NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 18, 2024*
Decided December 20, 2024

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

NANCY L. MALDONADO, *Circuit Judge*

No. 24-1556

HENRY L. MACK, *Plaintiff-Appellant*,	Appeal from the United States District Court for the Central District of Illinois.
v.	No. 1:21-cv-1247-SLD
KURT OSMUNDSON, et al., *Defendants-Appellees*.	Sara Darrow, *Chief Judge*.

O R D E R

Henry Mack, a prisoner at Illinois River Correctional Center, sued several of his medical providers and the warden for violating his rights under the Eighth Amendment through deliberate indifference to his respiratory and gastrointestinal conditions. The district court granted the defendants' motion for summary judgment. A reasonable jury

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

could not find deliberate indifference on this record, and Mack's objections to various discretionary rulings lack merit; therefore, we affirm.

We draw the facts from the record at summary judgment, which we view in the light most favorable to Mack, the nonmoving party. *See Arce v. Wexford Health Sources Inc.*, 75 F.4th 673, 678 (7th Cir. 2023). When Mack arrived at Illinois River Correctional Center in May 2017, he had an appointment with the medical director, Dr. Kurt Osmundson. He mentioned a history of respiratory issues and bloody stools, and he requested a colonoscopy. The doctor explained that his occasional symptoms were normal in light of his reported medical history, so a colonoscopy was unnecessary. In 2018, Mack requested that Dr. Osmundson re-evaluate the results of a 2016 sleep study after which, Mack says, a doctor told him he had sleep apnea but found him ineligible for a CPAP machine. Dr. Osmundson reviewed the report but took no action.

Mack did not seek treatment for either stool or respiratory issues until March 2020. On March 27, Mack wrote a request for treatment for bloody stool, ongoing breathing difficulties, and persistent cough. The same day, he described these symptoms to warden Cherryle Hinthorne, and he believes she helped him obtain an appointment with a nurse, Tracy Neuendorf, on March 30. At that appointment, Mack reported a cough, and Neuendorf treated him for a cold; she did not record that Mack reported either bloody stool or breathing difficulties. When Mack filed a grievance about this appointment, stating that Neuendorf had failed to address his stool and respiratory symptoms, Hinthorne approved an emergency review. The grievance was forwarded to Dr. Osmundson, who said that Mack's medical chart did not reflect complaints about these symptoms at the appointment.

In early June 2020, nurse Amalia Manning collected three stool samples that all tested positive for blood. On June 24, Mack met with Brittany Miller, a nurse practitioner, and discussed his stool samples and gastrointestinal symptoms. NP Miller referred Mack to an offsite gastroenterologist. Mack later filed a grievance about this appointment, complaining that he had also requested treatment for his sleep apnea, which was not addressed. When Mack saw NP Miller again in late July about his shortness of breath, she diagnosed him with insomnia and prescribed a nasal spray. And during a December 2020 visit with nurse Manning, Mack complained of difficult and painful defecation, and she provided pain relievers.

Mack contracted COVID-19 in December 2020 and was isolated for 14 days. During isolation, he filed several grievances about the prison's policy of isolating only

prisoners who tested positive for the virus, not their cellmates. At that time, the prison was not widely testing for the virus, although other prisons in the state were.

Meanwhile, Mack saw the outside gastroenterologist, who recommended a colonoscopy. After some rescheduling, the procedure took place in March 2021, and the gastroenterologist observed polyps and hemorrhoids. During a second procedure in July, the gastroenterologist diagnosed Mack with diverticulosis and removed the polyps. Pathology results showed that the polyps were benign, and Mack reported no further bloody stools after these procedures.

In July 2021, Mack repeatedly complained of shortness of breath to non-party medical staff, who provided a nebulizer treatment. When Mack saw Dr. Osmundson a month later, he reported that this treatment was effective. Dr. Osmundson examined Mack, diagnosed him with chronic obstructive pulmonary disease and gastroesophageal reflux disease, prescribed several medications, and enrolled Mack in an asthma clinic. When Mack saw NP Miller on September 15, she noted that his condition was "good and stable." But Mack complained the next week to a non-party nurse about difficulty breathing and reported that his prescriptions were ineffective. Within two months, Mack was approved for a sleep study.

