

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD PEARSON :
 :
 v. :
 :
 CITY OF PHILADELPHIA, JAMES : CIVIL ACTION
 SANTOMIERI, MATTHEW MCGUIRE, :
 JOHN GARVEY, JOHN DOE NOLE, : NO. 97-1298
 MAE CALEB, DONNA BATEMAN :
 ROBERT THOMAS, FRANK HALL :
 EARL HATCHER, MAJOR BAMBERSKI :
 AND PIEL :

MEMORANDUM ORDER

Presently before the court are defendant Caleb's Motion for Reconsideration (Doc. #89) and defendants Thomas's and Bateman's Motion for Reconsideration (Doc. #90) by which these defendants ask the court to vacate its order of August 31, 1998 denying their motions for summary judgment and now to grant those motions. Plaintiff alleges that these defendants willfully caused or contributed to an unreasonable delay in medical treatment for an obviously serious medical need while plaintiff was confined at Holmesburg prison.

The essence of defendants' arguments is that plaintiff has not produced expert medical testimony to prove the existence of a "serious" medical condition and has failed to overcome defendants' "good faith" defense.

Movants argue that plaintiff is required to produce expert medical testimony to establish that he had a serious

medical need. They cite Boring v. Kazakiewicz, 833 F.3d 468 (3d Cir. 1987), cert. denied, 485 U.S. 991 (1988). In Boring the questions were whether an old knee injury required surgery, what type of shampoo should be used to control scaling and what, if any, risks were posed by the use of temporary dental fillings. The Court concluded that an unaided jury would be unable to decide if the particular conditions in question were "serious." For that reason the Court held that "[i]n these circumstances, the district court properly required expert medical opinion." Id. at 473. The Court in Boring did not hold that expert testimony is required to establish the seriousness of any and every medical condition complained of by a plaintiff inmate. See, e.g., West v. Keve, 571 F.2d 158, 162 (3d Cir. 1978) (determination of seriousness of plaintiff's condition may be made with benefit of medical testimony "if necessary").

That a separated shoulder accompanied by extreme pain or a protruding metallic pin accompanied by bleeding and severe pain are "serious" conditions would seem to be sufficiently obvious to obviate the need for expert testimony. See, e.g., Oldham v. Chandler-Halford, 877 F. Supp. 1340, 1355 (N.D. Iowa 1995) (fractured wrist presents serious medical need apparent to layperson without need for expert testimony); Shoop v. Dauphin County, 755 F. Supp. 1327, 1331 (M.D. Pa. 1991) (suggesting obvious seriousness to layperson of certain medical conditions

including broken bones and bruises), aff'd, 945 F.2d 396 (3d Cir. 1991) cert. denied, 502 U.S. 1097 (1992). In any event, plaintiff does propose to call a medical expert, Dr. Michael Saltzburg, an orthopaedic surgeon.

Dr. Saltzburg will testify that there was an unconscionable delay in providing the surgery for plaintiff recommended by an orthopaedic consultant, that plaintiff suffered from an infection and that the medical care he received was "barbaric" and so unreasonable that it "demonstrates deliberate indifference." A medical condition which a physician has diagnosed as requiring treatment is "serious" for Eighth Amendment purposes. Oldham, 877 F. Supp. at 1357. It is also evident that ignoring numerous requests for attention for extreme unabated pain over several months could evince deliberate indifference to a serious medical need. See Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) ("serious medical need" encompasses condition producing extreme pain), cert. denied, 486 U.S. 106 (1988). See also Jolly v. Klein, 923 F. Supp. 931, 946 (S.D. Tex. 1996) (delay in treating pain and infection violates right to adequate medical care); Phillips v. Michigan Dep't. of Corrections, 731 F. Supp. 792, 799 (W.D. Mich. 1990) (denial of care resulting in unnecessary pain or suffering will sustain § 1983 claim), aff'd,

932 F.2d 969 (6th Cir. 1991); Jones v. Ehlert, 704 F. Supp. 885, 888 (E.D. Wis. 1989) (same), aff'd, 899 F.2d 17 (7th Cir. 1990).

