

23-6467
NO. _____

IN THE
SUPREME COURT OF THE
UNITED STATES OF AMERICA

FAIRLY W. EARLS,
Petitioner-Appellant,
v.

FILED
NOV 06 2023

OFFICE OF THE CLERK
SUPREME COURT, U.S.

SALAM SYED, et al.,
Defendants-Appellees.

On petition for Writ of Certiorari to the
United States Supreme Court,
from the Seventh Circuit court of Appeals
in a 42 U.S.C. § 1983 Civil Rights
Claim

PETITION FOR WRIT OF CERTIORARI

Dated: 11-06-2023

Fairly W. Earls
Jackson Correctional
P.O. Box 233
Black River Falls, WI 54615

QUESTION PRESENTED

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ISSUE 1. Whether the Seventh Circuit Court of Appeals committed error's of Constitution Law by failing to follow the Supremacy Clause of the Federal Constitution and the Rule of Orderliness on summary judgment when there were geniune issues of dispute presented by the plaintiff on both cases.	11
ISSUE 2. Whether the Federal District Court committed error's of Law by deciding the plaintiff's credibility and weighing the evidence which is a Jury function in a civil suit, thereby denying Earls a Trial by 12 Jurors.	15

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CONSTITUTIONAL PROVISIONS

Federal Practice an Procedure Civil § 2712

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U.S. Constitution Eighth Amendment

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28 U.S.C. § 2101

42 U.S.C. § 1983

CITATIONS - ORDERS ENTERED

The Order of the United States Court of Appeals for the Seventh Circuit denying the Petition for Rehearing, (App.1); Final Judgment Order by the Circuit Court, (App.2); The Order by the Seventh Circuit on the Merits affirming District Court Granting Defendants Summary Judgment in both Cases, (App. 3); Opinion and order of the Wisconsin District Court Granting Summary Judgment to defendants in both Cases, (App.4).

JURISDICTION STATEMENT

This Court has Jurisdiction on the Federal Court of Appeals Order's and the Federal District Court Orders invoked under 42 U.S.C. § 1983 and the United States Constitution Article III, 2. This Petition for Writ is timely Filed pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS

The United States Constitution Eighth Amendment, and the "Rule of Orderliness" that Guarantees the Rule of Law given by the Fourteenth Amendment Right to Equal Protection and Due Process.

STATEMENT OF CASE

The Plaintiff Earls has two Civil Cases with different defendants that were Filed at different times, Case No. 18-cv-332 and 19-cv-117. The Western District Court of Wisconsin Federal Court joined the two cases. The the same district court Granted Summary Judgment for the defendants even thou there were Genuine Issues of Disputed Facts supported by evidence by the Plaintiff. The district court committed multiple error's of Constitutional Law, plus violated the Jury's province when the district court disputed the credibility of the plaintiff and the evidence, which is a Jury function, thereby denying the plaintiff a Jury Trial.

The Seventh Circuit Court of Appeals committed serious errors of Constitutional Law by failing to follow the "Rule of Orderliness" and the "Supremacy Clause" of the United States Constitution on Summary Judgment Appeals. The Court of Appeals gave lip service on the evidence in the light most favorable to Earls but that's all it was lip service.

EMERGENCY HOSPITAL VISIT, Case No. 18-cv-332

If the Infectious Disease alleged treatment was adequate, then why did Earls have to be taken to the Emergency Room as an Emergency days after the alleged adequate medical treatment by the prison Dr. Syed, ruled by the hospital as a misdiagnosis.

On August 2, 2017 Earls was having severe back and muscle pain, Earls was sent the First time to the hospital to only review for heart conditions. The defendants did not request any blood work-up or laboratory test to determine Earls serious illness.

