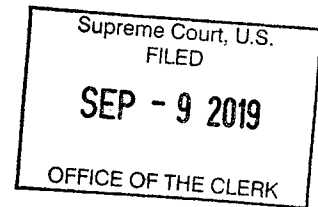


No. 19-5960

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

BEN W. BANE -- PETITIONER



VS.

UNITED STATES OF AMERICA -- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BEN W. BANE, Pro se

FCI Estill Camp

P.O. 699

Estill SC 29918

QUESTION PRESENTED

Whether a Federal District Court and the Appellant Court of that District can enforce a Local State Law, under South Carolina Code § 15-36-100, requiring affidavits be submitted by a federal prisoner for reason in denying his Federal Tort Claim filed on Form 95, under Federal Tort Claim Act 28 U.S.C. § 2671-80(h) for negligence of medical care and 18 U.S.C. § 4042 for Breach of Duty which does not require affidavits.

LIST OF PARTIES

All Parties appear in the caption of the case on the cover page.

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In The
Supreme Court of the United States

Petition For Writ of Certiorari

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgement below.

Opinions Below

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished. The opinion of the United States Court of Appeals appears at Appendix B to the petition and is unpublished.

Jurisdiction

The date of which the United States Court of Appeals decided my case was May 16, 2019. The Petition for rehearing en banc was denied on July 16, 2019, Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).j

Statutory Provisions Involved

18 U.S.C. § 4042

Breach of Duty for irreversible harm of pain and suffering.

28 U.S.C. § 1346(b)

The Defendants may be held liable only if the conduct complained on amounts to negligence "in accordance with the law of the place where the act of omission occurred."

28 U.S.C. § 2671-80(h)

Negligence of medical care while incarcerated.

Rules

South Carolina Code § 15-36-100

Required for Medical Malpractice claims.

FORM 95

Federal Tort Claim Form

STATEMENT OF THE CASE

Negligence is the breach of the legal duty to the Petitioner to use due care. The failure of the Defendants to discharge this duty has resulted in a breach, resulting in damages owed to the Petitioner. Defendant's failure to perform this duty has resulted in harm to the Petitioner, thus making this negligence, actionable.

The facts of Petitioner's Case have been mistakenly misrepresented to the Appellant Court. The Government, as well as the Magistrate's Court Recommendation, have successfully led the Court to believe: "Petitioner's Case is that of a medical malpractice claim." By this standard, Petitioner concedes that his claim would fail.

Petitioner's claim clearly states his case is that of a "significant Breach of Negligent Care while incarcerated and a significant Breach of Duty pursuant to 18 U.S.C. § 4042(2)." See Form 95. Petitioner claim is a "tort claim for [ordinary] negligence and breach of duty by the BOP." Petitioner's claim does not rest on the specialized knowledge of medical professionals, therefore his claim is not a medical malpractice claim, therefore requiring an expert affidavit pursuant to S.C. Code § 15-36-100. Delaney v. United States, 260 Supp. 3d 505,509-10 (D.S.C. 2017), See Cf. Dawkins v. Union Hosp. Dist., 758 S.E. 2d 501m504(S.C. 2014)

The Court has mistakenly stated on Page 9, ¶2, "this case is not one challenging some nonmedical aspect of prisoner care." But, this is exactly what Petitioner is trying to show the Court. The Defendant has breached its duty to provide care. See Title 18 U.S.C. § 4042(2). Petitioner's feet are in much worst condition today, than when he was first incarcerated on December 10, 2010.

Title 18 U.S.C. § 4042(2) states "The Bureau of Prisons, under the direction of the Attorney General, shall -- (2) provide suitable quarters and provide for the safekeeping, care" The care Petitioner has received over the last 8 years would amount to no more than the purchase of garden variety pair of tennis shoes and inserts from commissary.

Petitioner relies on the following as to the defining of Negligence: "the omission to do something that a reasonable person, guided upon those considerations that ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable person wouldn't do, under the circumstances." "If we assume that this statement speaks of cases where a legal duty exist and where the breach isn't willful, this statement is an accurate definition of negligence; and, it likewise defines due care." Therefore, the proper inquiry is what a reasonably prudent and careful person would have done in the same circumstances in which the Petitioner was at the same time. (A reasonably prudent and careful person, upon viewing Plaintiff feet, with no expertise

as a medical provider, would opinion that Petitioner has a significant foot problem.)

If the Defendant in its conduct fails to measure up to the standard of reasonably prudent and careful, then the Defendant is liable for negligence whether the Defendant's conduct falls short of it slightly, somewhat more, or very greatly.

If the Petitioner is to receive justice in his case; the law sets a standard for what a reasonably prudent and careful person would do in that case, and requires this conduct of the Defendants. Hence, there is just one degree of care for every situation -- the care of a reasonably prudent and careful person in that particular situation.