Movants also argue that plaintiff has failed to overcome their "good faith defense." Insofar as good faith is an affirmative defense, neither defendant Thomas nor defendant Bateman has pled it. Indeed, a review of the file and docket confirms that these defendants have never filed an answer to plaintiff's complaint. They also never asserted such a defense in their motions to dismiss and for summary judgment. They raise the defense of good faith for the first time in their motion for reconsideration. Defendant Caleb did file an answer with affirmative defenses including qualified immunity and good faith. She also asserted a good faith defense in her motion for summary judgment.

Movants state that as independent contractors paid by the City to staff prison medical facilities, they are entitled to assert a good faith defense which plaintiff must overcome with proof that movants subjectively understood their conduct violated plaintiff's constitutional rights. For this they rely on Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994). The Court in Jordan held that private individuals invoking state attachment laws subsequently held unconstitutional had a defense of good faith. Id. at 1276. See also Wyatt v. Cole, 994 F.2d 1113, 1120 (5th Cir.) (same), cert. denied, 114 S.

Ct. 470 (1993). The defense is predicated on the elements of malice and lack of probable cause required to prove wrongful attachment at common law, which was presumptively subsumed by § 1983. See Jordan, 30 F.3d at 1276 n.31. See also Wyatt v. Cole, 504 U.S. 158, 173-74 (1992) (Kennedy, J. concurring) (discussing support in common law for reasonableness of good faith reliance by private individual on facially valid statute prior to judicial determination of unconstitutionality).

To import into Eighth Amendment jurisprudence a defense predicated on the elements of a common law claim for a wrongful seizure of property and the reasonableness of reliance on a facially valid statute is a leap. The good faith defense discussed in Jordan has yet to be afforded to other than private individuals who in concert with state officials invoke state law in pursuit of a private objective. In any event, like the subjective knowledge component of an Eighth Amendment claim itself, bad faith can be inferred from circumstantial evidence. Id. at 174. It is virtually inconceivable that a medical professional working in a prison would be unaware that failing to address severe pain for a period of months and rendering care to an inmate which is "barbaric" violated his constitutional rights. If the jury were to credit plaintiff's evidence and reject defendants', it could reasonably conclude that defendants did not act in good faith.

As noted, movant Caleb also pled qualified immunity although she did not pursue it in her motions to dismiss and for summary judgment.¹ A claim of qualified immunity implicates the objective legal reasonableness of a defendant's conduct rather than questions of subjective malice implicated by a good faith defense. See Anderson v. Creighton, 483 U.S. 635, 645 (1987).²

Qualified immunity has been afforded to private individuals who at the behest of state officials perform governmental functions. See Warner v. Grand County, 57 F.3d 962, 965-67 (10th Cir. 1995); Williams v. O'Leary, 55 F.3d 320, 323 (7th Cir. 1995); Burwell v. Board of Trustees of Georgia Military College, 970 F.2d 785, 795 (11th Cir. 1992), cert. denied, 507 U.S. 1018 (1993). Whether such immunity remains available in these circumstances is questionable after the recent five to four holding of the Supreme Court that private prison guards, at least those who act without meaningful government supervision or direction, do not enjoy qualified immunity from suit under

¹ It is unclear whether defendant Caleb meant to preserve a claim of qualified immunity. Since the denial of a claim of qualified immunity is immediately appealable, however, the court has addressed it. See Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). It would appear that no such appeal is available to test a defendant's claim of good faith. See Jordan, 20 F.3d at 1277 n.33.

² While a claim of qualified immunity and of good faith are thus conceptually quite distinct, as a practical matter "good faith may be difficult to establish in the face of a showing that from an objective standpoint no reasonable person could have acted as the defendant did." Wyatt, 504 U.S. at 173.

