

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Filed 12/19/95

RICK JOURNEY,

Plaintiff-Appellant,

v.

ARISTEDES ZAVARAS, DAVE HOLT,
RODERIC GOTTULA, JOSEPH
McGARRY,

Defendants-Appellees.

No. 95-1270
(D.C. No. 94-K-2057)
(Dist. Of Colo.)

ORDER & JUDGMENT¹

Before **ANDERSON, BARRETT and LOGAN**, Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Rick Journey (Journey), a Colorado state prisoner, appearing pro se, and having been

¹ This Order and Judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of Orders and Judgments; nevertheless, an Order and Judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

granted leave to proceed in forma pauperis, appeals from the district court's order dismissing his 42 U.S.C. § 1983 civil rights action based upon the recommendation of the magistrate judge.

Journey filed this action alleging that while he was incarcerated at the Fremont Correctional Facility within the Colorado Department of Corrections (DOC), he was denied serious medical treatment in violation of his constitutional rights under the Eighth and Fourteenth Amendments. Journey sued Aristedes Zavaras, Executive Director of DOC, Dave Holt, Clinical Administrator for the East Canon Facility, Roderic Gottula, M.D., Chief Medical Advisor of DOC, and Joseph McGarry, M.D., Acting Chief Medical Officer of DOC, in their official capacities. Journey sought monetary damages, together with declaratory and injunctive relief.

Magistrate Judge Richard M. Borchers recommended that the Motion to Dismiss filed by defendants Zavaras, Holt and McGarry be granted on four grounds: (1) suits against public officials in their official capacities are suits against the state, barred by the Eleventh Amendment, (2) Journey failed to allege that these defendants personally participated in any unconstitutional conduct, (3) the claims are barred by Colorado's two-year statute of limitations, and (4) to the extent that Journey sought relief under the Colorado Governmental Immunity Act, he failed to comply with the statute's notice of claim requirement. (R., Vol. I, Tab 39). With regard to Dr. Gottula's Motion for Summary Judgment, the magistrate judge found that Journey had not presented any evidence that Gottula had participated beyond

approving a cystoscopy and skin biopsy, thus failing to show any deliberate indifference to Journey's medical needs. The magistrate judge further held that Gottula was sued in his official capacity, thus he was protected under the Eleventh Amendment, and that Journey's claim under the Colorado Governmental Immunity Act was barred.

On appeal, Journey reiterates his claims that he was denied serious medical treatment in violation of his constitutional rights. He asks that his case should proceed as required.

We review a dismissal for failure to state a claim de novo under Fed. R. Civ. P. 12(b)(6). Conley v. Gibson, 355 U.S. 41 (1957); Roman v. Cessna Aircraft Co., 55 F.3d 542, 543 (10th Cir. 1995). We review the grant or denial of summary judgment de novo, applying the same legal standard used by the district court pursuant to Fed. R. Civ. P. 56(c). Celotex Corp. v. Cattrett, 477 U.S. 317, 325 (1986).

After careful review of the record, we hold that Journey's contentions were fully considered and rejected by the district court. We AFFIRM substantially for the reasons set forth in the magistrate judge's Recommendation of May 24, 1995.

AFFIRMED.

Entered for the Court:

James E. Barrett,
Senior United States
Circuit Judge