After returning back to the prison from the hospital, Earls on September

4th, 5th and 6th submitted various health service request forms reporting severe skin problems. The prison doctor examined Earls on August 9th guessing Earls severe skin condition was scabies. However failed to follow prison policy for, ectoparasites, such as scabies, are also evaluated by HSU personnel if the laboratory test for scabies comes back positive, see DOC Policy 717.01 Ectoparasites control is initiated. Earls did not have mites or any bites, the Seventh Circuit is lying by saying Earls had bites. No evidence supports this. No blood work was conducted or laboratory testing requested by the prison doctor. There are several bacterial skin conditions which each one requires different types of medication to treat, Dr. Salam Syed a prison doctor prescribed Earls the wrong medication for this skin condition.

Through a series of misdiagnoses by the prison doctor, delays, Earls infection remained untreated and had a allergic reaction to the misdiagnoses the skin condition remained untreated until it significantly worsened. Earls hands got so bad and worse his hands ballooned to twice there normal size, green liquid leaked from them, giant blood filed blisters, severe muscle spasms in his back and chest. A supervisor at the prison as an emergency sent Earls to the hospital a second time as an emergency due to the allergic reaction and misdiagnoses by the prison doctor.

The two cases were screened seperately, filing fees paid seperately, and both cases were allowed to proceed on individual claims. The cases had seperate defendants and different facts. On 09-14-2021 the Magistrate Judge over Earls objection (Dkt. 25) joined the two cases for discovery only (Dkt. 27) and issued a preliminary pretrial schedule order on 10-21-2021.

In Case No. 18-cv-332, Earls claimed that two defendants Timothy Deters a nurse and Dr, Salam Syed both failed to provided adequate medical care for his skin condition both failing to follow protocol and policy. Dr. Syed in his medical opinion guessed that the skin condition was scabies and provided medication for scabies, altho the medication arrived late. However the skin was not scabies but impetigo, and several days after the prison doctors mis-diagnoses Earls gets rushed to the Hospital.

CASE NO. 19-cv-117 (Fractured Leg)

The Health Services at the prison and defendants did not give Earls an x-ray of his ankle fracture for several weeks. The fracture healed and the x-ray evidence presented by Earls conclusively show's a healed bone fracture. The Seventh Circuit in two other cases, in *Grieve v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008) (Reversing decision of district judge summary judgment for defendants where plaintiff did not receive treatment for painful broken nose for nearly two days"); also see *Barry v. Peterman*, 604 F.3d 435; *Zaya v. Sood*, 836 F.3d 800 (7th Cir. 2016) (7 week delay on broken wrist, bone was healing at a incorrect angle, no summary judgment and it is deliberate indifference, the doctor disregarded a course of treatment. A Jury can infer conscious disregard, and a genuine factual dispute.

Earls claimed that several defendants, Syed, Schiler, Valerius, Gaier, Hodge, and Pafford all failed in their duty to provide adequate medical care for a fractured leg. The x-ray images do show a Bone fracture, see (Appendix 7 three x-rays).

In case 19-cv-117 the six defendants filed the group summary judgment motion. Earls filed Memorandum of Law in opposition to defendants summary

judgment, also Response to defendants proposed findings of facts, declaration and exhibit evidence. see (Dkt. 67,68,69,70,71). Likewise Earls filed several motions to compel discovery, the later Dkt. 81,87 were discovery request for the two DVD disk which contained the x-ray images of the fractured leg. That request was denied by the district court.

ARGUMENT

1) The Seventh Circuit in (Case No. 18-cv-332 skin condition) did commit error's of Constitutional Law by failing to follow the "Supremacy Clause" of the Federal Constitution the Supreme Law of the land and the Rule of "Orderliness" thereby violating Earls Constitutional Rights.

The Seventh Circuit Court decision is in conflict with itself and other Federal Appeal Courts, thereby departing from accepted and usual course of Judicial Proceedings and the Constitution, Article IV.

Under the Rule of Orderliness the Federal Court's may not overrule controlling precedent unless there is an intervening change in the Law, such as a statutory amendment or a decision from either the Supreme Court or the Enbanc Court. see Wilber v. Hepp, 16 F.4th 1232 (7th Cir. 2021); Thompson v. Deli City Attorney, 913 F. 3d 464, 467 (5th Cir. 2019).

