

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 18 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT CARRASCO GAMEZ, Jr.,

No. 20-16180

Plaintiff-Appellant,

D.C. No. 2:17-cv-02044-JJT-ESW

v.

MEMORANDUM*

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
John J. Tuchi, Judge, Presiding

Argued and Submitted June 15, 2023
Pasadena, California

Before: CHRISTEN and BYBEE, Circuit Judges, and VITALIANO,** District Judge.

Appellant Robert Gamez, an inmate detained at an Arizona state correctional institution, appeals from the district court's grant of summary judgment to appellees, who are various officials and contractors employed at that institution, on a broad range of claims. Because Gamez is a pro se litigant, his complaint is construed

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eric N. Vitaliano, United States District Judge for the Eastern District of New York, sitting by designation.

liberally in order to “afford [him] the benefit of any doubt.” *Boquist v. Courtney*, 32 F.4th 764, 774 (9th Cir. 2022) (quoting *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010)). Our appellate jurisdiction rests on 28 U.S.C. § 1291, and our review of the district court’s grant of summary judgment is de novo. *Solis v. Cnty. of Los Angeles*, 514 F.3d 946, 952 (9th Cir. 2008).

Among the points preserved for our review¹ is Gamez’s claim that the district court committed error when it effectively granted summary judgment in favor of appellees Director Charles Ryan, Assistant Director Richard Pratt, Corizon (the medical provider of the Arizona Department of Corrections (“ADC”)), and Administrator Stacey Crabtree on his freestanding claim that his prolonged solitary confinement was in violation of his substantive due process rights and his right to be free from cruel and unusual punishment. The claims arising from his prolonged solitary confinement are nestled in the paragraphs of the complaint asserting a claim for appellees’ deliberate indifference to Gamez’s medical needs. Nevertheless, when the complaint is read with solicitude, the allegations targeting Gamez’s prolonged solitary confinement sufficiently state claims, standing separate and apart from his medical indifference claim, that appellees Ryan, Pratt, Corizon, and Crabtree violated his Eighth and Fourteenth Amendment rights. The district court’s

¹ In the absence of appellate challenge, the district court’s grant of summary judgment in favor of appellees on Gamez’s First Amendment claims is affirmed.

grant of summary judgment without separate evaluation of that claim was in error. Remand to permit the district court to conduct such an evaluation in the first instance is mandated.

As for the deliberate indifference claim itself, appellant contends that there are issues of fact in dispute, barring the award of summary judgment to appellees. Deliberate indifference to the medical needs of a person in custody can be shown where “prison officials . . . ‘deny, delay or intentionally interfere with’ needed medical treatment,” *Hyde v. City of Willcox*, 23 F.4th 863, 873 (9th Cir. 2022) (quoting *Sandoval v. Cnty. Of San Diego*, 985 F.3d 657, 679 (9th Cir. 2021)), or where such officials “knowingly fail[] to respond to an inmate’s requests for help,” *Peralta v. Dillard*, 744 F.3d 1076, 1086 (9th Cir. 2014) (quoting *Jett v. Penner*, 439 F.3d 1091, 1098 (9th Cir. 2006)).

Specifically, appellant’s medical indifference claim is grounded in his contention that treatment decisions were driven by the policy determinations of the institutional appellees rather than by his medical needs. In particular, Gamez alleges that ADC’s policies, as administered by Ryan, Pratt, and Corizon, deprived him of effective “non-formulary” medications as a “cost-saving measure” and to avoid abuse of those medications more broadly in the prison system, even when he took the medications properly and when no effective alternatives could be found. However, the existence, and even the enforcement, of such policies does not create

a material issue of fact as to the individual provider appellees Gamez named in this action. Dr. Itoro Elijah and Nurse Practitioner Margaret Osgood each provided legitimate medical reasons to take Gamez off or keep him off of those medications—such as those medications’ addictive potential, the risks of keeping a patient on such medications long-term, and a belief that the medications were no longer medically indicated—creating a non-actionable difference of medical opinion between medical providers. *See Simmons v. Arnett*, 47 F.4th 927, 934 (9th Cir. 2022). Neither can there be liability for Dr. Kamal Rastogi, who repeatedly renewed Gamez’s Wellbutrin prescription, or for Administrator Stacey Crabtree, who, as Gamez admits, had no involvement whatsoever in Gamez’s medical treatment. As such, the district court’s grant of summary judgment on this claim in favor of Administrator Crabtree, Dr. Elijah, NP Osgood, and Dr. Rastogi is affirmed.

Gamez also brings medical indifference claims against Ryan and Pratt in their individual and official capacities and against Corizon as a private entity acting under color of law.² *See McMillian v. Monroe County*, 520 U.S. 781, 785 n.2, 117 S. Ct.

