UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LAYMON ADAMS	**CIVIL ACTION**
versus	**NO. 02-1059**
CHARLES FOTI, JR. ETC., ET. AL.	**SECTION: "A" (1)**

FILED:_____ _____
DEPUTY CLERK

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MEMORANDUM OF PLAINTIFF ADAMS IN OPPOSITION TO DEFENDANT McKENNA'S 12(b)6) MOTION TO DISMISS

MAY IT PLEASE THE COURT:

The removed state court petition and amended complaint filed by plaintiff Laymon Adams both state claims upon which relief can be granted against defendant Dwight McKenna. Accordingly, this Honorable Court should deny McKenna's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, all for the following reasons.

Laymon Adams contends that Dr. Dwight McKenna, particularly among

the physicians who treated him Medical Observation Unit (MOU) operated by the Orleans Parish Criminal Sheriff's Office (OPCSO) and Sheriff Charles Foti, Jr., treated him with deliberate indifference and unnecessarily and wantonly inflicted pain upon him, all of which is "repugnant to the conscience of mankind." See ***McCormick v. Stalder***, 105 F.3rd 1059, 1061 (5th Cir. 1997). Adams is a diabetic who presented at the MOU with an open fracture wound with an external fixator, which condition had been treated intensely at the Medical Center of Louisiana at New Orleans (MCLNO) during the weeks preceding his arrest on December 6, 2000. He particularly remembers McKenna exhibiting deliberate indifference to his immediate medical needs and treatment consistent with that prescribed by Dr. Cedric Tankson and Dr. Norman Chutkan at the MCLNO. The allegations of Adams's petition and amended complaint state claims upon which relief can be granted against Dr. McKenna.

A prisoner need only allege deliberate indifference to his serious medical needs to state a claim for relief under 42 U.S.C. § 1983 for denial of medical treatment. ***Varnado v. Lynaugh***, 920 F.2d 320, 321 (5th Cir. 1991); ***Woodall v. Foti***, 648 F.2d 268, 272 (5th Cir. Unit A June 1981) (citing ***Estelle v. Gamble***, 429 U.S. 97,

106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), ***reh'g denied***, 429 U.S. 1066, 50 L. Ed. 2d 785 , 97 S. Ct. 798 (1977). Dismissal of Adams's claim is improper because there are "the claim's realistic chance of ultimate success is great and the claim has an arguable basis in law and fact. ***Pugh v. Parish of St. Tammany***, 875 F.2d 436, 438 (5th Cir. 1989). McKenna's arguments in support of his motion miss the mark. The Supreme Court has held explicitly that "indifference... manifested by prison doctors in their response to the prisoner's needs... states a cause of action under § 1983." ***Estelle***, supra, 429 U.S. at 104-105 and at 104, n. 10.

McKenna's arguments miss the mark for another reason. Although mere negligence is not sufficient to demonstrate deliberate indifference to serious medical needs, it is also not necessary for a prisoner to prove complete denial of all medical care to show a violation of his rights. See ***McElligott v. Foley***, 182 F.3d 1248 (11th Cir. 1999) (sufficient evidence to show that doctor and nurse were deliberately indifferent to inmate's pain, although some care was provided); ***Young v. City of Augusta***, 59 F.3d 1160, 1170 (11th Cir. 1995) (although plaintiff received some treatment and medications, gaps in chart and other evidence raised triable issues regarding undue delay in providing treatment and provision of medications as

prescribed); ***Hathaway v. Coughlin***, 37 F.3d 63 (2nd Cir. 1994) (jury resolution required where defendant claimed to have engaged in adequate course of treatmen, but deliberate indifference could be inferred from facts indicating that surgery had been required); ***Durmer v. O'Carroll***, 991 F.2d 64 (3rd Cir. 1993)(plaintiff was seen by doctor and referred to specialists, but deliberate indifference was demonstrated by failure to provide him with physical therapy); ***Waldrop v. Evans***, 871 F.2d 1030 1033 (11th Cir. 1989 (in a case involving failure to give adequate psychiatric care, held that "grossly incompetent or inadequate care," or a "doctor's decision to take an easier and less efficacious course of treatment" would constitute a violation); ***Mandel v. Doe***, 888 f.2d 783 (11th Cir. 1989) (liability based on the actions of a physician's assistant at the jail, who diagnosed inflammation of a prisoner's leg and prescribed pain relievers, but consistently refused to refer him to a doctor or to have X-rays taken).