And, the duty of care owed by the Bureau of prisons to [Petitioner] federal prisoners is fixed by 18 U.S.C. § 4042, independent of an inconsistent state rule." United States v. Muniz, (374 US 150,164 1963).

The Defendants may be held liable only if the conduct complained on amounts to negligence "in accordance with the law of the place where the act of omission occurred." Thus, the substantive elements of his FTCA claim are governed by South Carolina Law. See 28 U.S.C. § 1346(b); see also FDIC v Meyer, 510 U.S. 471,478, 114 S.Ct. 996 (199); U.S. v. St. Louis University, 336 F.3d 294, 300 (4th Cir. 2003).

In South Carolina, "in order to establish a claim for negligence, a plaintiff must prove the following elements: (1) a duty of care owed by the defendant to the petitioner; (2) a

breach of that duty by negligent act or omission; and (3) damage proximately caused by the breach." Huggins v. Citibank, N.A., 355 S.C. 329 585 S.E. 2d 275,276 (S.C. 2003). A breach of duty exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed. The damages allegedly sustained must be shown to have been proximately caused, that is, causally connected to the breach of duty in order to warrant a recovery. Horne v. Beason, 285 S.C. 518, 331 S.E. 2d 342 (1985).

The breach of duty has resulted in the loss of mobility due to increased foot function deficit; calf and quad muscle loss of mass; loss of stability; and, knee and back pain, are the result of a causally connected breach of duty.

The Petitioner has proven all the elements of his actions: that the Defendant owed Petitioner a duty of care; the Petitioner has proven that the Defendants violated this duty; and, Petitioner has suffered harm because of this.

REASON FOR GRANTING THE PETITION

Petitioner seeks review under Supreme Court Rule 10(c) of a Fourth Circuits decision to deny a federal Prisoner's Tort claim filed under 28 U.S.C. § 2671-80(h) for Negligence of Medical Care and 18 U.S.C. § 4042 for Breach of Duty, by intentionally mischaracterizing his Tort Claim, as a Malpractice Claim. The court does not deny damage to the Petitioner, simply intentionally mischaracterizes his claim as a Malpractice Claim, whereas affidavits would be required from 5 medical physicians who had furnished diagnosis and recommendations for medical care, needed for the Petitioner. Medical records alone from the physicians were said by the Court to not meet South Carolina State Law, requiring affidavits. However, affidavits would not be required if the court would have viewed Petitioner's claim as a Tort Claim for Negligence and Breach of Duty, under which it was filed and defended. The local South Carolina State Law § 15-36-100 requiring affidavits, use to deny Petitioner's Tort claim, should have played no role, as Petitioner's damage can be easily identified simply by looking at the deformity of his feet. No medical knowledge would be necessary as the condition of deformity can be well established even with un-medically trained eyes.

For the Court to even suggest Petitioner's claim to be one of Medical Malpractice Blacks Law Dictionary clearly explains the difference between Petitioner's Tort Claim and one of Medical Malpractice:

Medical Malpractice: Would be a physician-failure to exercise the degree of care and skill that a Physician or surgeon of the same medical specialty would use under similar circumstance.

Negligent Tort: A tort committed by failure to observe the standard of care required by the law under the circumstances.

Negligence: The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation, any conflict (conduct) that falls below the legal standard established to protect others against unreasonable risk of harm.

Breach of Duty: The violation of a legal or moral obligation; the failure to act as the law obligates one to act, a fiduciary's violation of an obligation owed to another.


Under further consideration for this Court should also be that even if affidavits were decided to be required in Petitioner's claim, the Bureau of Prisons is still guilty of Breach of Duty and Negligence because they control every aspect of a prisoners health and life. The Bureau of Prisons controls, where and how prisoners are housed, who they are referred to for outside medical care, and whether or not the Bureau of Prisons follows any or none of the recommendations furnished to them. Prisoners have no access to the physicians, outside, other than a one time visit, where all paperwork and information is furnished to the prison medical staff. The prisoner is allowed no contact with the physician upon his return from the visit. Petitioner was placed in an impossible situation to receive any medical statements, let alone asking the physician for an affidavit at the time of his visit, even if they had been required; thereby making that requirement illegal by the Bureau of Prisons and State Laws should never overrule a Federal Statute that plainly says the duty of care owe by the Bureau of Prisons to (Petitioner) federal prisoners₈ is fixed by 18 U.S.C. § 4042,

independent of an inconsistent state rule. United States v. Muniz, (374 U.S. 150,164 1963).

CONCLUSION

The Petition for a Writ of Certiorari should be granted

Respectfully submitted,



Ben W. Bane
Date: 9/9/19