No. 10-2012

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ARBOLEDA ORTIZ,	) Appeal from the United States
Plaintiff-Appellant,	) District Court for the Southern
	) District of Indiana,
	) Indianapolis Division
v.	)
	) The Honorable Judge Larry J.
THOMAS WEBSTER, DOCTOR,	) McKinney
	)
Defendant-Appellee.	) No. 2:05-cv-246-LJM-JMS

REPLY BRIEF OF APPELLANT ARBOLEDA ORTIZ

Christopher P. Keleher
175 West Jackson Boulevard
Suite 1600
Chicago, IL 60604-2827
(312) 540-7626

Attorney for Appellant Arboleda Ortiz

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

RULES AND OTHER AUTHORITIES **PAGE(S)**

INTRODUCTION

Dr. Webster's Response is notable not for what it says, but what it does not. Ortiz stressed the six-year delay in surgery, seven different medical personnel advising surgery, and the persistence of his ptygeria. Unwilling, or unable, to address these fulcrums for reversal, Dr. Webster instead argues two points. First, the medical records lacked any mention that Ortiz was in pain. Second, Dr. Maturi opined that Dr. Webster met the proper standard of care.

Dr. Webster's first claim is incredible. The records show Ortiz's eyes were itchy, swollen, infected, emitting discharge, and in need of surgery. Ortiz was thus in pain, and his condition was sufficiently serious. The second claim is equally unavailing. Seven medical personnel advised surgery because Ortiz's ptygeria impaired his vision. Additionally, Dr. Webster never reconciles why surgery was appropriate in 2008 but not in 2001, despite Ortiz's condition remaining virtually unchanged. Because these two arguments consume most of the Response, large swaths of Ortiz's Opening brief still stand.

The contrast between the Opening and the Response is stark. While Ortiz references his actual medical records, Dr. Webster cites general medical propositions. Further, while Ortiz relies on the medical personnel who dealt with his condition first-hand, Dr. Webster clings to an after-the-fact expert. Because Ortiz suffered from vision-impairing ptygeria for six years as a result of Dr. Webster's deliberate indifference, reversal is needed.

ARGUMENT

I. The Seventh Circuit, District Court, and Seven Medical Personnel Found Ortiz's Ptygeria Sufficiently Serious.

The District Court found that Ortiz's ptygeria "certainly reached the stage of a serious medical need." (Opening Brief Appendix at A9). Similarly, the Seventh Circuit suggested serious medical need because "most of the doctors—including specialists—who examined Ortiz recommended surgery and all prescribed some treatment …." (*Id*. at A16). The Court further highlighted the "'visually significant' growths on his eyes." (*Id*. at A17). Still, Dr. Webster evades these findings.

Dr. Webster states Ortiz's condition "concededly qualified as a serious medical need as of the time he was approved for surgery" but not "for the period serving as the basis for the complaint." (Response at 23). The record says otherwise. When Dr. McGlothan advised surgery in April 2001, Ortiz had "visually significant" ptygeria and astigmatism, and his visual acuity was 20/80 in each eye. (Dkt. 142 at 4, 5, Ex. 3). Furthermore, Dr. Webster acknowledges that Ortiz complained of "irritation, redness, and itchiness," and yet believes that the condition was not serious simply because Ortiz did not report "he was suffering from any pain." (Response at 24, 25). This inherent contradiction aside, Dr. Webster cites no authority that an inmate must invoke the word "pain" to show seriousness.

It is baffling that Dr. Webster argues Ortiz's condition was not painful. More so that he spends seven pages on it. (Response at 22-28). Medical records that span six years note Ortiz's eyes were inflamed, draining liquid, swelling, and irritated. (Dkt. 142 at 11). He had headaches. *Id*. Moreover, his vision was significantly altered. (Dkt. 142 at 11, 17). For these reasons, Dr. McGlothan recommended surgery in April 2001, with Dr. George and Dr. Lawson approving. (Dkt. 142 at 5, Exs. 3, 8). Claiming that Ortiz did not suffer defies the record, numerous doctors, the District Court, this Court, and common sense.

