

STATE OF MICHIGAN
COURT OF APPEALS

FREDERICK H. GRUMBLEY,

Plaintiff-Appellant,

v

GOVERNOR, DIRECTOR OF DEPARTMENT
OF CORRECTIONS, and DEPARTMENT OF
CORRECTIONS/PRISON HEALTH SERVICES,

Defendants-Appellees.

UNPUBLISHED

April 11, 2013

No. 311171

Ingham Circuit Court

LC No. 12-000082-CZ

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants Governor of Michigan, Director of the Michigan Department of Corrections (MDOC), and Prison Health Services (PHS). Because plaintiff failed to comply with the prison litigation reform act (PLRA), MCL 600.5501 *et seq.*, we affirm.

Plaintiff is an inmate within the MDOC. On January 23, 2012, he filed an *in propria persona* complaint against defendants alleging that he requested specific medical care for treatment of his chronic pain caused by degenerative scoliosis, but his requests have been ignored and he has received only mild forms of medication. Defendants Governor of Michigan and Director of the MDOC moved for summary disposition under MCR 2.116(C)(4) and (7) on the basis of governmental immunity, the trial court's lack of subject matter jurisdiction, and plaintiff's failure to comply with the PLRA. Defendant PHS moved for summary disposition under MCR 2.116(C)(8) arguing that plaintiff was not a third-party beneficiary to the contract between PHS and the state of Michigan, plaintiff failed to file an affidavit of merit in regard to his medical malpractice claim, and plaintiff's failure to allege that PHS had a policy or custom of

denying medical care to inmates.¹ The trial court granted summary disposition in favor of both defendants, and plaintiff now appeals.

When a plaintiff fails to comply with certain requirements imposed by the PLRA at any stage of the proceedings, the complaint must be dismissed in its entirety. *Tomzek v Dep't of Corrections*, 258 Mich App 222, 225; 672 NW2d 511 (2003). The PLRA applies to a “civil action concerning prison conditions.” MCL 600.5501. “Civil action concerning prison conditions’ means any civil proceeding seeking damages or equitable relief arising with respect to any conditions of confinement or the effects of an act or omission of government officials, employees, or agents in the performance of their duties, but does not include proceedings challenging the fact or duration of confinement in prison” MCL 600.5531(a). The PLRA applies to the instant action because plaintiff seeks monetary damages for medical treatment that PHS allegedly failed to provide.

MCL 600.5507 of the PLRA provides in relevant part:

(2) A prisoner who brings a civil action or appeals a judgment concerning prison conditions shall, upon commencement of the action or initiation of the appeal, disclose the number of civil actions and appeals that the prisoner has previously initiated.

(3) The court shall dismiss a civil action or appeal at any time, regardless of any filing fee that may have been paid, if the court finds any of the following:

* * *

(b) The prisoner fails to comply with the disclosure requirements of subsection (2).

Under the PLRA, “[i]f a prisoner fails to disclose the number of previous suits, [MCL 600.5507(3)(b)] explicitly instructs the court to dismiss the action.” *Komejan v Dep't of Corrections*, 270 Mich App 398, 399; 715 NW2d 375 (2006). A prisoner is required to identify the number of civil actions and appeals both before the trial court and on appeal. *Id.*; *Tomzek*, 258 Mich App at 225.

Plaintiff complied with the PLRA on appeal pursuant to this Court’s unpublished order by identifying the previous number of civil actions and appeals. However, it cannot be disputed that plaintiff failed to comply with the PLRA in the trial court. No authority suggests that compliance with the PLRA on appeal operates retroactively to rectify a failure to comply with the PLRA before the trial court. For this reason, the trial court’s order dismissing plaintiff’s

¹ While PHS did not request dismissal of plaintiff’s complaint for failure to comply with the PLRA in the trial court, on appeal PHS now joins with the Governor and the director of the MDOC in requesting dismissal on that basis.

complaint in its entirety is affirmed because plaintiff failed to comply with MCL 600.5507(2) of the PLRA.

With respect to plaintiff's substantive issues on appeal, we find they are wholly without merit.

Plaintiff's first claim that the trial court erred by dismissing his claims against the Governor and the Director of the MDOC for lack of jurisdiction is without merit because the "Court of Claims has exclusive jurisdiction to hear claims against the state and any of its departments, commissions, boards, institutions, arms, or agencies." *Steele v Dep't of Corrections*, 215 Mich App 710, 715; 546 NW2d 725 (1996); MCL 600.6419. The exclusive jurisdiction of the Court of Claims also includes actions sounding in contract or tort and seeking only declaratory relief, and to claims against state officers. *Id.* Thus, the circuit court lacked subject-matter jurisdiction over plaintiff's claims and it correctly dismissed plaintiff's claims against the Governor and the Director for lack of jurisdiction.

Plaintiff's second claim that the trial court erred by dismissing his complaint against PHS on the basis of the fact that he is not a third-party beneficiary is without merit because even assuming plaintiff is a third-party beneficiary, plaintiff's claim is a medical malpractice claim on the basis of a contractual relationship, and plaintiff failed to file the required affidavit of merit. Accordingly, plaintiff's claim was properly dismissed. MCL 600.2912d; *Lignons v Crittenton Hosp*, 490 Mich 61, 70-72, 75; 803 NW2d 271 (2011).

Finally, plaintiff's argument that the trial court erred by dismissing his 42 USC 1983 claims against PHS is without merit because plaintiff failed to allege a necessary element of the claim. "42 USC 1983 provides a remedy against any person who, under color of state law, deprives another of the rights protected by the Constitution." *Davis v Wayne Co Sheriff*, 201 Mich App 572, 576; 507 NW2d 751 (1993). "A cause of action under § 1983 is stated where a plaintiff shows (1) that the plaintiff was deprived of a federal right, and (2) that the defendant deprived the plaintiff of that right while acting under color of state law." *Id.* at 576-577. In this case, plaintiff claimed that PHS violated § 1983 by violating his Eighth Amendment right to be free from deliberate indifference to his serious medical needs. In order for PHS to be liable under § 1983, plaintiff had to prove that his injuries were inflicted pursuant to a policy or custom, and that there is an affirmative link between the policy or custom and the alleged constitutional violation. *Jackson v Detroit*, 449 Mich 420, 433; 537 NW2d 151 (1995).

Plaintiff alleged that he was "singled out" for lack of adequate medical care by PHS. This allegation is the exact opposite of a "policy or custom." A policy or custom suggests a regular, repeated course of action. See *Sudul v Hamtramck*, 221 Mich App 455, 469-470; 562 NW2d 478 (1997). Plaintiff's allegation, in contrast, suggests that it was PHS's regular course of action to provide adequate medical care for neck injuries, but that PHS failed to follow its regular course of action in his case. Accordingly, even if PHS failed to provide adequate medical care to plaintiff for his neck injury in this one instance, plaintiff has still failed to state a § 1983 claim against PHS because he did not identify an allegedly unconstitutional "policy or custom."

Affirmed.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Joel P. Hoekstra