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In the
Supreme Court of the United States

OCTOBER TERM, 2022

TRAVIS BLANK

Plaintiff – Appellee

v.

UNITED STATES OF AMERICA, CHARLES EILERT, D.O., AMINIA BARUTI, M.D

Defendant – Appellant

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TRAVIS BLANK
1500 DALLAS DRIVE
DENTON, TX 76205

APPENDIX "A"
United States Court of Appeals
for the Fifth Circuit

No. 22-10120
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

January 31, 2023

Lyle W. Cayce
Clerk

TRAVIS BLANK,

Plaintiff—Appellant,

versus

UNITED STATES OF AMERICA; CHARLES EILERT, D.O.; AMINIA
BARUTI, M.D.,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CV-96

Before BARKSDALE, ELROD, and HAYNES, *Circuit Judges.*

PER CURIAM:*

Travis Blank, former federal prisoner # 16486-078 and proceeding *pro se*, appeals the district court's dismissal of his claims under the Federal Tort Claims Act against the United States, following a bench trial and the award of costs to the United States. Blank contends the court: erred by concluding

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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he failed to establish his medical-malpractice claims; and abused its discretion in awarding costs to the United States. (Blank's claims against the two other defendants were dismissed on qualified-immunity grounds at the summary-judgment stage and were not timely appealed. Accordingly, they are not before us in this appeal.)

We review the district court's bench trial "findings of fact for clear error and conclusions of law de novo", *Villafranca v. United States*, 587 F.3d 257, 260 (5th Cir. 2009); the award of costs, for "a clear abuse of discretion", *U.S. ex rel. Long v. GSDM Idea City, L.L.C.*, 807 F.3d 125, 128 (5th Cir. 2015).

Where, as here, appellant fails to provide the transcript necessary to evaluate the district court's factual findings—which the parties agreed before trial were the only issues in dispute—we have the discretion either to dismiss the "appeal for failure to provide a complete transcript of the record on appeal" or to "decide those issues which can be reached on the record before" us. *Coats v. Pierre*, 890 F.2d 728, 731 (5th Cir. 1989) (citation omitted). We opt for the former procedure because the record on appeal is insufficient for our reviewing whether the court committed clear error in its factual findings. *Id.*

As for the bill of costs, Federal Rule of Civil Procedure 54(d)(1) establishes "a strong presumption that the prevailing party will be awarded costs". *Pacheco v. Mineta*, 448 F.3d 783, 793 (5th Cir. 2006). "[A] district court *may*, but is not required to, deny a prevailing party costs where suit was brought in good faith *and* denial is based on at least one of" certain factors, including, relevant here, "the losing party's limited financial resources" and the "substantial benefit conferred to the public". *Smith v. Chrysler Grp., L.L.C.*, 909 F.3d 744, 753 (5th Cir. 2018) (emphasis in original) (citation omitted). Even assuming Blank brought his action in good faith, he demonstrated neither limited financial resources nor that this proceeding

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conferred a substantial benefit to the public. *E.g., id.* The court did not abuse its discretion in awarding costs to the United States. *E.g., U.S. ex rel. Long*, 807 F.3d at 128.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

TRAVIS BLANK,

Plaintiff,

v.

No. 4:20-cv-0096-P

UNITED STATES OF AMERICA ET AL.,

Defendants.

MEMORANDUM OPINION & ORDER

On December 2 and 3, 2021, came on for nonjury trial the above-captioned case. The Court, having heard and considered the testimony, the evidence, and arguments of counsel, makes the following combined findings of facts and conclusions of law and determines:

Pursuant to the Court's Memorandum Opinion and Order signed September 3, 2021, the only issues before the Court are (1) whether the government, through its employees, committed medical malpractice by failing to provide Plaintiff adequate opioid medications for his chronic pain, and (2) whether Plaintiff suffered an injury as a result of being denied his medical mattress, pillow, and medications, and having an appointment cancelled while he was in the special housing unit for his refusal to take ivermectin for scabies. *See* ECF No. 118 at 20.

The parties have agreed that under Texas law, which applies here, Plaintiff bears the burden of proving: (1) the physician's duty to act according to an applicable standard of care, (2) a breach of that standard of care, (3) injury, and (4) causation. ECF No. 136 (citing *Hannah v. United States*, 523 F.3d 597, 601 (5th Cir. 2008)). They also agreed as to the ultimate issues of fact to be decided as to each issue. *Id.* at 2–3.

As for the first issue, medical malpractice concerning treatment for chronic pain, the following questions must be answered in Plaintiff's favor for him to prevail:

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1. As a threshold issue, has Plaintiff established the applicable standard of care through expert testimony with respect to a medical provider caring for an individual pain patient with chronic pain?
2. If so, did Plaintiff establish through expert testimony that employee(s) of the United States breached the standard of care?
3. If so, did Plaintiff establish injury or harm?
4. If so, did Plaintiff establish through an expert that, without the negligence of employee(s) of the United States, the harm would not have occurred, and that the negligence of employee(s) of the United States was a substantial factor in bringing about the harm?

ECF No. 136 at 2.