Mack later sued Dr. Osmundson, nurses Neuendorf and Manning, and NP Miller (the "medical defendants") under 42 U.S.C. § 1983. In the operative complaint, he alleged that these defendants responded too slowly to his bloody stools and his difficulty breathing. Mack also sued Hinthorne, alleging that she was deliberately indifferent because she failed to ensure he was receiving proper medical care and that he contracted COVID-19 because her policies to contain the pandemic were insufficient.

The medical defendants and Hinthorne separately moved for summary judgment. The medical defendants argued that they all had provided Mack with appropriate treatment and exercised their professional judgment. Hinthorne argued that she properly deferred to the medical defendants' professional judgment and that Mack could not show that the prison's COVID-19 policies caused him any harm. In his response, Mack included an affidavit describing his pre-2020 appointments with Dr. Osmundson, along with multiple exhibits that he had not produced in discovery, including an excerpt of a protocol used by nurses at Illinois River. The medical defendants objected to the undisclosed exhibits and to Mack's "sham" affidavit.

In ruling on the motions for summary judgment, the district court found the defendants' objections "moot" because Mack's deposition testimony covered the same

facts as the affidavit and because the new exhibits were immaterial.[1] On the merits, the court concluded that Mack had insufficient evidence that the medical defendants failed to use medical judgment or harmed Mack. As to Hinthorne, the court concluded that she was entitled to rely on the judgment of medical personnel and that Mack failed to demonstrate that the COVID-19 policies she implemented were unreasonable.

On appeal, Mack challenges the district court's handling of certain evidence as well as its ruling on the merits. We review Mack's evidentiary challenges only for an abuse of discretion, *see Clemons v. Wexford Health Sources, Inc.*, 106 F.4th 628, 634 (7th Cir. 2024), and we see none here.

Mack first argues that the district court wrongly excluded the nursing protocol he submitted, but he is mistaken. The court did not exclude the protocol—it concluded that the protocol made no difference to the outcome, and we agree. Although medical protocols can be evidence of whether a medical provider exercised proper judgment, *Wilson v. Wexford Health Sources, Inc.*, 932 F.3d 513, 520 (7th Cir. 2019), Mack submitted only introductory pages that contain no information about proper treatment for his conditions, so the exhibit sheds no light on whether the nurses reasonably responded or exercised medical judgment.

Mack also argues that the district court improperly "suppressed" evidence contained within his grievances. The court found Mack's grievances relevant only to whether the defendants knew that Mack was continuing to have symptoms or that their treatments were ineffective. To the extent that Mack wanted the court to accept factual assertions in his grievances as true (*e.g.,* that he complained about his apnea to NP Miller on June 24, 2020), the court properly declined to do so. Evidence must be admissible to be accepted at summary judgment, FED. R. CIV. P. 56(c), and the contents of Mack's grievances would be inadmissible as proof that events occurred as he described them, *see* FED R. EVID. 801(c); *Moore v. W. Ill. Corr. Ctr.*, 89 F.4th 582, 593 (7th Cir. 2023).

Mack next challenges the decision on the merits, arguing that the court impermissibly weighed evidence to conclude that the defendants were not deliberately

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[1] In their appellate brief, the medical defendants argue that we cannot consider the undisclosed pre-2020 medical records to support an inference that Dr. Osmundson was aware of a prior apnea diagnosis. Because Mack did not produce these as required by Federal Rules of Civil Procedure 26(a) and (e), we do not consider them. FED. R. CIV. P. 37(c); *see Dynegy Mktg. & Trade v. Multiut Corp.*, 648 F.3d 506, 514 (7th Cir. 2011).

indifferent. We review the court's ruling de novo. *See Arce*, 75 F.4th at 678. There is no dispute that Mack had an objectively serious medical condition, and so for his Eighth Amendment claim to survive summary judgment, Mack needed evidence that the defendants knew of and disregarded an excessive risk to his health. *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994). As to the medical defendants, this would be evidence that his treatment was so deficient that it reflected an absence of professional judgment to a degree beyond mere negligence or malpractice. *See Arce*, 75 F.4th at 679.

