No. 16-51148

In the United States Court of Appeals
For the Fifth Circuit

SCOTT LYNN GIBSON,
Plaintiff-Appellant

v.

BRYAN COLLIER; DR. D. GREENE,
Defendants-Appellees

On Appeal from the United States District Court for the
Eastern District of Texas - Waco Division
(Civil Action No. 6:15-CV-190)

BRIEF OF DEFENDANT-APPELLEE BRYAN COLLIER

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NO. 16-51148

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Defendant-Appellee:	Dr. D. Greene
Counsel for Defendant-Appellee:	Dr. D. Greene is unrepresented. Counsel for Bryan Collier have made an argument as *amicus curiae* on Dr. Greene's behalf.
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page(s)

Statutes and Rules:

ISSUES PRESENTED

Appellant presents fifteen issues on appeal. They may be properly and concisely addressed when consolidated into the following dispositive issues for review:

1. Whether Gibson has established a genuine issue of material fact as to whether policy G-51.11 is unconstitutional on its face or as applied to Gibson.

2. Whether Defendants were required to affirmatively negate Gibson's claims to be entitled to summary judgment.

STATEMENT OF THE CASE

Plaintiff-Appellant Scott Lynn Gibson ("Gibson") is a male-to-female preoperative transsexual[1] who seeks an evaluation for sex-reassignment surgery ("SRS") and, if warranted, the surgery itself, on the grounds that inmates diagnosed with severe Gender Dysphoria ("GD," previously known as Gender Identity Disorder), are entitled to such treatment under the Eighth Amendment's prohibition against cruel and unusual punishment.

I. Gibson's Background

Gibson has identified as a female for 20 years, but did not begin receiving treatment for his gender disorder until 2014. ROA.388-89. When Gibson entered TDCJ 1995, he verbally requested treatment for his undiagnosed gender disorder, but was denied. ROA.388-89. The policy in place at that time prohibited treatment for

[1] Though Gibson self-identifies as female, Gibson is biologically male and is confined in a male prison unit. For clarity and consistency, this brief will refer to Gibson as male.

transgender inmates without a gender disorder diagnosed before incarceration. ROA.388-89. The current policy, effective since October 2013, does not have this treatment barrier for inmates like Gibson. ROA.266-70.

Once Gibson learned of the new policy and expressed a desire to castrate himself, Gibson was evaluated by University of Texas Medical Branch doctors at the Skyview psychiatric facility and diagnosed with GD in May 2014. ROA.398-99. Gibson has since received ongoing mental health care, and began receiving hormone therapy in September 2014. ROA.398-99.

II. Correctional Managed Health Care Policy G-51.11 ("G-51.11")

Policy G-51.11 provides guidelines for the management of inmates with intersex conditions and GD. ROA.266-70. The policy provides three levels of procedures to manage inmates with a known intersex condition, those pre-diagnosis, and those who receive a diagnosis while incarcerated. ROA.267-69. The policy provides that inmates with GD "will receive thorough medical and mental health evaluations," ROA.268, mental health counseling, ROA.269, and, hormone therapy if warranted under the [c]urrent, accepted standards of care and the offender's physical and mental health." ROA.269. Gibson's care and treatment was managed under the guidelines of this policy. ROA.18, 414.

III. Gibson's Claim

Gibson does not contend that he has not received treatment within the current policy's guidelines. Rather, Gibson contends that mental health care and hormone

therapy are insufficient to treat his severe GD, and that the policy's failure to provide SRS as a treatment option renders it constitutionally inadequate. In support, Gibson cites the World Professional Association for Transgender Health's (WPATH) standards of care for the treatment of transgender individuals, which includes SRS as a last resort treatment option. Gibson argues that Livingston showed deliberate indifference to his severe GD by creating and enforcing a treatment policy, which should—but does not—include WPATH's SRS recommendation.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Gibson filed suit under 42 U.S.C. § 1983 against Livingston, in his official capacity, alleging the violation of his Eighth Amendment rights. Gibson seeks prospective injunctive relief in the form of an evaluation for SRS, and if necessary, SRS. Gibson asserts Livingston was deliberately indifferent to his serious medical needs by creating and enforcing a policy that provides constitutionally inadequate guidelines for the treatment of inmates with GD. Bryan Collier has since taken over from Livingston as Executive Director of TDCJ.