Adams's claims against nurses Victorian, Hampton, and Hawkins, and Doctors McKenna, Inglese, Andrews, and Silady allege deliberate indifference to his serious medical needs, constituting an unnecessary and wanton infliction of pain and ultimately the loss of his leg. ***Wilson v. Seiter***, 501 U.S. 294, 297, 115 L. Ed. 2d 271, 111 S. Ct. 2321 (1991). Adams alleges that the medical staff at the MOU of the

OPCSO acted with deliberate indifference because they knew of and disregarded an excessive risk to Adams's health; that they were both aware of facts from which the inference could be drawn that a substantial risk of serious harm existed to Adams, and they also drew the inference. ***Farmer v. Brennan***, 511 U.S. 825, 837, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994) (Liability attaches if the official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.") The subjective element of deliberate indifference "entails something more than mere negligence... [but] something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." ***Farmer v. Brennan***, 511 U.S. 825, 114 S. Ct. 1970, 1978, 128 L. Ed. 2d 811 (1994), citing ***Estelle***, 429 U.S. at 104. "Deliberate indifference" describes a mental state more blameworthy than negligence; but a plaintiff is not required to show that the defendant acted for the "very purpose of causing harm or with knowledge that harm will result." ***Id.*** Adams's claims against Sheriff Foti and the medical staff at the MOU of the OPCSO are not merely allegations of unsuccessful medical treatment, acts of negligence or medical

malpractice, or disagreement with prison officials regarding medical treatment, claims that are insufficient to establish an unconstitutional denial of medical care. See ***Norton v. Dimazana***, 122 F.3d 286, 292 (5th Cir. 1997); ***Varnado v. Lynaugh***, 920 F.2d 320, 321 (5th Cir. 1991). Adams claims that the OPCSO defendants, particularly Dr. McKenna, ignored his open wound, refused to give him the medication prescribed by the MCLNO physicians, refused to return him the Dr. Norman Chutkan and Dr. Cedric Tankson, ignored the puss evidencing infection, thereby exhibiting a deliberate indifference to his medical condition. A claim has been stated.

Two significant points of law must be elucidated at the outset before addressing McKenna's motion to dismiss Adams' claims against him. First, and quite significantly, the Supreme Court jurisprudence clearly establishes that McKenna's delivery of medical treatment to Adams was state action fairly attributable to the Sheriff Foti and the Orleans Parish Criminal Sheriff's Office; McKenna therefore acted under color of state law for purposes of § 1983. ***West v. Adkins***, 487 U.S. 42; 108 S. Ct. 2250; 101 L. Ed. 2d 40 (1988). "Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to

vindicate their Eighth Amendment rights." 487 U.S. at 56; 108 S.Ct. at 2259; 101 L.Ed.2d at 54. Sheriff Foti bore an affirmative obligation to provide adequate medical care to Adams; Sheriff Foti delegated that function to respondent McKenna, Andrews, Inglese, Silady, and other physicians, who voluntarily assumed that obligation by contract. "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity . . . ." ***Id.*** 487 U.S. at 57; 108 S.Ct. at 2260; 101 L.Ed.2d at 55. Dwight McKenna and other physicians are public actors under color of law when they provide health care services at the Orleans Parish Prison.

Secondly, the Louisiana Medical Malpractice Act is inapplicable to Sheriff Foti, his employees and contract physicians because this case involves allegations of deliberate indifference, wanton and willful conduct against public officials acting under color of state law. Sheriff Foti, the Medical Observation Unit (MOU) of the Orleans Parish Criminal Sheriff's Office, and the personnel working there simply are covered by neither the public nor the private malpractice act. Section 1299.39A(1)(b) of Title 40 of the Medical Malpractice Act provides that

"State health care provider" or "person covered by this Part" shall not mean and **shall not include a political subdivision** of the state nor any hospital, hospital service district, or any other health care facility of a political subdivision, nor shall it mean or include any individual acting in a professional capacity in providing health care services not by or on behalf of the state. 40 La. Rev. Stat. § 1299.39A(1)(b) (Emphasis added).