In other words, the Rule of Orderliness applies when a prior panel decision already answers the issue before them. see Newman v. Plains All Am. Pipeline, 23 F. 4th 393, 400 (5th Cir. 2022) (explaining that the Rule of orderliness binds the Appeal Court to follow a prior panel's decision on an issue"). Under the Law of the Case Doctrine, "an issue of Law or Fact decided on Appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal".

Earls is pointing to the Law that this Court may rely on to sway the Court from agreeing with the Seventh Circuit Court of Appeals, Constitutional Miscarriage of Justice.

SUPREMACY CLAUSE OF THE FEDERAL CONSTITUTION

The Constitution, and the Law of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding. see U.S.C.A. Constitution Article VI clause 2.

STANDARD OF REVIEW

Summary Judgment is not appropriate where there are Genuine issues of material facts and the movant is not entitled to judgment as a matter of Law. see Levy v. Marion Cty. Sheriff, 940 F.3d 1002, 1008 (7th Cir. 2012; citing Fed. R. Civ. P. 56(a). The Court considers the entire evidentiary record and draws all reasonable inferences from that evidence in the light most favorable to the nonmovant. see Horton v. Pobjecki, 883 F.3d 941, 948 (7th Cir. 2018).

To defeat summary judgment a nonmovant must produce more than a "mere scintilla of evidence" and come forward with "specific facts" showing that there is a Genuine issue for trial. see Johnson v. Advocate Health Hospital Corp., 892 F.3d 887, 894-96 (7th Cir. 2018). Inferences only supported by speculation or conjecture will not suffice. see Skiba v. III, Cent. R.R. Co., 884 F.3d 708, 721 (7th Cir. 2018). Summary Judgment is not warranted when the evidence is such that a reasonable jury could return a verdict for the

nonmoving party. Id. citing *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986).

The Seventh Circuit Court of Appeals failed to follow the Law of the Land on Case No. 18-cv-332. Thereby violating the Supremeacy Clause of the United States Constitution. Earls did provide evidence in his Response to the Court and all reasonable inferences were to be given to Earls in the light most favorable as the nonmovant. The Seventh Circuit failed to apply this Law of the Land and did not give Earls any Favorable Inferences altho Earls submitted evidence in his favor. see Earls Appendix 5 #68 thru #85 in pages 1 thru 8' There is overwhelming evidence present by Earls with specific facts showing there are genuine issues to survive summary judgment and proceed to a jury trial. Over nine Disputed Genuine Issues of Facts supported by Evidence.

The Seventh Circuit Court of Appeals a second time failed to apply and follow the Constitutional Law of the Land and its own Seventh Circuit Court precedent on Case No. 18-cv-332 because Earls did produce specific facts, which there was no speculation or conjecture, therefore this inferences were supported by evidence.

Lastly on this Case, the Seventh Circuit Court of Appeals failed to apply and follow the Law of the Land Supremacy Clause that binds the Court to the Summary Judgment Standard and Law when there are Genuine Issues of Material Facts in Dispute supported by Record Evidence. "If Earls skin condition treatment by the prison doctor was adequate than why was Earls rushed to the hospital a second time and given adequate treatment by a different expert doctor", genuinie disputes.

No blood work was requested or done by the prison doctor to determine exactly what was the cause of the infection. It was guess work by the prison

doctor which proved to be inadequate and inaccurate. Summary judgment is not Appropriate. There are other examples of disorders that may have symptoms or signs that are the same or similar to those resulting from scabies that is why blood work and or labortory testing is needed. Similar is fibromyalgia, including rheumatologic disorders, myofacial pain syndrome, polymyalgia rheumatica, chronic lyme disease which is common in Wisconsin, and cervical hypertension associated disorders. see SSR 12-2 (SSA), 2012 WL 3104867, cited in Moreno v. Commissioner of S.S.A., 2023 WL 6621582 @ footnote #3.