On summary judgment, the district court found Gibson failed to demonstrate a violation of his Eight Amendment rights. ROA.416-17. In assessing Gibson's claim, the district court first considered the current state of relevant Fifth Circuit law, finding no controlling precedent suggesting that inmates are constitutionally entitled to SRS as a treatment for GD. ROA.416-17. The court next declined to adopt the WPATH standards of care under which Gibson sought to hold Livingston accountable, because Gibson

failed to provide sufficient summary judgment evidence that those standards were constitutionally required. ROA.416. Finally, the court found that even assuming the appropriate standard of care mandated SRS as a treatment option for GD, the record evidence did not support Gibson's conclusory assertion that Livingston's conduct amounted to deliberate indifference. ROA.416. On appeal, Gibson challenges the district court's conclusions and asserts that the court erred in granting summary judgment because Defendants did not affirmatively negate his claims.

SUMMARY OF THE ARGUMENT

Gibson cannot establish a genuine issue of material fact as to whether policy G-51.11 is unconstitutional. Gibson failed to produce competent summary judgment evidence demonstrating that SRS is constitutionally required or that the medical treatment he has received under G-51.11 is constitutionally inadequate. Gibson also failed to show Livingston's conduct as a policy-maker amounted to deliberate indifference.

Summary judgment was appropriate due to Gibson's failure to establish a genuine issue of material fact concerning the essential elements of his Eighth Amendment claims. Livingston, as the moving party, was not required to affirmatively negate Gibson's claims to be entitled to summary judgment.

The District Court properly dismissed Dr. Greene from the suit *sua sponte*. That discretion was within the court's power under the Federal *in forma pauperis* statute, and Gibson failed to allege facts stating a claim on which relief could be granted. This Court should affirm the judgment below in its entirety.

STANDARD OF REVIEW

This Court "review[s] a district court's decision granting summary judgment *de novo*, applying the same standards as the trial court." *Milton v. TDCJ*, 707 F.3d 570, 572 (5th Cir. 2013). "Summary judgment must be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which it will bear the burden of proof at trial." *Pioneer Expl., L.L.C. v. Steadfast Ins. Co.*, 767 F.3d 503, 511 (5th Cir. 2014) (internal quotation mark omitted). To make that required showing, "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Id.* (internal quotation mark omitted). "Conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial." *Id.* (quotation marks omitted).

ARGUMENT

I. Gibson Cannot Establish A Genuine Issue Of Material Fact As To Whether G-51.11 Is Unconstitutional.

The Eighth Amendment is meant to prohibit "unnecessary and wanton infliction of pain," which is "repugnant to the conscience of mankind." *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976). The Eighth Amendment's focus on punishment means that not every shortage or failure of medical care violates the Constitution. The Eighth Amendment is implicated only where there is (1) objective proof of a serious medical need, and (2) deliberate indifference to that serious medical need. *See id.* at 104. Gibson failed to put forth evidence that raises a genuine issue of material fact as to either of these prongs.

A. Gibson Failed To Produce Evidence Suggesting That The Care Provided For In G-51.11 Is So Inadequate As To Shock The Conscience.

To satisfy the first prong of his Eighth Amendment claim, Gibson must show that he has a serious medical need for which he received inadequate care. *See Gamble*, 429 U.S. at 106. This Court has previously declined to hold that GD is a serious medical need. *See Praylor v. Texas Dep't of Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005) (per curiam). The Court need not reach that issue here because, even assuming that GD is a serious medical need, Gibson has failed to show that the mental health counseling and hormone treatment provided for in G-51.11 is so inadequate as to shock the conscience. In fact, as this Court recognized in *Praylor*, multiple courts have held that not even hormone treatment is required to adequately address GD. *See id.* at 1209 (citing cases).

To be actionable under the Eighth Amendment, medical care must be so inadequate as to shock the conscience. *See, e.g.*, *Gamble*, 429 U.S. at 106 (actions must be "repugnant to the conscience of mankind"); *Kosilek v. Spencer*, 774 F.3d 63, 83 (1st Cir. 2014) (en banc) ("[T]he Constitution proscribes care that is so inadequate as to shock the conscience.") (internal quotation marks omitted), *cert. denied sub nom.*, *Kosilek v. O'Brien*, 135 S. Ct. 2059 (2015); *Miller v. Calhoun Cnty.*, 408 F.3d 803, 819 (6th Cir. 2005) ("Grossly inadequate medical care is medical care that is so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.") (internal quotation marks omitted). To support his assertion that mental health counseling and hormone therapy are inadequate, Gibson relied on the WPATH guidelines. ROA.416; Appellant's Br. 12, 17-20. But while those guidelines do

recommend SRS as a form of treatment, they provide no help in determining whether diverging from those guidelines shocks the conscience.