Equally unhelpful is Dr. Webster's recitation of the medical sources at pages 23-25 of the Response. Dr. Webster's excerpts are rife with conditional language: "*most* ptygeria," "*could* cause blindness," "*mostly* a cosmetic issue," "in *some* cases," "*may* affect vision." (Response at 23-24). However, Dr. Webster misses the point. Some forms of ptygeria are mild, just as some tumors are benign. Here, Ortiz's ptygeria was neither mild nor benign. It blurred his vision, emitted discharge, and necessitated surgery. (Dkt. 142 at 4, 5, 11). It also hurt. (Dkt. 142 at 11). These realities do not comport with Dr. Webster's script. Thus, the comparison between Ortiz's condition and non-intrusive ptygeria is false. Moreover, Dr. Webster cannot answer whether he would live with ptygeria for six years. *See* Opening Brief at 16.

The absence of case law also demonstrates why Ortiz's claim fails. Dr. Webster cites to one case, *Gutierrez v. Peters*, 111 F.3d 1364 (7th Cir. 1997), for the

proposition that "not every ache and pain or medically recognized condition" supports an Eighth Amendment claim. (Response at 25). While acceptable in theory, the principle has no application here. Six years of blurred vision and itchy eyes are not conditions that can be so easily dismissed. Vision is a critical perception, not a cosmetic convenience. And in the correctional confines, this sense is especially imperative.

Dr. Webster evades the Seventh Circuit precedent that Ortiz cited to show why his ptygeria is sufficiently serious: *Edwards v. Snyder,* 478 F.3d 827, 831 (7th Cir. 2007) (openly dislocated finger); *Norfleet v. Webster,* 439 F.3d 392, 394 (7th Cir. 2006) (arthritis); and *Johnson v. Doughty,* 433 F.3d 1001, 1003 (7th Cir. 2006) (hernia). Dr. Webster also avoids the principle that a serious condition is one "diagnosed by a physician as mandating treatment." *Gutierrez*, 111 F.3d at 1373; Opening Brief at 16. These holdings confirm why Dr. Webster's position fails.

The unspoken premise of the Response is that inmates are prone to embellish. But medical personnel, especially seven of them, are not. And even if the Court accepts the contention that Ortiz never said he was in pain until 2006, it does not change the fact that seven medical personnel recognized Ortiz needed surgery. Ortiz thus satisfies the sufficiently serious test.

II. Delaying Surgery for Six Years While Ortiz Suffered is Deliberate Indifference.

Describing Dr. Webster's brief as a "response" is a misnomer. Ortiz made the following arguments in the Opening Brief:

1. Knowing Ortiz's Condition Yet Ignoring Repeated Requests for Surgery is Inadequate Care.

2. Contentment With Ineffective Treatment is Deliberate Indifference.

3. Insisting on the Easiest Treatment is Deliberate Indifference.

4. Forcing Ortiz to Languish For Six Years is Deliberate Indifference.

(Opening Brief 18-25). Dr. Webster does not respond to these points. Each is sufficient to reverse, and Dr. Webster's silence underscores why the Court should.

Nor can Dr. Webster's actual argument salvage him. Dr. Maturi is the focal point, with ten pages of the argument addressing him. (Response at 25-28, 31-33, and 36-38). However, Dr. George, Dr. Lawson, Nurse Swain, Dr. Ponugoti, and Dr. Deitch are never mentioned. Thus for Dr. Webster, a hired expert's opinion is compelling while the surgery recommendations of treating personnel abstract. Dr. Webster's central points are now addressed.

First, because Dr. McGlothan's consultation notes "lacked information regarding treatment options short of surgery," surgery was outside the standard of care. (Response at 31). The flaws of this argument are fourfold. First, since Dr. McGlothan concluded Ortiz's condition was severe enough to need surgery, there was no reason to explore other options. Second, Dr. McGlothan's position was clear enough to lead Dr. George and the URC Chairman, Dr. Lawson, to approve Dr. McGlothan's treatment plan. (Dkt. 142 at 5, Exs. 3, 8). Third, Dr.