CASE NO. 19-cv-117 (Leg Fracture)

The combining of two Cases with different defendants and facts is not appropriate, it's more important as to how the Seventh Circuit Court of Appeals committed errors of Constitutional Law in both of these Cases. ("The Supremacy Law", "the Orderliness Rule", "the Summary Judgment Law", and the "Evidentiary Law"); see Id. U.S. Constitution Article VI clause 2; and Wilder v. Hepp, 16 F. 4th 1232 (7th Cir. 2021); Horton v. Pobjecky, 883 F. 3d 941 (7th Cir. 2018); Federal Rule of Civil Procedure 56(a).

The Seventh Circuit Court of Appeals failed to follow and apply the Law of the Land on Case No. 19-cv-117. Thereby violating the Supremacy Law of the Land and the United States Constitution. Earls did provide evidence to support his disputed facts, and all reasonable inferences were to be given to Earls in the light most favorable as the nonmovant in this summary judgment decision. see Earls Appendix 6 pages 1 thru 15 and the x-ray evidence showing a healed break or crack all the way thru Earls bone. Plus 33 Disputed Genuine issues of disputed facts supported by evidence.

There is overwhelming evidence presented by Earls with specific facts

showing that there are genuine issues to survive Summary Judgment and proceed to trial. The x-ray evidence provided by Earls (Appendix 7) clearly shows a crack going across his bone. The x-ray was not taken by the prison staff until seven weeks after the injury. see Zaya v. Sood, 836 F. 3d 800 (7th Cir. 2016) (where the Seventh Circuit said a seven week delay on broken wrist, bone was healing at an incorrect angle, No Summary Judgment and it is deliberate indifference, the doctor disregarded a course of treatment. A Jury can infer conscious disregard and a genuine factual dispute). There is no humanly way that a person can get a crack in their bone, unless the leg was fractured.

The Seventh Circuit Court of Appeals a second time failed to apply and follow the Constitutional Law of the land and it's own Seventh Circuit precedent on this case (19-cv-117) because Earls did produce specific facts, which none were speculative or conjecture. Therefore the inferences were supported by evidence that created genuine issues of dispute. see Johnson v. Advocate Health, 892 F.3d 887, 894-96 (7th Cir. 2018); Skiba v. III Cent. R.R, 884 F. 3d 708, 721 (7th cir. 2018); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986).

Lastly the seventh Circuit failed to follow or apply the Law of the Land that Binds the Court on Summary Judgment Standard when there are genuine issues of material facts in dispute supported by evidence. see Earls Appendix 4.

Issue 2. The Federal District Court did deny Earls his Jury Trial by 12 Jurors that is guaranteed by the United States Constitution 6th and 14th Amendment.

Case No. 18-cv-332 Skin Condition, Case No. 19-cv-117 Fractured Leg.

The District Court abused it's discretion by making Credibility determinations on the witness and the evidence when awarding Summary Judgment to the defendant's.

The Law is clear on this point, Credibility determination on a witness and evidence is the sole function awarded to the Jury, not those of the Judge. see Waldridge v. Am. Hoechst Corp. 24 F. 3d ¶18, 920 (7th Cir. 1994) ("Credibility determination, the weighing of evidence, and the drawing of legitimate inferences from the facts are a jury function, not those of a Judge, whether he is ruling on a Motion for Summary Judgment or for a direct verdict. see Chittum v. Hare, 2022 WL 35846670; Anderson v. Liberty Lobby Inc. 477 U.S. 242, 255, (1986); Cruz v. New Jersey, 2022 WL 3681243).

Even if the Judge believed moving party has more and better evidence in it's favor, Motion For Summary Judgment does not Authorize or invite the Judge to weigh evidence and decide whose's story is more Credible or persuasive. see Fed. R. Civ. P. 56(a), cited by Brown v. Green County, 2022 WL 1978734.

