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

FILED

PERRY BURRUS

v.

MARILYN CONNELL, et. al.

JUL 28 1995

Civil Action

By MICHAEL E. KINZ, Clerk  
Dep. Clerk

NO. 95-296

ORDER

AND NOW, this 28<sup>th</sup> day of July, 1995, upon consideration of the Plaintiff's Motion to Vacate Memorandum Order Dated January 23, 1995, and the Court finding that:

Plaintiff Perry Burrus ("Burrus") filed this motion seeking to vacate my Order of January 23, 1995, dismissing his pro se complaint as frivolous pursuant to 28 U.S.C. §1915(d) "by reason of fraud, misrepresentation (sic) and by any other reason justifying relief from the operation of the judgment[]";

By Order dated January 23, 1995, I dismissed Burrus' pro se complaint pursuant to 28 U.S.C. §1915(d) because his §1983 claim failed to allege that the defendant supervisor Marilyn Connell personally participated or acquiesced in the alleged constitutional violation and because the facts as alleged failed to indicate that the defendant dentist had done anything more than commit dental malpractice, which is not actionable under §1983;

Burrus contests the dismissal, asserting that discovery would show that Marilyn Connell either participated or acquiesced in the alleged constitutional tort;

While that may be true, Burrus must nonetheless allege her participation or acquiescence in his complaint in order to state a claim upon which relief can be granted. He failed to do

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so, and the fact that such information may be revealed during discovery does not resuscitate a claim against her.<sup>1</sup> This contention does not provide a basis to vacate my Order. Further, to permit Burrus to replead a case against Marilyn Connell would serve no purpose since, as indicated above, the tortious conduct alleged does not rise to the level of a constitutional violation and thus does not state a claim under §1983;

Burrus next contends that my dismissal constituted an abuse of discretion because I dismissed his complaint before the defendants had been served;

However, 28 U.S.C. §1915(d) expressly grants me the authority to dismiss a pro se complaint at the initial stage. It contains no requirement that the defendants must first be served. See §1915(d) (when ruling on motion to proceed in forma pauperis, district court may dismiss complaint if it is "frivolous"). Therefore, it was not an abuse of my discretion to dismiss this complaint before it had been served; and

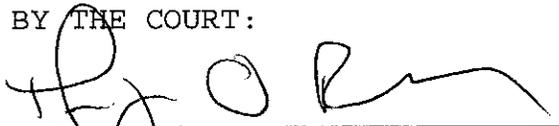
Finally, while Burrus requests that my Order be vacated for "any . . . reason justifying relief," he does not indicate any such reason. Further, in light of the fact that this motion was filed six months after I dismissed his complaint, his motion can in no way be deemed timely. As such, I can offer no reason justifying the relief Burrus seeks,

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1. Burrus also argues that by indicating in his complaint that Marilyn Connell was the hospital administrator, he has clearly revealed that she knew of and acquiesced in the constitutional violation effected. However, as I explained in the January Order, her position alone cannot subject her to §1983 liability because §1983 does not contemplate respondeat superior liability. Because he did not allege additional facts to indicate he participation or acquiescence, Burrus failed to state a claim against her, and reiterating his original statement does not suffice as a reason to vacate my Order.

It is hereby ORDERED that this Motion is DENIED.

BY THE COURT:



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MARJORIE O. RENDELL, J.

7-31-95  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED

PERRY BURRUS

CIVIL ACTION

v.

MARILYN CONNELL, HOSP:  
ADMIN: OF MAH:, et al.

JAN 24 1995  
MICHAEL KUNZ, Clerk  
Dep. Clerk

NO. 95-0296

MEMORANDUM

RENDELL, J.

January

23d

, 1995

Plaintiff, an inmate, has filed a pro se 42 U.S.C. § 1983 civil rights complaint against the hospital administrator and a dentist at the State Correctional Institution at Mahanoy ("SCI Mahanoy"). He alleges that he did not receive proper dental treatment.

With his complaint, plaintiff filed a request for leave to proceed in forma pauperis. As it appears he is unable to pay the cost of commencing this action, leave to proceed in forma pauperis is granted.

In order for a defendant to be liable under § 1983, he must have participated in or had personal knowledge of and acquiesced in the actions which deprived plaintiff of his constitutional rights. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). Plaintiff does not allege that Marilyn Connell participated in or had personal knowledge of the events that he describes in this complaint. The mere fact that Ms. Connell is the hospital administrator is insufficient to find her liable as there is no respondeat superior liability in § 1983 cases. Hampton v. Holmesburg Prison Officials, 546 F.2d 1077,

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1082 (3d Cir. 1976). Therefore, the claim against Marilyn Connell will be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d).

Plaintiff's claim against Dr. Dendeler will also be dismissed. In order to bring suit under 42 U.S.C. § 1983, plaintiff must allege that a person acting under color of state law deprived plaintiff of his constitutional rights. West v. Atkins, 487 U.S. 42 (1988). To make a colorable claim of medical treatment so inadequate that it violates the Eighth Amendment's prohibition against cruel and unusual punishment, plaintiff must allege not mere "inadvertent failure to provide adequate medical care," but "deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 104-105 (1976). When a physician exercises professional judgment, his behavior does not violate a prisoner's constitutional rights. Brown v. Borough of Chambersburg, 903 F.2d 274, 278 (3d Cir. 1990). Plaintiff's statement of claim indicates that he received dental treatment. Although he is not satisfied with the treatment that was provided by Dr. Dendeler, there is nothing in plaintiff's complaint that would suggest that his constitutional rights have been violated.

In addition, while an act of negligence may give rise to a state tort claim, negligent conduct is not actionable under § 1983. See Davidson v. Cannon, 474 U.S. 344, 347-48 (1986); Daniels v. Williams, 474 U.S. 327, 328 (1986).

For the foregoing reasons, the complaint will be dismissed as legally frivolous pursuant to 28 U.S.C. § 1915(d).

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MARILYN CONNELL, HOSP.  
ADMIN: OF MAH: , et al.

**FILED**  
JAN 24 1995  
MICHAEL A. KUNZ, Clerk  
Dep. Clerk

NO. 95-0296

ORDER

AND NOW, this 23<sup>rd</sup> day of *January*, 1995  
since it appears plaintiff is unable to prepay the costs of  
commencing this suit pursuant to 28 U.S.C. § 1915(a).

IT IS ORDERED that:

1. Leave to proceed in forma pauperis is GRANTED.
2. This complaint is DISMISSED as legally frivolous  
pursuant to 28 U.S.C. § 1915(d).

*FOR*  
MARJORIE O. RENDELL, J.

1-24-95  
copy to  
P.D.  
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