The Louisiana Public Malpractice Act also excludes coverage for acts wanton, willful, and gross negligence. This lawsuit is about deliberately indifferent, willful and wanton conduct in the provision of health care to Laymon Adams in a ***public*** penal facility controlled by Sheriff Foti and the Orleans Parish Criminal Sheriff's Office. There is nothing private about the facility or the people who work under Sheriff Foti. The MOU operated by Sheriff Foti and the OPCSO is public, not private. The Louisiana Legislature provided that gross negligence or any willful or wanton act or omissions committed in health care facilities operated by authority of the State of Louisiana, such as the MOU of the Orleans Parish Prison, are not covered by the Act. Section 1299.39A(1)(a)(iv)(cc) expressly excludes gross negligent conduct from coverage. "However, no person or entity referenced in this Item shall

be considered a "state health care provider" or "person covered by this Part" for any injury to or death of the patient resulting from any act or omission of gross negligence or any willful or wanton act or omission. 40 La. Rev. Stat. § 1299.39A(1)(a)(iv)(cc).

Moreover, the private malpractice act also expressly provides that "the provisions of this Part shall not apply to medical malpractice actions against the state or any political subdivision thereof..." 40 La. Rev. Stat. § 1299.41(I). Sheriff Foti and the staff he employs at the MOU of the OPCSO are not covered by either the public nor private Louisiana Medical Malpractice acts. How can a private actor who contracts to perform services at a public penal facility retain his or her private status? As noted above, the Supreme Court has determined unequivocally that private physicians treating persons incarcerated at prisons are state actors. ***West v. Adkins***, 487 U.S. 42; 108 S. Ct. 2250; 101 L. Ed. 2d 40 (1988). McKenna simply was not a private physician while he worked under contract for Sheriff Foti and the OPCSO at the Orleans Parish Prison. He was not a qualified or covered under the private malpractice act for purposes of this section 1983 lawsuit. At no all time pertinent to this matter was McKenna a qualified health care provider under the Private Medical

Malpractice Act because he was working for the OPCSO, a political subdivision. 40 La. Rev. Stat. § 1299.41(I); ***West v. Adkins***, supra. Therefore, under Louisiana law, he is not entitled to the benefits of the Act, specifically a presuit medical panel review.

To reiterate, McKenna was a state actor for purposes of this section 1983 action. He was under contract working for Sheriff Foti and the OPCSO, political subdivisions of the Louisiana. He is not covered by the private act because the act expressly excludes coverage for political subdivisions, providing that "the provisions of this Part shall not apply to medical malpractice actions against the state or any political subdivision thereof..." McKenna is not covered by the private act, which provides that "state health care provider" or "person covered by this Part" shall not mean and **shall not include a political subdivision** of the state nor any hospital, hospital service district, or any other health care facility of a political subdivision, nor shall it mean or include any individual acting in a professional capacity in providing health care services not by or on behalf of the state." The public act moreover excludes coverage for intentional, subjective, wanton, willful, or gross negligent acts, such as alleged here. McKenna is not covered by the Medical

Malpractice Acts.

Not only are the medical malpractice acts inapplicable, the circumstances presented here weigh against requiring Adams to exhaust any such administrative remedies before pursuing his action in this Court. "[I]n determining whether exhaustion is required, federal courts must balance the interests of the individual in retaining prompt access to a federal judicial forum against the countervailing institutional interests favoring exhaustion." ***McCarthy v. Madigan***, 503 U.S. 140, 146, 112 S. Ct. 1081, 1086, 117 L. Ed. 2d 291 (1992).[1] There are at least three broad sets of circumstances in which the interests weigh heavily against requiring administrative exhaustion: 1) requiring resort to administrative remedy may prejudice subsequent litigation, due to an unreasonable time frame or danger of the plaintiff suffering irreparable harm, 2) the administrative remedy may be inadequate because the agency is not empowered to grant the relief requested, and 3) the administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it. ***Id.*** at 147-48. Given the