² The official capacity claims against Ryan and Pratt do not fall victim to the protections of sovereign immunity afforded by the Eleventh Amendment. As state officials administering the operations of a state penal institution, Ryan and Pratt would ordinarily be covered by state sovereign immunity. *See Printz v. United States*, 521 U.S. 898, 930–31, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997). However, Ryan and Pratt failed to address sovereign immunity in their summary judgment motion or in their briefing before this Court, after briefly raising it in their Answer to the Third Amended Complaint. A state entity or officer who “baldly assert[s]” sovereign immunity in answering a complaint seeking damages and then “litigate[s]

1734, 138 L. Ed. 2d 1 (1997) (government officers); *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (private entity acting under color of law). In order to prevail under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and its progeny, Gamez must demonstrate (1) deprivation of a constitutional right, (2) existence of a policy, (3) that “the policy amounted to a deliberate indifference to [his] constitutional right,” and (4) that “the policy was the ‘moving force behind the constitutional violation.’” *Mabe v. San Bernardino Cnty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1110–11 (9th Cir. 2001) (quoting *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996)).

The record contains evidence showing that other medical providers, whom Gamez did not name as defendants in his complaint, refused to reinstate his previous prescriptions even after he informed them that the alternative treatments were ineffective or caused side effects without adequately considering those harms. The record also establishes that Corizon is ADC’s medical provider while Ryan and Pratt have responsibility for reviewing and making decisions on health needs requests, demonstrating that those parties necessarily took a leading role in, at the very least,

the suit on the merits, participate[s] in discovery, and file[s] a motion to dismiss and a summary judgment motion without pressing a sovereign immunity defense” is deemed to have waived it. *See Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1022 & n.5 (9th Cir. 2010). The Eleventh Amendment, as a consequence, affords Ryan and Pratt no immunity to suit here. The same holds true for Corizon as a private entity, notwithstanding its acting under color of state law. *See Koohi v. United States*, 976 F.2d 1328, 1336 (9th Cir. 1992).

interpreting and carrying out these policies. Even if the decisions of Dr. Elijah and NP Osgood were medically reasonable, these alleged subsequent acts of deliberate indifference by other providers can support Gamez's claims against Ryan, Pratt, and Corizon as parties responsible for the implementation and enforcement of treatment policies that resulted in deliberate indifference to his medical needs. *See Onyenwe v. City of Corona*, No. Civ. 12-01363 (MMM) (SPx), 2013 WL 12169375, at *17–18 (C.D. Cal. Dec. 1, 2013) (holding that plaintiff alleging *Monell* liability need not prevail against, or even sue, the individuals who personally committed the constitutional violation), *aff'd*, 637 F. App'x 370 (9th Cir. 2016) (mem.). Gamez further alleges that the review board overseeing non-formulary medications similarly failed to reinstate his previous medications even after the ineffectiveness and side effects of the substitute medications were known, which can likewise support such liability.

Gamez proffers other evidence from which a reasonable factfinder could conclude that a policy existed that served as the moving force behind these deprivations of medical treatment that Gamez charged showed indifference to his medical needs. For example, Gamez alleges that Dr. Elijah told him that the sole purpose of her visit with him was to take him off of the non-formulary medication that he was on, and that NP Osgood told him that there was no way he would have his Wellbutrin reinstated by the review board, irrespective of its effectiveness, given

its potential for abuse. If interpreted in the light most favorable to Gamez, as the evidence must be on summary judgment, these statements and the aforementioned denials of his requests suggest the existence of a policy of refusal to prescribe non-formulary medications, even where, as Gamez contends is true in this case, those medications are shown to be effective while alternatives are shown not to be. This evidence showing the existence and enforcement of this policy is sufficient to create a genuine issue of material fact as to the policy serving as the driving force behind ADC's indifference to Gamez's medical needs. Accordingly, the district court's grant of summary judgment in favor of Ryan, Pratt, and Corizon must be reversed and the matter remanded for further proceedings consistent with this decision.

Further, the district court's dismissal of Gamez's state law gross negligence/medical malpractice claim with prejudice was in error, as the relevant state law required that such dismissal be without prejudice. Ariz. Rev. Stat. Ann. § 12-2603(F). Though the statute of limitations has now run on the claim, appellant's claim may survive, notwithstanding appellees' argument to the contrary, by operation of Arizona's claim saving statute, *id.* § 12-504(A), or by application of equitable tolling, *see Jepson v. New*, 164 Ariz. 265, 271, 792 P.2d 728, 734 (1990) (en banc), so repleading in state court would not be futile. Given the possibility of repleading, the judgment is vacated to the extent it ordered the dismissal of Gamez's state law gross negligence/medical malpractice claim with prejudice, and the matter

is remanded with instructions to enter an amended judgment dismissing the claim without prejudice.

Finally, in light of the complexity of the claims that will be considered on remand, the district court is directed to appoint counsel to represent Gamez for those proceedings.³

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

³ Pursuant to the order of the United States Bankruptcy Court for the Southern District of Texas, this appeal and all actions against Corizon were stayed. Order Regarding Debtor's Emergency Motion to Extend and Enforce the Automatic Stay, *In re Tehum Care Servs., Inc.*, No. 23-90086 (CML), at 1 (Bankr. S.D. Tex. Mar. 3, 2023), ECF No. 118, at 1. As memorialized on our docket, *see* Status Report, Dkt. 87, at 1–2, the bankruptcy court lifted the stay to the extent that it permitted this appeal to go forward; in accord with the terms of that order, that relief expires with the filing of this memorandum disposition. Stipulation and Agreed Order Regarding (I) Debtor's Motion to Extend and Enforce the Automatic Stay and (II) Agreement to Modify the Automatic Stay, *Tehum*, No. 23-90086 (CML), ¶¶ 1–2, ECF No. 463.