The District Court made a credibility determination on Plaintiff's claims as the claims were consolidated by declaring ("since Plaintiff's Claim is based on Lies") see Earls Appendix 4 District Court decision on page 22, footnote 6. There are other Credibility determinations by the district judge on page 6, believing defendants not Earls. The Credibility determinations by the District judge can't be taken back, it was his though process all along in the Order and decision and the Judge crossed over into the Jury's Function.

The District Court's decision wandered into assessing the Credibility of Earls as a witness and the evidence, an issue that should have been left solely for the Jury to determine and Summary Judgment for the Defendants should have been denied based on these facts.

Summary Judgment is not appropriate "if the pleadings and evidence shows that there is genuine issues as to material facts in dispute, see Pries v.

The District Court abused it's discretion and authority by weighing the evidence and deciding the credibility of the plaintiff. Earls provided Medical evidence that shows to any reasonable person viewing these x-ray's images could find that Earls did have a fractured leg when he first complained to the prison staff and the defendant's.

The paper copies of the original DVD images are not quite as clear as the DVD images when viewed on the computer screen. However the paper copy's of the images do provide evidence that disputes the defendants claims.

Earls presented evidence in Response (Appendix 6 and 7) to dispute the defendants proposed findings of facts. earls record evidence shows the defendants were deliberately indifferent to Earls Medical Condition by failing even to take an x-ray prior to seven weeks, thereby denying Earls his right to medical care and his right to view the x-rays.

The District Court may not choose between combating inferences or balance the relative weight of conflicting evidence. see Abdullan v. City of Madison, 423 F. 3d 763, 773 (7th Cir. 2005).

Even when evidence is not disputed, if there are conflicting reasonable inferences from the evidence, those conflicting inferences may create genuine factual disputes that entitles one party to a trial. see Sauk County v. Cruz, 2003 WI App 164, ¶ 40 N.17 (Wis. 2d 758) "whether an inference is questionable is a question of Law" see Hennakens v. Hoeri, 160 Wis. 2d 144, 162 (1991).

The District Court in it's Order misstated the facts on case no. 18-cv-332, see Appendix 4 page 3 "the hospital said no further treatment, on that date Earls was there for the chest pain was needed; page 4, Earls hospital visit could'nt show complaint for his ankle, the ankle injury did not occur until being transported back to the prison from the hospital.

Earls did present evidence by defendant Gaier on August 11th that the defendants knew about his injury to his leg two weeks earlier, that would put the date of August 2nd they knew about the injury. The evidence proves this disputed fact in Earls favor and contradicts the defendant declarations and should go to the Jury. see Earls Appendix 6 and exhibit 50 in Dkt. 69.

The district court is wrong on evidence because Earls submitted Health Service Request forms which is record evidence. The district court is weighing evidence in the court's decision ¶ 11. Earls did dispute the defendants facts with conflicting evidence that Earls could not of been seen ambulating on the unit on 8/1 or 8/12 because he was in protocol lock down for Scabies. Under scabies protocol Earls is locked in his cell and can't get out because the guards operate the doors electronically. On page 7 of Earls Response Earls disputes the defendants delay in providing Medication with record evidence. The x-ray images for evidence Earls proves that he did have a fractured leg. see Appendix 7.

On page 8 of the district court decision the court even concedes that Earls had swelling as the evidence shows. On page 10 the district court abused its discretion and authority by deciding Earls evidence which is a jury function by deciding the x-ray's were not evidence. The x-ray images are admissible evidence because it was in Earls discovery provided by the defendants. Earls has meet his burden with evidence to defeat the granting of summary judgment.

The inferences are to be given to Earls from the underlying facts contained in the moving party's material, thus review in the light most favorable to the non-moving party which is Earls. If the material presented in the moving party's motion is subject to conflicting interpretations or reasonable people might differ as to significance, it would be improper for the district court

to Grant Summary Judgment for the defendants. see Grams v. Boss, 97 Wis. 2d 332, 339 (1980), "the court is to construe all facts in the light most favorable to the party opposing Summary Judgment. also see McNeal v. Ostrov, 368 F. 3d 657 (7th Cir. 2004).