[1]Since ***McCarthy*** was a case involved interpretation of 42 U.S.C. § 1997e, relative to federal prisoner exhaustion of administrative remedies, it is directly applicable. The Court included a general discussion of the purposes of administrative exhaustion requirements, thus lending guidance in the present case.

inapplicability of the medical malpractice acts to MOU at OPCSO and to Sheriff Foti's medical staff, requiring resort to a medical review panel would have amounted to an unreasonable delay and danger of his federal claim prescribing. Further, a medical malpractice panel is authorized to determine unintentional torts only. Finally, the medical malpractice panel proves inadequate because rarely does a plaintiff prevail, particularly a prisoner claiming against a jail physician working through LSU or Tulane.[2]

McKenna cites ***Seoane v. Orthopharmaceuticals, Inc.***, 660 F.2d 146 (5th Cir. 1981); ***Richardson v. Advanced Cardiovascular Sys.***, 865 F. Supp. 1210 (E.D. La. 1984); and ***Graham v. Freeport Sulphur Co.***, 962 F. Supp. 82 (E.D. La. 1997) in support of his contention that Adams's section 1983 claim should be dismissed pursuant to Rule 12(b)(6). Neither of those cases stands for the proposition that a civil rights plaintiff must file a medical malpractice claim against doctors and nurses employed by a criminal sheriff prior to instituting a civil rights action against those

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[2]Sheriff Foti and the OPCSO had promulgated no administrative procedure for medical malpractice claims pursuant to the Corrections Administrative Remedy Procedure (CARP), La. Rev. Stat. §§ 15:1171-1179. Any original jurisdiction of Foti over tort actions filed by prisoners was held to be unconstitutional. ***Pope v. State***, La. 99-2559, La. 99-2959 (6-29-01), 792 So. 2d 713.

persons. The cases upon which McKenna relies are inapposite and inapplicable here.

Seoane was a diversity action and the appeal presented only the question of the constitutionality of the medical malpractice review panel procedure established by Louisiana Revised Statutes 40:1299.41-47, holding that the limited court access restriction, posed by this statute, does not constitute a denial of due process. In ***Richardson*** the Court expressly recognized that intentional tort allegations constitute causes of action which are separated from a claim for negligence, since malpractice refers to any unintentional tort or breach of contract based on health care or professional services rendered. However, the court expressly found that the plaintiffs attempted to escape the clear dictates of the Medical Malpractice Act by masking their allegations under the guise of an intentional tort. "This Court finds little difficulty in piercing the veil and refusing to be swayed by semantic manipulations." 865 F. Supp. at 1218. The ***Richardson*** court dismissed plaintiff's action based on the finding that the intentional tort allegations, such as alleged here, were unfounded. ***Richardson*** is clearly distinguishable. Finally, the court in ***Graham*** granted a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) filed by a defendant ambulance service. The plaintiff alleged against the ambulance service a claim for medical

malpractice and a claim against another defendant for negligence and failure to provide plaintiff with adequate medical care. Jurisdiction was based on diversity of citizenship, general maritime law, or alternatively on section 905(b) of the Longshoremen and Harbor Workers' Compensation Act. No intentional tort was alleged, and the Court granted the motion to dismiss.

Contrary to Dr. McKenna's contention, plaintiff's claims amount to more than a "difference of opinion" about treatment and are therefore cognizable under the Fourteenth Amendment. Liberally construing Adams's pleadings, he alleges that one or more doctors and nurses, including McKenna, at the MOU of OPCSO intentionally refused to comply with treating MCLNO physician Dr. Norman Chutkan and Dr. Cedric Tankson orders for the prescribed antibiotics, follow-up treatment at the MCLNO, and proper treatment of open wounds of a diabetic with an open wound on his foot, all of which resulted in infection, pain and suffering, and ultimately amputation of Adams' leg below the knee. These allegations, if true, would clearly demonstrate more than an "inadvertent failure to provide adequate medical care." ***Estelle***, 429 U.S. at 105. They would, instead, establish deliberate indifference to plaintiff's serious medical needs.

