

ALD-357

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 07-2289

MICHAEL J. ASCENZI,
Appellant

v.

DOCTOR R. DIAZ; J. MATALONI;
DR. GUNNAR KOSEK

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 05-cv-01656)
District Judge: Honorable Thomas I. Vanaskie

Submitted For Possible Dismissal Under 28 U.S.C. § 1915(e)(2)(B)
August 23, 2007

BEFORE: SLOVITER, CHAGARES and COWEN, CIRCUIT JUDGES.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania. On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the within appeal is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B). All of the above in accordance with the Opinion of the Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: September 7, 2007

Ascenzi vs. Diaz

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Certified as a true copy and issued in lieu
of a formal mandate on January 11, 2008.

Teste: *Marcia M. Waldron*

Clerk, United States Court of Appeals
for the Third Circuit

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

Marcia M. Waldron
Clerk

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January 11, 2008

Mrs. Mary D'Andrea
U.S. District Court for the Middle District of Pennsylvania
Middle District of Pennsylvania
235 North Washington Avenue
Room 101
Scranton, PA 18501

RE: Docket No. 07-2289
Ascenzi vs. Diaz
D.C. No. 05-cv-01656

Dear Mrs. D'Andrea:

Enclosed is a certified copy of the judgment together with copy of the opinion in the above-entitled case(s). The certified judgment is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Kindly acknowledge receipt for same on the enclosed copy of this letter.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgment is also enclosed showing costs taxed, if any.

Very truly yours,
MARCIA M. WALDRON
Clerk


By: LaToya W. Corprew
Case Manager

Enclosure
cc:

Mr. Michael J. Ascenzi
Alan S. Gold, Esq.
Laura J. Neal, Esq.
Lori R. Gramley, Esq.
Daniel T. Brier, Esq.

ALD-357

NOT PRECEDENTIAL

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(Filed: September 7, 2007)

OPINION

PER CURIAM

Appellant Michael Ascenzi, currently an inmate at the Retreat State Correctional Institution (“SCI-Retreat”) in Hunlock Creek, Pennsylvania, filed an in forma pauperis civil rights complaint against Dr. Gunnar Kosek, a physician at the Luzerne County

Prison, Dr. Renato Diaz, a contract physician at SCI-Retreat, and Joseph P. Mataloni, SCI-Retreat's Health Care Administrator. Ascenzi alleged that, while he was incarcerated at the Luzerne County Prison and SCI-Retreat, defendants were deliberately indifferent to his medical needs, in particular, his need for narcotic pain relievers and corrective surgery for two herniated cervical discs. Ascenzi also asserted that, on two separate occasions, defendants were deliberately indifferent to his skin infections. Ascenzi sought medical attention in the form of an orthopaedic consultation and surgery for his neck, as well as compensatory and punitive damages.

In an order entered on March 30, 2007, the District Court granted defendants' motions to dismiss for failure to state a claim upon which relief may be granted. The court reasoned that the action could not proceed because Ascenzi's allegations of inadequate care did not rise to the level of deliberate indifference, see Farmer v. Brennan, 511 U.S. 825, 842 (1994), and because defendant Mataloni was aware that Ascenzi was being treated by the institution's physician for various ailments. Mataloni could not be found deliberately indifferent under the Eighth Amendment simply because he deferred to the medical judgment of Ascenzi's treating physician. See Durmer v. O'Carroll, 991 F.2d 64, 69 (3d Cir. 1993). Ascenzi appeals and has been granted leave to proceed in forma pauperis on appeal.

Deliberate indifference to serious medical needs is a violation of the Eighth Amendment and actionable under 42 U.S.C. § 1983. Estelle v. Gamble, 429 U.S. 97 (1976). However, mere disagreements over the type or amount of care provided do not

state an Eighth Amendment claim. White v. Napoleon, 897 F.2d 103, 110 (3d Cir. 1990). See also United States ex rel. Walker v. Fayette County, 599 F.2d 573, 575 n.2 (3d Cir. 1979) (“Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law.”). Ascenzi’s complaints were evaluated by the medical staff, and he received treatment in the form of medications (including pain medications and antibiotics) and diagnostic x-rays. The circumstances alleged do not amount to deliberate indifference to serious medical needs. We further agree with the District Court that granting Ascenzi leave to amend the complaint a second time would have been a futile act. See Grayson v. Mayview State Hospital, 293 F.3d 103, 108 (3d Cir. 2002).

Accordingly, we will dismiss the appeal under 28 U.S.C. § 1915(e)(2)(B)(i) as it is lacking in legal merit. Neitzke v. Williams, 490 U.S. 319 (1989).