Nos. 13-10268-DD & 13-10828-DD

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHNNIE FITZGERALD HOWARD,

Plaintiff-Appellant and Cross-Appellee,

v.

C. KRAUS *et al.*,

Defendants-Appellees and Cross-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida
Case No. 2:10-cv-00434-UA-SPC, Hon. G. Kendall Sharp

PRINCIPAL BRIEF

Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Court-Appointed Counsel for Johnnie Fitzgerald Howard

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Adams, D. – Defendant-Appellee;
2. Adams, J. – Defendant-Appellee;
3. Burns, P.A. – Appellate counsel for Johnnie Fitzgerald Howard;
4. Burns, Thomas A. – Appellate counsel for Johnnie Fitzgerald Howard;
5. Chappell, Hon. Sheri Polster – United States Magistrate Judge;
6. England, C. – Defendant-Appellee;
7. Garland, C. Ian – Assistant Attorney General;
8. Honeywell, Hon. Charlene E. – United States District Judge;
9. Howard, Johnnie Fitzgerald – Plaintiff-Appellant and Cross-Appellee;
10. Johnson, A.L. – Defendant-Appellee;
11. Kraus, C. – Defendant-Appellee;
12. Leahey, S.M. – Defendant-Appellee and Cross-Appellant;
13. Licata, J.W. – Defendant-Appellee;
14. McCracken, R. – Defendant-Appellee;
15. Meier, M.H. – Defendant-Appellee and Cross-Appellant;
16. Mount, B. – Defendant-Appellee and Cross-Appellant;

17. Reid, T. – Defendant-Appellee;

18. Severson, FNU – Defendant-Appellee;

19. Sharp, Hon. G. Kendall – United States District Judge;

20. Skipper, P. – Defendant-Appellee;

21. Snider, D. – Defendant-Appellee and Cross-Appellant;

22. Williams, K. – Defendant-Appellee and Cross-Appellant.

May 28, 2014

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

In this Addendum Five appeal, Plaintiff-Appellant Johnnie Fitzgerald Howard requests oral argument. As an alternative basis for affirming the judgment, Defendants-Appellees will likely raise a novel and factually complex argument that the complaint should have been dismissed pursuant to the "three strikes" provision of 28 U.S.C. § 1915(g). Oral argument will assist the Court.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes **Page(s)**

Rules **Page(s)**

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This is a direct appeal from a final judgment. Doc. 97. The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3) because the complaint (Doc. 1) raised federal constitutional claims pursuant to 42 U.S.C. § 1983. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the District Court entered an order dismissing the complaint (Doc. 91), which was rendered final when the District Court entered an order (Doc. 94) denying a motion to alter or amend the judgment (Doc. 92) and entered judgment (Doc. 97). Howard timely appealed. Doc. 95.

STATEMENT OF THE ISSUE

Did the District Court err when it dismissed Howard's Eighth Amendment claim with prejudice?

STATEMENT OF THE CASE

Course Of Proceedings

This appeal arises from prison litigation. Howard asserted constitutional claims pursuant to 42 U.S.C. § 1983 against Defendants-Appellees. Doc. 1. Specifically, Plaintiff-Appellant Johnnie Fitzgerald Howard claimed Defendants-Appellees cruelly and unusually punished him in violation of the Eighth Amendment, entered into a conspiracy to violate his federal rights, maliciously prosecuted him, and violated his due process rights. *See* Doc. 1. After preliminary proceedings, Defendants-Appellees moved to dismiss. Doc. 79. The District Court granted that motion and dismissed the federal claims for failure to state a claim, for immunity in the defendants' official capacities, for qualified immunity, and with respect to all remaining defendants yet to be served.[1] Doc. 91 at 8-18. Pursuant to Federal Rule of Civil Procedure 59, Howard moved to alter or amend the judgment. Doc. 92. The District Court de-

[1] The District Court declined to dismiss Howard's complaint pursuant to the "three strikes" provision of 28 U.S.C. § 1915(g). This ruling was consistent with its prior orders. *See* Docs. 70 & 75.

nied that motion (Doc. 94) and entered judgment (Doc. 97). Howard timely appealed. Doc. 95.

