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IN THE
COURT OF APPEALS OF INDIANA

DWIGHT G. FRY,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 52A04-0901-CV-23
	)	
PRISON HEALTH SERVICES	)	
OF INDIANA, LLC.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Robert Spahr, Judge
Cause No. 52C01-0705-CV-236

May 26, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Dwight Fry appeals the trial court's grant of judgment on the pleadings in favor of Prison Health Services of Indiana, LLC ("PHS"). We reverse and remand.

Issue

The sole issue properly before us in this appeal is whether the trial court correctly concluded that PHS was entitled to judgment on the pleadings.

Facts

Fry is an inmate at the Miami Correctional Facility ("MCF"). PHS is under contract with the State to provide health services to MCF inmates. Fry alleges that on May 13, 2005, he injured himself while working out in the prison weight room. For four days, Fry sought to obtain medical treatment, until he was finally seen on May 17, 2005, by a nurse who discovered that Fry had a collapsed lung. He was transported to two different hospitals for treatment, where he was assessed to be in critical condition and had a chest tube inserted to re-inflate his lung. Fry subsequently re-injured his lung in October 2005, and this time had to undergo two surgeries to repair it.

On May 3, 2007, Fry filed a complaint against the Department of Correction, ("DOC"), PHS, and a number of State and PHS employees. He stated a claim against the defendants for being deliberately indifferent to his serious medical needs because of the four-day delay in providing medical treatment in May 2005, pursuant to the Eighth Amendment to the United States Constitution and 42 U.S.C. § 1983. The complaint also alleged that the defendants were negligent under Indiana law.

On May 14, 2007, the trial court issued a pro se prisoner litigation screening order, pursuant to Indiana Code Chapter 34-58-1. The order dismissed "all federal claims against the defendants . . . ." App. p. 35. It also dismissed all claims against the individual defendants. However, the order also stated, "The plaintiff has alleged a sufficient set of facts to go forward on his claim of negligence against the [DOC], and has also named [PHS] as an entity under contract to provide medical services." Id.

Fry became embroiled in discovery disputes with the DOC. Based on Fry's alleged disregard of discovery rules, on January 14, 2008, the trial court granted the DOC's motion for default judgment in its favor. Fry attempted to appeal this ruling. On September 24, 2008, we dismissed Fry's appeal on the basis that the default judgment was not a final order, because it did not affect Fry's case against PHS, and it was not properly certified for interlocutory appeal. See Fry v. Indiana Dep't of Corr., 893 N.E.2d 1089, 1091 (Ind. Ct. App. 2008).[1]

On October 20, 2008, PHS moved for judgment on the pleadings and dismissal of Fry's complaint. The motion alleged only that Fry could not maintain a § 1983 action against PHS based on the doctrine of respondeat superior for alleged acts by PHS employees. On December 10, 2008, the trial court granted PHS's motion for judgment on the pleadings. Fry now appeals.

Analysis

[1] We also held in our original opinion that Fry's appeal was untimely. However, on rehearing we withdrew that reason for dismissing Fry's appeal. See Fry v. Indiana Dep't of Corr., No. 52A02-0802-CV-172 (Ind. Ct. App. Feb. 2, 2009).

A motion either for judgment on the pleadings under Indiana Trial Rule 12(C) or for failure to state a claim under Rule 12(B)(6) both attack the legal sufficiency of the pleadings. Fox Dev., Inc. v. England, 837 N.E.2d 161, 164 (Ind. Ct. App. 2005). The difference between the two is that a motion filed under Rule 12(B)(6) requires the court to review only the complaint, while a motion filed under Rule 12(C) requires the court to review all pleadings filed in the case. Id. When ruling on a Rule 12(C) motion, the court must view the complaint in a light most favorable to the non-moving party and with every inference regarded in his or her favor, and determine whether the complaint is sufficient to constitute any valid claim. Id. at 165. The court looks only at the pleadings, with all well-pleaded material facts alleged in the complaint taken as admitted, supplemented by any facts of which the court will take judicial notice. Id. "The standard of review is de novo, and we will affirm the trial court's grant of a Rule 12(C) motion for judgment on the pleadings when it is clear from the face of the pleadings that one of the parties cannot in any way succeed under the operative facts and allegations made therein." Id.