As the district court explained, Gibson put forth "no witness testimony or evidence from professionals in the field demonstrating that the WPATH-suggested treatment option of SRS is so universally accepted, that to provide some but not all of the WPATH-recommended treatment amounts to" a constitutional violation. ROA.416; *see also Kosilek*, 774 F.3d at 86-91 (en banc First Circuit reversing district court's conclusion that WPATH guidelines represented constitutionally required standard of care).[2] Gibson failed to provide any evidence that would give context to the WPATH guidelines—indeed, he did not even provide a full copy of the guidelines. *See* ROA.416.

Evidence that supports the use of a certain treatment is not evidence that such treatment is required. Because Gibson failed to produce the latter evidence, he "fail[ed] to make a showing sufficient to establish the existence of an element essential to" his "case," and the district court properly granted summary judgment to Defendants. *Steadfast Ins. Co.*, 767 F.3d at 511 (internal quotation mark omitted).

B. Gibson Failed To Produce Evidence Suggesting That G-51.11 Amounts To Deliberate Indifference.

Even if Gibson did produce evidence suggesting that SRS is medically necessary to adequately treat GD, his claim would still fail because he failed to produce any evidence suggesting that anyone "knew or should have known this fact, but nonetheless failed to

[2] Gibson cites the district court's opinion in *Kosilek* but overlooks its subsequent reversal. *See* Appellant's Br. 12.

respond in an appropriate manner." *Kosilek*, 774 F.3d at 91; *accord Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (explaining that "the subjective component" of an Eighth Amendment claim asks whether "officials act[ed] with a sufficiently culpable state of mind"). Gibson produced no evidence concerning the process that went into developing G-51.11 or the medical advice received and relied on by prison officials. Without such evidence, it impossible to determine whether "officials act[ed] with a sufficiently culpable state of mind." *Wilson*, 501 U.S. at 298.

Gibson likewise produced "no evidence addressing the security issues associated with adopting in full the WPATH standards in an institutional setting." ROA.416. This Court does "not sit to substitute [its] own judgment for that of prison administrators." *Kosilek*, 774 F.3d at 92; accord *Hay v. Waldron*, 834 F.2d 481, 486 (5th Cir. 1987) ("[A] court should accord broad deference to prison administrators regarding the reasonableness of the scope, the manner, the place and the justification for a particular policy."). As the First Circuit noted in *Kosilek*, "[r]ecognizing that reasonable concerns would arise regarding a post-operative, male-to-female transsexual being housed with male prisoners takes no great stretch of the imagination." 774 F.3d at 93 (citing *Farmer v. Brennan*, 511 U.S. 825, 848-49 (1994)).

Yet Gibson produced no evidence bearing on this issue. As a result, Gibson has again "fail[ed] to make a showing sufficient to establish the existence of an element essential to" his "case," and the district court properly granted summary judgment to Defendants. *Steadfast Ins. Co.*, 767 F.3d at 511 (internal quotation mark omitted).

Gibson's Eighth Amendment claim against Livingston as a policymaker fails for the additional reason that Gibson failed to produce any evidence suggesting that Livingston was personally aware of facts indicating a substantial risk of serious harm or that Livingston was actually aware of that risk. A plaintiff bringing a civil rights claim under 42 U.S.C. § 1983 must establish a causal connection between the alleged constitutional deprivation and the defendant whom they would hold responsible; "[p]ersonal involvement is an essential element of a civil rights cause of action." *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983); see *Rizzo v. Goode*, 423 U.S. 362, 371-77 (1976) (affirmative link needed between injury and conduct of defendant). For a claim of deliberate indifference, a public official must have been personally aware of the facts indicating a substantial risk of serious harm, and the official must have actually recognized the existence of such a risk. *Farmer*, 511 U.S. at 838.

Because Gibson sues Livingston as a policymaker, as the district court correctly reasoned, Gibson must show that Livingston was aware both that the WPATH standards of care were appropriate for inmates diagnosed with GD, and that a substantial risk of serious harm would be posed to those inmates absent a policy that provides SRS. Further, Gibson must show Livingston deliberately created and enforced a policy to deny such treatment despite the known or obvious constitutional violations that would follow. Gibson, however, produced no evidence of Livingston's knowledge of any relevant fact or risk. As such, summary judgment was appropriate for this reason as well.