Statement Of Facts

A. The Complaint

Howard alleged he "began experience very moderate chest pains, and pursuant to policy declared a medical emergency."[2] Doc. 1 at 10. Instead of providing medical attention, Defendants-Appellees C. Kraus, D. Snider, and M.H. Meier[3] "threaten[ed] Plaintiff with chemical agents and compel[led] Plaintiff to continue to perform work duties assignments, completely ignoring Plaintiff's medical emergency request." Doc. 1 at 11. Several hours later, other prison officials gave Howard medical attention. Doc. 1 at 11. Thereafter, Howard filed informal and formal grievances against Kraus, Snider, and Meier. Doc. 1 at 11. Pursuant to those grievances, the prison disciplined Kraus, Snider, and Meier for their conduct. Doc. 1 at 11. In the complaint's prayer for relief, Howard sought compensatory, punitive, and nominal damages. Doc. 1 at 16.

---

[2] Howard subsequently explained that "very moderate chest pains" meant more than moderate chest pains. *See* Doc. 90 at 10-11.

[3] Kraus was never served with process (Doc. 39), but Snider and Meier were (Docs. 41 & 43).

B. The Dismissal

After preliminary proceedings, Defendants-Appellees moved to dismiss. Doc. 79. Howard opposed. Doc. 90. The District Court granted the motion and dismissed the federal claims for failure to state a claim, for immunity in the defendants' official capacities, for qualified immunity, and with respect to all remaining defendants yet to be served. Doc. 91 at 8-18.

In dismissing Howard's Eighth Amendment claim, the District Court relied (Doc. 91 at 9) on this Court's summary-judgment decision in *Hill* v. *Dekalb Regional Youth Detention Center* for the proposition that "[a]n inmate who complains that delay in medical treatment [rises] to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of the delay." 40 F.3d 1176, 1187 (11th Cir. 1994). The District Court did not explain (*see* Doc. 91 at 9) how the summary-judgment requirement that plaintiffs "must place verifying medical evidence in the record" was consistent with the notice-pleading requirement that plaintiffs must merely provide only "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2).

After the dismissal, Howard moved to alter or amend the judgment pursuant to Rule 59. Doc. 92. In that motion, Howard contended he could cure the pleading defect in his complaint if the Court granted leave to amend. Doc. 92 at 3-4. Defendants-Appellees opposed on the basis that Howard had not previously asked for leave to amend. Doc. 92 at 6-7. Defendants-Appellees did not, however, explain what law obligated a *pro se* litigant to seek leave to amend. *See* Doc. 92 at 6-7.

Standard Of Review

"We review de novo the district court's grant of a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Timson* v. *Sampson*, 518 F.3d 870, 872 (11th Cir. 2008). "We review a district court's determination that an official is entitled to qualified immunity de novo." *Thomas* v. *Roberts*, 261 F.3d 1160, 1170 (11th Cir. 2001). "We review a dismissal under the Prison Litigation Reform Act, 28 U.S.C. § 1915(e)(2)(B)(ii) de novo and view the allegations in the complaint as true." *Douglas* v. *Yates*, 535 F.3d 1316, 1319-20 (11th Cir. 2008). "*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, there-

fore, be liberally construed." *Tannenbaum* v. *United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

SUMMARY OF THE ARGUMENT

The District Court erred when it dismissed the Eighth Amendment claim with prejudice. Howard could have remedied any pleading defects in his Eighth Amendment claim by alleging that his deliberately indifferent medical care caused him an injury. For all the District Court knew at the pleading stage, Howard may have suffered a heart attack from the deliberately indifferent delay in providing medical care. Accordingly, the District Court should have *sua sponte* granted him leave to amend his Eighth Amendment claim. For the same reason, the District Court's qualified immunity and 28 U.S.C. § 1915(e)(2)(B)(ii) rulings were premature: it violates clearly established law to give a prisoner deliberately indifferent medical care, and Howard could state an Eighth Amendment claim against Kraus, who was never served, on remand.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ERRED WHEN IT DISMISSED HOWARD'S EIGHTH AMENDMENT CLAIM WITH PREJUDICE

The District Court should not have dismissed the complaint with prejudice. Howard could have remedied any pleading defects in his

Eighth Amendment claim, so the District Court should have *sua sponte* granted him leave to amend.

To state an Eighth Amendment claim, Howard needed to allege "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle* v. *Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976). "To show that a prison official acted with deliberate indifference to serious medical needs, a plaintiff must satisfy both an objective and a subjective inquiry." *Farrow* v. *West*, 320 F.3d 1235, 1243 (11th Cir. 2003). "First, a plaintiff must set forth evidence of an objectively serious medical need." *Id.* "Second, a plaintiff must prove that the prison official acted with an attitude of 'deliberate indifference' to that serious medical need." *Id.* Finally, if a prison official was deliberately indifferent to a serious medical need, a prisoner must also establish "causation between that indifference and the plaintiff's injury." *Youmans* v. *Gagnon*, 626 F.3d 557, 563 (11th Cir. 2010).