The Court cannot find that Plaintiff established the applicable standard of care through expert testimony. The Court is not persuaded that Plaintiff's expert was familiar with the standard of care applicable to physicians of ordinary skill, care, and diligence in the Fort Worth community. And his testimony was not persuasive in any event. Even though United States bore no burden, the government's expert was a local anesthesiologist specializing in pain management who is familiar with the local community and standard of care, who established that United States met that standard of care in treatment of Plaintiff. The Court further finds that Plaintiff failed to establish that, but for the negligence of employees of United States, any harm to him would not have occurred. Rather, the Court is persuaded that any harm occurring to Plaintiff was caused by his own actions in trying to game the system. Plaintiff's testimony throughout the trial was simply incredible. For example, he testified that he never requested to be taken off morphine, when the records of outside treatment providers reflect that Plaintiff told them he wanted to be off morphine. He testified that going off morphine did not relieve his constipation, but he also testified that he suffered diarrhea as a result. In sum, Plaintiff would say whatever benefitted him most at the time, throughout his incarceration and at trial.

APPENDIX B

As for the second issue, concerning the withholding of medically prescribed medication, mattress, and pillow, and rescheduling of an appointment while Plaintiff was in isolation, the following questions must be answered in Plaintiff's favor for him to prevail:

1. Did employee(s) of the United States deny Plaintiff access to his prescribed medication, pillow, and/or mattress while he was isolated in the SHU?
2. If so, did Plaintiff establish he was harmed by lack of access to his prescribed medication, pillow, and/or mattress for the period of time he went without those items?
3. Concerning Plaintiff's lack of access to his medically prescribed mattress and pillow for thirteen days, did Plaintiff establish he was harmed by a lack of access to his medically prescribed mattress and/or pillow for the period of time he went without those items?
4. Concerning Plaintiff's pain-management appointment on June 23, 2018, which was cancelled and rescheduled for August 13, 2018, did Plaintiff establish he was harmed by the cancellation of this appointment and later rescheduling?

ECF No. 136 at 3.

Again, Plaintiff's testimony regarding this issue was not credible. Nor was the testimony of his expert. The Court is not persuaded that Plaintiff suffered any harm caused by United States from being without his mattress and pillow, missing any medication, or having an appointment rescheduled while in isolation.

Plaintiff was a complex and difficult patient who often second-guessed and refused to follow the recommendations of his medical providers. He was repeatedly seen and treated by employees of the United States and was referred to outside specialists as appropriate. Although Plaintiff disagrees with the treatment he received, he has not shown that he was harmed by any negligent conduct by United States. Rather, as a result of the persistence of his treating physician, Plaintiff received surgery shortly before being released from custody and has been pain free and narcotic free ever since.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

TRAVIS BLANK,

Plaintiff,

VS.

UNITED STATES OF AMERICA,
ET AL.,

Defendants.

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NO. 4:20-CV-096-P

ORDER ON BILL OF COSTS

Came on for consideration the motion of plaintiff, Travis Blank, for disallowance and objections to the bill of costs submitted by defendant United States of America. The Court, having considered the motion and objections, the response of United States, the record, and applicable authorities, finds that the motion should be denied.

The Federal Rules of Civil Procedure establish a strong presumption that the prevailing party be awarded costs. *Smith v. Chrysler Grp., L.L.C.*, 909 F.3d 744, 753 (5th Cir. 2018); *Pacheco v. Mineta*, 448 F.3d 783, 793 (5th Cir. 2006). The Court may neither deny nor reduce costs without articulating some good reason for doing so. *Pacheco*, 448 F.3d at 794. The factors the Court may consider include the losing party's financial resources, misconduct by the prevailing party, close and difficult legal issues presented, substantial benefit conferred to the public by the lawsuit, and the prevailing party's enormous financial

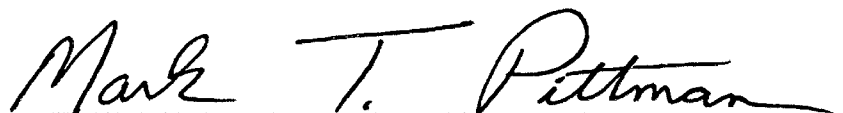
resources. *Id.* If one or more of these factors exist and the case was prosecuted in good faith, the Court may consider disallowing costs. *Id.*

Having considered the pertinent factors, the Court is not persuaded that costs should be denied or limited. Although not prepared to rule that plaintiff's claims were pursued in bad faith, the Court notes that at some point plaintiff's motive crossed to a money grab rather than a genuine belief that he had been wronged. Although one of plaintiff's previous lawsuits may have conferred a substantial benefit on the public, the Court cannot conclude that this one did. And, as the government points out, plaintiff has not established indigency. That he may not be able to pay all the costs at this time should not excuse payment.

As for the argument that certain costs should not be taxed, the Court is not persuaded. The government has adequately explained the need for a replacement court reporter during plaintiff's deposition. Plaintiff apparently agreed at the time to proceed as proposed. The government's explanation for the need for videotaping the deposition is reasonable and undisputed. Further, the expedited transcript was made necessary because of plaintiff's late designation of his expert and the deadline for filing summary judgment motions.

The Court **ORDERS** that plaintiff's motion for disallowance and objections to bill of costs is hereby **DENIED**.

SIGNED January 24, 2022.

A handwritten signature in black ink that reads "Mark T. Pittman". The signature is fluid and cursive, with the first name "Mark" and last name "Pittman" being more prominent than the middle initial "T.". The signature is written over a horizontal line.

Mark T. Pittman
UNITED STATES DISTRICT JUDGE