II. Rule 56 Does Not Require The Summary Judgment Movant To Produce Affirmative Evidence To Negate A Non-Movant's Claim.

Citing Federal Rule of Civil Procedure 56(e), Gibson asserts that the district court erred in granting summary judgment to Livingston because Livingston did not produce evidence to affirmatively negate Gibson's claims. See Appellant's Br. 27-28. Gibson is mistaken.

Subsection (e) of Rule 56 says nothing about what is needed to negate a non-movant's claim. Subsection (c), meanwhile, provides that "[a] party asserting that a fact cannot be . . . genuinely disputed must support the assertion by . . . showing that the materials [in the record] do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Thus, contrary to Gibson's premise, a summary judgment "movant need not negate the elements of the nonmovant's case." *Steadfast Ins. Co.*, 767 F.3d at 511 (internal quotation marks omitted).

Because Gibson, as the nonmovant, failed to "set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case" (*Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005)), summary judgment was appropriate.[3]

III. *Amicus Curiae* Advisory regarding the District Court's proper dismissal of Gibson's claims against Dr. Greene.

Concurrent with its grant of summary judgment in Livingston's favor, the district

[3] The case relied on by Gibson—*Okoye v. University of Texas Houston Health Science Center*, 245 F.3d 507 (5th Cir. 2001)—correctly states that the non-movant must support her claim with competent summary judgment evidence. See id. at 515. Gibson failed to do that here and thus summary judgment was appropriate.

court also dismissed Gibson's claim against Dr. Greene[4] pursuant to 28 U.S.C. § 1915(e)(2), which subjects *in forma pauperis* complaints to *sua sponte* dismissal for failure to state a claim on which relief may be granted. *See* § 1915(e)(2)(B)(ii). The lower court found Gibson's allegations against Dr. Greene amounted to a treatment disagreement, not a constitutional violation. ROA.419. This Court should affirm that judgment.

Gibson asserts Dr. Greene, a TDCJ medical doctor, violated his Eighth Amendment rights by refusing to provide Gibson the same treatment—the items necessary to have "real life experience" as a female—recommended by Dr. McKinney, his UTMB doctor. ROA.284-295; App.Br. 15-16. Gibson concedes that Dr. McKinney did not specify what "real life experience" items included, but asserts it should include SRS under the WPATH standards. App.Br. 15-17; *accord* ROA.417-19. Gibson further argues that Dr. Greene is not a GD specialist and therefore did not base his treatment denial on accepted standards of care for inmates with GD but instead relied on the guidelines provided by G-51.11.

The lower court correctly reasoned that Gibson's allegations against Dr. Greene "fail to amount to a constitutional violation." ROA.421. The competent summary judgment evidence shows Dr. Greene provided Gibson treatment in line with G-51.11, a constitutionally adequate policy for managing inmates with GD. ROA.421; *see also* discussion *supra* at 5-9. Though Gibson plainly disagrees with the extent of the care he

[4] Dr. Greene has not made an appearance in this case and is not represented by the Office of the Attorney General for Texas.

has received, Gibson has not and cannot demonstrate Dr. Greene "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Domino v. Texas Dept. of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). Therefore this Court should affirm the District Court's *sua sponte* dismissal of Gibson's claim against Dr. Greene.

CONCLUSION

The Court should affirm the judgment of the District Court in its entirety.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On January 5, 2017, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,865 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Garamond) using Microsoft Word (the same program used to calculate the word count).

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United States Court of Appeals

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No. 16-51148 Scott Gibson v. Bryan Collier, et al
USDC No. 6:15-CV-190

Dear Mr. Huntpalmer,

The following pertains to your brief electronically filed on 12/28/16.

We filed your brief. However, you must make the following corrections within the next 14 days.

Opposing party's briefing time continues to run.

You need to correct or add:

Caption on the brief does not agree with the caption of the case in compliance with FED R. APP. P. 32(a)(2)(C). (See attachment)

Record References: Every assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record, whether in paper or electronic form, where the matter is found, using the record citation form as directed by the Clerk of Court. Although your brief contains citations to the record, they are not in proper form. (See 5TH CIR. R. 28.2.2) **Use of the word 'id.' is not permitted when citing to the record on appeal.**

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Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa V. Mattingly, Deputy Clerk
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cc:
Mr. Scott Lynn Gibson

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No. 16-51148 Scott Gibson v. Bryan Collier, et al
USDC No. 6:15-CV-190

Dear Mr. Huntpalmer,

We have reviewed your electronically filed proposed sufficient brief and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

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