On page 12 of the district court decision the court abused its discretion by deciding "negligence", "as a general rule ...the existence of negligence is a question of fact which is to be decided by the jury. Summary Judgment does not lend itself to negligence questions". see Cepline v. South Milwaukee, 73 Wis. 2d 338, 342 (1976), also see "Negligence is almost always inappropriate for Summary Judgment", see Brown v. Sandeen Agency, 2009 WI App. 11, p23.

On page 16 of the district court decision the district court is fabricating facts for the defendants to suit its own belief. Earls presented evidence to dispute the defendants proposed facts and there are 56 exhibits of disputed facts by Earls that should have been viewed in the light most favorable to Earls who opposed the defendants Motion. There are conflicting facts and evidence. There are over 35 proposed facts with evidence in Earls favor in Appendix 7 to this Court plus the actual images of the crack in Earls leg in Appendix 7.

The Seventh Circuit in another case did find Deliberate Indifference for a seven week delay of ordering a x-ray of a broken hand. see Zaya v. Sood, 836 F.3d 800 (7th Cir. 2016). Also see (Where the doctors failure to give any kind of cast or boot to the plaintiff, the doctor is not entitled to Summary Judgment. The Seventh Circuit failed to apply either of these to Earls. This could be viewed as "the very defination of deliberate indifference", Rowe v. gibson, 798 F.3d 622, 635 (7th Cir. 2015) citing Green v. Daley, 414 F.3d 645, 653 (7th Cir. 2005).

The district court may not choose between conflicting or competing inferences or balance the relative weight of conflicting evidence. see Abdullah v. City

of Madison, 423 F.3d 763, 773 (7th Cir. 2005); Wendricks v. Serres, 2022 WL 3700887 @ *6.

The Record shows that Genuine issues of facts exist and that the evidence on those issues are conflicting, with certain weight, in part incompetent, and itself susceptible to interpretation and reasonable people might differ as to its significance. Only by a Trial can the court ascertain the pertinent facts and move on to decide questions of substantive law as those facts present themselves. In a situation such as this case presents, entry of Summary judgment is not proper. see American Security v. Hamilton, 254 F.2d 889, 892 (7th Cir. 1958); also see Bellaver v. Quanex, 200 F.3d 485 (7th Cir. 2000) for Conflicts in the evidence.

Earls provided Expert evidence/Medical evidence that Earls did not have Mites or Scabies, it was impetigo and the proper treatment was Klefex and Ancef antibiotic's. see Earls Response page 7 line 3-4. There is no evidence in the record by the defendants that Impetigo can develope from scabies, therefore the prison doctor misdiagnosed Earls. Earls presented his own Declaration to defeat Summary Judgment. "A plaintiff may defeat Summary Judgment with his own deposition" see Williams v. Seniff, 342 F.3d 774, 785 (7th Cir. 2003).

On page 13 of the district court decision the district court is misstating the facts and evidence by deciding Earls did not come forward with evidence that his skin condition had progressed. Earls was taken as an Emergency to the Hospital because his skin condition progressed, the record evidence proves this, so the district court made an error of law.

Earls did present Evidence for factual disputes, therefore Summary Judgment is not a vehicle for resolving factual disputes. see 10 Charles A. Wright Federal practice and procedure civil § 2712 @ 574.

CONCLUSION

The Plaintiff Earls did suffer at the hands of the defendants in Both Cases with a Fractured Leg and a Misdiagnosed Skin Condition. Earls did submit sufficient evidence to over come Summary Judgment. The Seventh Circuit Court did commit error's of Law conflicting with Controlling Case Law and the United States Constitution. This Court should exercise its Supreme Authority and Grant Earls Writ of Certiorari remanding the case back to the Seventh Circuit Court with directions.

Dated: 11-06-2023

Respectfully,

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