Here, the District Court assumed that the delay in treating Howard's "very moderate chest pains" was deliberate indifference to an objectively serious medical need. Doc. 91 at 9. Nevertheless, the District Court ruled Howard could not establish the causation requirement be-

cause Howard did not allege or "place verifying medical evidence in the record to establish the detrimental effect of the delay." *Hill* v. *Dekalb Regional Youth Detention Center*, 40 F.3d 1176, 1187 (11th Cir. 1994).

There are two significant problems with this ruling. First of all, *Hill* was a summary-judgment case. For that reason, it made sense in *Hill* to require a plaintiff to put "verifying medical evidence in the record." *Id.* But here, the dismissal occurred at the pleading stage. Nothing obligates plaintiffs to place "evidence" in the record in a complaint. Rather, under notice pleading, plaintiffs need only provide "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). Accordingly, the District Court's reliance on *Hill* for the proposition that the complaint needed to place "verifying medical evidence in the record" was error.

Second, although the District Court was correct to dismiss the Eighth Amendment claim for failure to allege causation facts, it should have dismissed the claim with leave to amend. That is, the District Court erred when it failed to *sua sponte* grant Howard, a layman proceeding *pro se*, at least one opportunity to amend.

When amendment would not be futile, district courts should *sua sponte* grant *pro se* litigants leave to amend. In *Bank* v. *Pitt*, this Court

held that district courts must *sua sponte* grant all plaintiffs "at least one chance to amend the complaint before the district court dismisses the action with prejudice." 928 F.2d 1108, 1112 (11th Cir. 1991). A decade later in *Wagner* v. *Daewoo Heavy Industries American Corp.*, however, this Court overruled *Bank* in part and held district courts need not grant counseled parties leave to amend *sua sponte* when they "never filed a motion to amend nor requested leave to amend before the district court." 314 F.3d 541, 542 (11th Cir. 2002) (en banc). Importantly, however, *Wagner* "decide[d] and intimate[d] nothing about a party proceeding *pro se*." *Id.* at 542 n.1. As such, district courts must still *sua sponte* grant *pro se* litigants leave to amend any claim that is not futile. *Clark* v. *Maldonado*, 288 Fed. App'x 645, 647 (11th Cir. 2008); *Spear* v. *Nix*, 215 Fed. App'x 896, 902 (11th Cir. 2007).[4]

Here, Howard was proceeding *pro se*, and he might have been able to allege entirely "plausible," not "speculative" facts that show he suffered an injury from deliberately indifferent medical care. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1949 (2009); *Bell Atl. Corp.* v.

[4] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007). Specifically, to satisfy the District Court's pleading requirement, Howard needed only to allege that the delay in providing medical care was not only deliberately indifferent, but that it also caused him to suffer a "detrimental effect." Doc. 91 at 9. The complaint does not allege any facts one way or the other regarding any detrimental effect. For all the District Court knew at the pleading stage, Howard may have suffered a heart attack from the deliberately indifferent delay in providing medical care. Accordingly, the District Court should have granted Howard leave to amend so it could discern what causation facts Howard could allege.

Because the District Court should have granted leave to amend, it was premature for it to determine whether Defendants-Appellees had qualified immunity from Howard's Eighth Amendment claim. As a general matter, when a plaintiff properly alleges a claim of deliberate indifference, there is no qualified immunity. *See Gilmore* v. *Hodges*, 738 F.3d 266, 276 (11th Cir. 2013) ("for purposes of qualified immunity, we have little difficulty concluding that the evidence allows the inference that the officers' response to Weinberg's medical need was objectively insufficient, that the officers acted with deliberate indifference, and

that their actions caused Weinberg's harm"). Similarly, it was premature for the District Court to dismiss the Eighth Amendment claim as to Kraus (who was never served with process) pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), because Howard may yet be able to state an Eighth Amendment claim against him on remand.

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment with respect to Howard's Eighth Amendment claim against Kraus, Snider, and Meier and remand for further proceedings.

Respectfully submitted,

/s/ Thomas Burns
Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Court-Appointed Counsel for Johnnie Fitzgerald Howard

CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 1,878 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

May 28, 2014

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 28th day of May, 2014, to:

John Ley, Clerk of Court
U.S. COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT
56 Forsyth Street N.W.
Atlanta, GA 30303

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 28th day of May, 2014, to:

Fla. Attorney General's Office

AAG C. Ian Garland

May 28, 2014

/s/ Thomas Burns
Thomas A. Burns