Webster is guilty of the ambiguity that he alleges—his denials of surgery never elaborated on surgery cost, effectiveness, surgery risks, or other medical options. Finally, Dr. Conner separately recommended surgery due to conical distortion. (Dkt. 142, Ex. 16).

Second, Dr. Webster contends that Ortiz cannot prove medical malpractice under Indiana law. He invokes Dr. Maturi's opinion that Ortiz's treatment was within the proper standard of care. (Response at 32). Under this criteria, deliberate indifference could never be shown. A litigant may always rely upon an expert's assertions and Dr. Webster has done just that. The seven treating medical personnel that advised surgery cannot be trumped by a hired expert. Although Dr. Webster argues that a plaintiff "generally must present expert testimony," (Response at 32), no binding authority is cited in support. *Id*. Moreover, Ortiz's failure to present expert testimony was not for lack of trying; the District Court refused him expert witness funds. (Dkt. 135).

Third, Dr. Webster makes the hyper-technical argument that "[n]otwithstanding the recommendations of Dr. McGlothan and Dr. Conner, Ortiz's medical notes for these professionals do not state that they believed such surgery was required." (Response at 33). The record is to the contrary. Registered Nurse Pam Swain referred Ortiz to Dr. Conner because Ortiz's visual acuity was 20/100 and he had "difficulty seeing up close and at a distance in both eyes." (Dkt. 142 at 7, Exs. 15, 16). Dr. Conner noted that the ptygeria was "causing

corneal distortion," and referred Ortiz to Dr. McGlothan for surgery. (Dkt. 142 at 7, Exs. 16, 17). In turn, Dr. McGlothan submitted (another) request for surgical excision. (Dkt. 142 at 7, Ex. 19). These facts embody the emptiness of Dr. Webster's position. Repeated surgery requests by medical personnel are not made lightly in the correctional context, and the failure to include the word "required" does not alter the reality that Ortiz needed surgery.

Fourth, Ortiz's treatment was sufficient because he received eye drops and artificial tears. (Response at 36). However, persisting in treatment "known to be ineffective" is deliberate indifference. *Greeno v. Dailey*, 414 F.3d 645, 655 (7th Cir. 2005). In this case, years of eye drops proved ineffective. Undeterred, Dr. Webster then claims "[t]he record does not substantiate that symptomatic treatment was totally ineffective." (Response at 36). As Ortiz needed surgery after almost seven years of eye drops, experiencing blurred vision and itchy eyes in the interim, Dr. Webster displays a perverse understanding of effective.

Fifth, Dr. Maturi testified "that there is no national standard of care guideline for when surgery is necessary, except as when the visual acuity is significantly declined." (Response at 38). The strategy of relying on Dr. Maturi contains the seeds of its own destruction. Dr. Maturi stated that surgery is needed when visual acuity declines below the 20/50 range. (Dkt. 90, Ex. 1, Attachment B). Here, Dr. McGlothan found that Ortiz's visual acuity was 20/80 in each eye in 2001. (Dkt. 142, Ex. 3). It then regressed to 20/100 without

correction. (Dkt. 142, Exs. 16, 18). Therefore, Ortiz met Dr. Maturi's guidelines for surgical removal in April 2001. (Dkt. 90, Ex. 1, Attachment B). Further, in 2003, Dr. Conner recommended surgery due to conical distortion. (Dkt. 142, Ex. 16). The recommendations of these eye specialists adhere to Dr. Maturi's opinion that surgery is necessary when "severe conical distortion occurs or severe loss of vision occurs." (Dkt. 90, Ex. 1, Attachment B). Thus, the Response ignores that Dr. Maturi's opinion echoes the surgery recommendations and approvals of Drs. McGlothan, Conner, Lawson, and George.

Litigation should not be the prerequisite for a necessary surgery. Yet this suit was the only reason Dr. Webster reversed course and permitted surgery. Even then, with a favorable district court ruling in his pocket, Dr. Webster held out. On May 1, 2008, Dr. Webster refused surgery for Ortiz because it was "not medically necessary." (Dkt. 119 at 36, Ex. 5 at 2-3). It was not until this Court's reversal that Dr. Webster finally relented. Such equivocations prove Dr. Webster's reliance on Dr. Maturi a sham.

