including: a motion to compel; two motions for discovery; two motions for summary judgment; a motion for recusal; two motions for reargument; a motion for transcripts; and four motions for appointment of counsel. Additionally, Plaintiff filed two appeals and two petitions for writs of mandamus to the Delaware Supreme Court.

On February 7, 2011, Dr. Conlon filed a Motion to Dismiss. By Order dated August 15, 2011, the Court granted Conlon's Motion, and dismissed all claims against Dr. Conlon.

THE 2012 LAWSUIT

On May 18, 2012, Kenneth T. Deputy filed the Complaint in this action.

The allegations in this action are virtually identical to those in the 2007 lawsuit.

Plaintiff is seeking:

monetary damages in the amount of \$100,000 from defendant for compensation and punitive damages for violations and deprivations of his 8th and 14th amendment rights as well as violations of state tort laws under title 11 §6536. All of which has resulted in un-necessary and unwarranted infliction of pain, needless suffering. Deliberate indifference to serious medical needs, which if adequately administered as recommended by surgery would have ended Plaintiff's suffering. Instead defendant deliberately and intentionally failed and refused to provide adequate medical care in a timely fashion.

On April 19, 2013, Dr. J. Conlan ("Defendant") filed a Motion to Dismiss the 2012 action. Defendant makes two arguments: (1) that Plaintiff's claims are barred by the two-year statute of limitations;⁸ and (2) that Plaintiff has failed to comply with the statutory requirement that medical negligence claims must be accompanied by an Affidavit of Merit.⁹

In his Response in Opposition of Defendant's Motion to Dismiss, Plaintiff "concedes his claim of medical negligence."

Defendant argues that in order to meet the burden of proving deliberate indifference to justify a claim for violation of 8th Amendment rights, a prisoner must present expert testimony when the seriousness of the injury or illness complained of would not be apparent to a lay person.

Assuming the accuracy of Defendant's contention, Plaintiff is not required at this stage in the proceedings to produce expert medical testimony.

CONCLUSION

A motion to dismiss for failure to obtain an Affidavit of Merit only will be granted in medical negligence cases. Expert testimony ordinarily is not required

⁸18 Del. C. §6856.

⁹18 Del. C. §6853(a)(1).

to demonstrate a *prima facie* case, for purposes of considering a Motion to Dismiss under Superior Court Civil Rule 12(b)(6).

The same 8th and 14th Amendment claims in this 2012 lawsuit were brought by Plaintiff in his 2007 lawsuit, and were dismissed, without prejudice, by Order dated August 15, 2011. The 2012 claims relate back to the 2007 Complaint.¹⁰ The two-year statute of limitations does not bar this action.

THEREFORE, Defendant Dr. J. Conlan's Motion to Dismiss is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston

The Honorable Mary M. Johnston

¹⁰See Super. Ct. Civ. R. 15(c)(2) (amendment relates back to date of original pleading when claim asserted arose out of same conduct or occurrence). Although the lawsuits are separate, a motion to consolidate may be appropriate.