No reasonable jury could conclude that the medical defendants were deliberately indifferent to Mack's gastrointestinal conditions based on a delay in treating his stools. Delayed treatment can demonstrate deliberate indifference, but, in a prison setting where resources are limited, the inquiry is whether the length of delay was tolerable based on the "seriousness of the condition" and whether the delay "exacerbated the injury" or unnecessarily caused prolonged pain. *Petties v. Carter*, 836 F.3d 722, 730–31 (7th Cir. 2016) (en banc). Here, the only delay possibly attributable to the medical defendants is the three-month gap between March 2020, when Mack sought treatment for his stools,[2] and June 2020, when Mack discussed his fecal samples with NP Miller. (Mack does not contend that the medical defendants are responsible for the time it took to schedule his colonoscopies.)

No reasonable jury could conclude that this delay, amid a global pandemic, was unreasonable. At the March 30 appointment, Neuendorf treated Mack for cold symptoms, and the record does not show that she ignored an emergency. Then, at the June 24 appointment, NP Miller examined Mack, found clear bowel sounds and no signs of acute distress or pain, and referred him to a gastroenterologist. This was a reasonably prompt response to a patient with a non-emergent condition. Mack also supplies no evidence that the delay caused avoidable harm. *See Arce*, 75 F.4th at 680. Mack points to a general risk of colon cancer among men of his age and ethnicity as evidence that the medical defendants should have acted sooner, but the polyps Mack had removed were still benign, so he fails to establish that the delay itself caused harm.

As to his breathing difficulties, Mack contends that the medical defendants took too long to pursue effective treatment, and that they should have provided another sleep study and a CPAP machine much sooner. (His brief states that he has now had a sleep study and received a CPAP machine.) But a prisoner's disagreement with a course

[2] Although Mack insists the operative date should be 2017, when he says that he told Dr. Osmundson he was noticing blood in his stools, the record does not support an inference that he needed additional treatment at that time.

of treatment is not evidence of a provider's deliberate indifference. *See Johnson v. Dominguez*, 5 F.4th 818, 825–26 (7th Cir. 2021). Between July 2020 and November 2021, medical staff pursued various remedies for Mack's breathing problems, including a nasal spray, nebulizer treatments, medications for COPD and GERD, and enrollment in an asthma clinic. Eventually, Mack received what he had been asking for. Mack has presented no evidence that the decisions to pursue other remedies before his preferred treatment amounts to an abdication of professional judgment or caused his condition to worsen. *See id.* Rather, evidence suggests that some of the other treatments worked; Mack himself reported that the nebulizer treatments improved his symptoms, and examinations throughout this period showed clear lungs.

Finally, no reasonable jury could conclude that Hinthorne was deliberately indifferent to Mack's medical needs. With respect to the claim that Hinthorne should have compelled faster treatment, a nonmedical prison administrator is generally justified in deferring to the judgment of medical professionals, so long as she does not turn "a blind eye to a medical treatment failure." *Stewart v. Wexford Health Sources, Inc.*, 14 F.4th 757, 767 (7th Cir. 2021). So Mack must show that she relied unreasonably on the medical defendants' expertise. *See Giles v. Godinez*, 914 F.3d 1040, 1049 (7th Cir. 2019). But, as Mack concedes, Hinthorne helped arrange the March 30 appointment after Mack voiced his concerns to her. And when he later filed a grievance stating that his needs were ignored, she approved it for emergency review (then accepted Dr. Osmundson's view of Mack's medical history). Hinthorne could not have directed the medical staff to give specific treatments; that was beyond her expertise. *See Stewart*, 14 F.4th at 767–68.

Mack also cannot show that Hinthorne was deliberately indifferent by implementing a COVID-19 policy that did not prevent him from contracting the disease. A prison official who responded reasonably to a known, substantial risk to prisoner health or safety is not liable, even if the response did not prevent the harm. *Farmer*, 511 U.S. at 844. We agree with the district court that, even if Mack is correct that other prisons within the state enacted more stringent measures, he failed to adduce evidence that Hinthorne responded unreasonably to the emerging COVID-19 crisis—whether or not the isolation and testing policies she initially enacted were the most effective in preventing the spread of the virus.

AFFIRMED