III. The NO TOWN TRIP Policy Defies the Eighth Amendment.

One fact eviscerates Dr. Webster's entire NO TOWN TRIP argument. URC Chairman Dr. Lawson approved Ortiz's surgery. (Appendix at A19). Since Dr. Lawson (along with Dr. George) approved surgery, Debi Lamping's claim that the NO TOWN TRIP policy meant the URC deferred surgery is false. Yet Dr. Webster contends the notation was made "after the URC deferred" the surgery

and "to show whether a recommendation for outside medical treatment had been approved." (Response at 41). The inconvenient reality that the URC Chairman approved the surgery is cast aside. Instead, Dr. Webster makes the contradictory claim that it would not be unusual "for a clinical director's recommendation ultimately to be denied by the URC even though the clinical director has the final authority." (Response at 43). If the director has final authority, which Dr. Webster admits, then it is illogical that he could be overruled by the URC. More so when Dr. George and Dr. Lawson, two URC members, approved surgery. (Dkt. 142 at 5, Ex. 3). *See also* Response at 43, "the clinical director as the Chair of the URC [has] ultimate responsibility for approving medical procedures." Dr. Webster's position is at odds with itself.

Dr. Webster downplays Ortiz's contention that no death row inmate was taken off-site for medical care. He states the death row declarants "can certainly testify as to their own observations and personal knowledge, [but] they have no personal knowledge" about the NO TOWN TRIP policy. (Response at 42). Rhetoric must be set aside and realities faced; Dr. Webster could have foreclosed this issue by producing records of death row inmates given outside medical treatment. He did not. Thus, the declarations of the death row inmates remain, and considering the facts in a light most favorable to Ortiz, it was error to grant Dr. Webster summary judgment.

In sum, the ostensible reason for the NO TOWN TRIP notation is that it was an internal record keeping practice, but another motive lurks. No inmate, including Ortiz, was given outside medical treatment from 2001 to 2005. With two opportunities to explain the NO TOWN TRIP notation, Dr. Webster still cannot offer a plausible answer. This is not surprising. The plain language of the NO TOWN TRIP notation indicates exactly that. The Court should reject Dr. Webster's effort to mask what is plain on its face—a refusal to provide death row inmates outside medical care. Because, at the least, unanswered questions of fact persist about the NO TOWN TRIP notation, reversal is again proper.

CONCLUSION

"The degree of civilization in a society can be judged by entering its prisons." FYODOR DOSTOEVSKY, THE HOUSE OF THE DEAD 76 (C. Garnett trans., 1957) (1862). To maintain the significant strides American correctional facilities have made in inmate healthcare, the Court should reverse.

Respectfully submitted,

Arboleda Ortiz

s/Christopher P. Keleher
Christopher P. Keleher

Attorney for Appellant
Querrey & Harrow, Ltd.
175 W. Jackson Boulevard, Suite 1600
Chicago, IL 60604

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)(C)

The undersigned, counsel of record for the Appellant, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7)(C):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7)(C) for a brief produced with a monospaced font. The length of this brief is 2,792 words according to the Microsoft word count function.

s/Christopher P. Keleher
Christopher P. Keleher, an attorney for the Appellant

Christopher P. Keleher
QUERREY & HARROW, LTD.
175 West Jackson Boulevard
Suite 1600
Chicago, IL 60604-2827
(312) 540-7000

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief.

s/Christopher P. Keleher
Christopher P. Keleher, an attorney for the Appellant

Christopher P. Keleher
QUERREY & HARROW, LTD.
175 West Jackson Boulevard
Suite 1600
Chicago, IL 60604-2827
(312) 540-7000

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Reply Brief upon the party listed herein, by mailing same on May 23, 2011 at 175 W. Jackson Blvd., S. 1600, Chicago, IL 60604.

TO:

William L. McCoskey
Assistant United States Attorney
Office of the United States Attorney
10 W. Market Street, Suite 2100
Indianapolis, IN 46204-3048

s/Christopher P. Keleher
Christopher P. Keleher
Attorney for Appellant
Arboleda Ortiz