Fry's complaint alleged in part that he had been subjected to cruel and unusual punishment, in violation of the Eighth Amendment and § 1983, because of the May 2005 delay in receiving medical treatment for his collapsed lung. See Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976) (holding that deliberate indifference to serious medical needs of prisoners violates the Eighth Amendment). Here, the trial court's pro se prisoner litigation screening order clearly dismissed all federal § 1983 claims Fry was

making against all defendants, including PHS. It is true that there is no respondeat superior liability under § 1983. Perkins v. Lawson, 312 F.3d 872, 875 (7th Cir. 2002). Thus, the trial court correctly dismissed Fry's § 1983 claim against PHS because it was based solely upon respondeat superior. Fry does not challenge that ruling.

PHS's motion for judgment on the pleadings explicitly and exclusively referenced Fry's claims under § 1983 as the basis for the motion. Fry's complaint, however, also stated claims against the defendants, including PHS, under Indiana tort law, specifically negligence. The trial court's screening order allowed this claim to proceed as to the DOC and PHS. On appeal, PHS contends, "When an inmate sues state actors for alleged delay in providing medical care, the [sic] actionable only under the rubric of a constitutional violation for deliberate indifference to serious medical needs." Appellee's Br. p. 8. PHS cites no authority for this proposition, and in fact it appears to be contrary to law.

In Perkins, a jail inmate sued the sheriff in charge of the jail in federal court, alleging that he had received inadequate medical care for injuries sustained in a fight with another inmate. The inmate's complaint sounded under both § 1983 and Indiana negligence law. The district court granted summary judgment in favor of the sheriff on both the § 1983 and negligence claims. The Seventh Circuit affirmed as to the § 1983 claim against the sheriff, but reversed as to the state law negligence claim, stating that that claim presented "different issues" than the federal claim. Perkins, 312 F.3d at 876. It noted the availability of respondeat superior liability under Indiana negligence law, and that the standard for negligence liability is considerably less than needed to establish

deliberate indifference under § 1983. Id. The Seventh Circuit vacated the grant of summary judgment as to the state law claim and remanded to the appropriate state court for further proceedings on that claim. Id.

PHS fails to provide any argument as to why Perkins would not support allowing Fry to proceed with his state law negligence claim. As Perkins observed, there are considerable distinctions between an Eighth Amendment deliberate indifference claim and a negligence claim under Indiana state law. PHS also has failed to state any other reason, before the trial court or this court, to dismiss Fry's negligence claim against it outright. We conclude the trial court erred in granting judgment on the pleadings to PHS to the extent it purported to dismiss Fry's state law negligence claim. To the extent it dismissed Fry's § 1983 claim against PHS, that already had occurred in the trial court's screening order.[2]

In this appeal, Fry does not advance a substantive argument challenging the trial court's entry of default judgment in favor of the DOC. He does seem to argue the trial court erred in stating that that order was a final appealable order. Regardless of whether the trial court sowed some confusion on that point, we concluded that the default judgment was an interlocutory order that was not properly certified for interlocutory appeal. Fry, 893 N.E.2d at 1091. That ruling now is the law of the case. See Godby v. Whitehead, 837 N.E.2d 146, 152 (Ind. Ct. App. 2005), trans. denied. Fry cannot collaterally challenge that ruling by faulting the trial court for not certifying its order for

[2] A different judge ruled on the motion for judgment on the pleadings than had issued the screening order.

interlocutory appeal. Additionally, Fry mentions discovery disputes that have occurred between him and PHS and claims the trial court is biased against him; however, we do not believe that those disputes are relevant with respect to the propriety of the judgment on the pleadings or properly before us at this point in the litigation.

Conclusion

We reverse the grant of judgment on the pleadings and remand for further proceedings on Fry's state law negligence claim against PHS.

Reversed and remanded.

BAKER, C.J., and MAY, J., concur.