Qualified Immunity. Qualified immunity is an affirmative defense; if the plaintiff proves that the right allegedly violated was clearly established, the burden shifts to the defendant official to prove that his or her conduct was reasonable even though it might have violated the law. The law regarding the medical treatment of prisoners was "clearly established" at the time Adams was incarcerated at the Orleans Parish Prison. ***Estelle v. Gamble***, 429 U.S. 97, 103, 50 L. Ed. 2d 251 , 97 S. Ct. 285 (1976). A finding of deliberate indifference necessarily precludes a finding of qualified immunity; prison officials who deliberately ignore the serious medical needs of inmates cannot claim that it was not apparent to a reasonable person that such actions violated the law. ***Hamilton v. Endell***, 981 F.2d 1062, 1066 (9th Cir. 1992) ("A finding of deliberate indifference necessarily precludes a finding of qualified immunity."); ***Albers v. Whitley***, 743 F.2d 1372, 1376 (9th Cir. 1984), ***rev'd on other grounds***, 475 U.S. 312, 89 L. Ed. 2d 251 , 106 S. Ct. 1078 (1986). This Court need only determine whether the Adams stated a cause of action, rather than whether he established a genuine issue of material fact, as to whether the defendant the OPCSO officials were deliberately indifferent to his medical needs in order to determine whether dismissal under Rule 12(b)(6) is appropriate. Adams's complaint

states a cause of action and dismissal is inappropriate.[3]

CONCLUSION

The Supreme Court has explained that with respect to medical malpractice and deliberate indifference, mere allegations of negligent malpractice do not state a claim of deliberate indifference:

> Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.

Estelle v. Gamble, 429 U.S. 97, 106 & n.14, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976). The Court of Appeals for the Second Circuit in a triology of decisions, explained the Supreme Court's decision in ***Estelle***. See ***Hathaway v. Coughlin***, 841 F.2d 48 (2d Cir. 1988) ("***Hathaway I***") and ***Hathaway v. Coughlin***, 37 F.3d 63 (2d Cir. 1994) ("") ***Hathaway v. Coughlin***, 99 F.3d 550 (2nd Cir. 1996) and ("***Hathaway III***"):

> However, while "mere medical malpractice" is not

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[3]McKenna's certificate filed in support of his motion to dismiss should not be considered by the Court in a Rule 12(b)(6) motion, particularly for purposes of qualified immunity.

> tantamount to deliberate indifference, certain instances of medical malpractice may rise to the level of deliberate indifference; namely, when the malpractice involves culpable recklessness, i.e., an act or a failure to act by the prison doctor that evinces "a conscious disregard of a substantial risk of serious harm," Accordingly, not every instance of medical malpractice is, a priori, precluded from constituting deliberate indifference.

Hathaway v. Coughlin, 99 F.3d 550, 554 (2nd Cir. 1996) ("***Hathaway III***"), citing ***Farmer v. Brennan***, 511 U.S. 825, 114 S. Ct. 1970, 1980, 128 L. Ed. 2d 811 (1994); ***Williams v. Mehra***, 135 F.3d 1105 (6th Cir. 1998). The Second Circuit in ***Hathaway III*** reiterated that in raising the issue of medical malpractice in ***Estelle***, the Supreme Court was not establishing a per se rule precluding any malpractice from being actionable. Rather, it raised the concept to explain that certain kinds of medical misconduct -- specifically, the "inadvertent failure to provide adequate medical care" and "negligence in diagnosing or treating a medical condition," -- did not rise to the level of deliberate indifference. "The Supreme Court's statement, however, cannot be construed to mean that there are no instances of malpractice that can rise to the level of deliberate indifference." ***Id.***, citing ***Estelle***, 429 U.S. at 105-06.

Adams has lost his leg and blames McKenna's deliberate indifference. Thus, he has stated a valid cause of action against McKenna based on acts and

omissions sufficiently harmful to evidence deliberate indifference to serious medical needs, rather than merely alleging only a difference of opinion. McKenna is not qualifiedly immune from suit, and this Court should permit discovery to continue. Accordingly, this Honorable Court should deny McKenna's motion to dismiss.

Certificate of Service

I hereby certify that a copy of the foregoing paper has been served on opposing counsel of record, by U.S. Mail, postage prepaid, this 26th day of November, 2003.

Reginald J. Laurent

RESPECTFULLY SUBMITTED,

Reginald J. Laurent

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