6-18-2015

Brief for Plaintiff-Appellant Guy Zappulla

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15-903

United States Court of Appeals
FOR THE
Second Circuit

GUY ZAPPULLA,
Plaintiff - Appellant,
-v.-
SUPERINTENDENT WILLIAM LEE, individually and in his official capacity, ANTHONY J. ANNUCCI, ACTING COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, individually and in his official capacity, DOCTOR CARL KOENIGSMANN, CHIEF MEDICAL OFFICER OF THE NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, individually and in his official capacity,
Defendants - Appellees,

FRANCO, DEPUTY SUPERINTENDENT OF PROGRAMS, individually and in his official capacity, JOHN DOE, HEALTH CARE SUPERVISOR AT GREEN HAVEN, individually and in his official capacity, OFFICER JOHN DOE, 1-2, Individually and in their official capacities, HEALTH CARE SUPERINTENDENT BERNSTEIN, OFFICER B. HOTALING, OFFICER BEACHY,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT GUY ZAPPULLA

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INTRODUCTION

Plaintiff-Appellant, Guy Zappulla, appeals the decision of the district court dismissing his Eighth Amendment claims against Defendants Annucci and Koenigsmann under the administrative exhaustion requirement of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). Specifically, the district court held that because Mr. Zappulla did not specifically name these Defendants in his grievances, he did not adequately exhaust under the statute. The district court's decision, however, failed to acknowledge that the Supreme Court held that proper exhaustion is defined by a prison system's grievance procedures and that, where such grievance procedures do not require grievants to name future defendants, neither does the PLRA. *Jones v. Bock*, 549 U.S. 199 (2007). Moreover, the district court also ignored this Court's holding that the New York State Department of Corrections and Community Supervision's ("DOCCS") grievance system — the grievance system at issue in this case — does not require grievants to name future defendants and that failure to do so cannot be grounds for dismissal for non-exhaustion. *Espinal v. Goord*, 558 F.3d 119 (2d Cir. 2009). Here, where Mr. Zappulla exhausted his administrative remedies to the final level of review, dismissal was inappropriate and in direct opposition to Supreme Court and Second Circuit precedent. Defendants-Appellees' failure to cite either of these binding authorities to the district court, where the Plaintiff was proceeding *pro se*, was in

violation of their obligation under New York Rule of Professional Conduct 3.3(a)(2).

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 over Plaintiff-Appellant Zappulla's claims under 42 U.S.C § 1983. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court's entry of a final order of dismissal. The district court's March 4, 2015 decision granting summary judgment to Defendants constituted a final order. (JA 244-256). Mr. Zappulla filed a timely Notice of Appeal on March 12, 2015. (JA 257).

STATEMENT OF THE ISSUE

Whether the district court erred in dismissing Mr. Zappulla's claims against Defendants Annucci and Koenigsman given that *Jones v. Bock*, 549 U.S. 199 (2007) and *Espinal v. Goord*, 558 F.3d 119 (2d Cir. 2009), together establish that New York State prisoners need not name individual defendants in their grievances in order to comply with the PLRA's exhaustion requirement.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*, viewing the facts in the light most favorable to the non-moving party. *Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006). The question of whether a prisoner-

plaintiff has exhausted administrative remedies under the PLRA, 42 U.S.C. § 1997e(a), is also reviewed *de novo*. *E.g*., *Amador v. Andrews*, 655 F.3d 89, 94-95 (2d Cir. 2011).

STATEMENT OF THE CASE

This appeal follows the district court's dismissal of Plaintiff-Appellant Guy Zappulla's civil rights action against staff members at the DOCCS, alleging Eighth and Fourteenth Amendment violations arising from his inadequate medical treatment while in DOCCS custody and seeking damages, injunctive and declaratory relief. The district court by order of the Honorable Jesse M. Furman dismissed Mr. Zappulla's claims for injunctive relief against Defendants Annucci and Koenigsmann, finding that because he did not name these defendants or their predecessors in his grievances, Mr. Zappulla did not properly exhaust his administrative remedies under the PLRA. (JA 254-55). The district court also dismissed Mr. Zappulla's remaining claim against Defendant Lee for lack of personal involvement. (JA 250-254).

On September 22, 2011, Mr. Zappulla, proceeding *pro se*, timely filed his initial Complaint. (JA 4). Defendants filed their Motion to Dismiss on March 1 2012 (JA7), after which Mr. Zappulla filed the Amended Complaint in which he alleged, *inter alia*, that DOCCS officials were not providing him proper treatment for his torn rotator cuff and a degenerative joint disease in his elbow. (JA 26-41).

Defendants subsequently moved to dismiss the Amended Complaint on June 29, 2012. (JA 8). In an Opinion and Order issued by the district court in April 2013 and a ruling on Defendants' subsequently filed Motion for Reconsideration, Judge Furman dismissed all of Mr. Zappulla's claims, except his claims for damages related to his right elbow injuries against Defendant Lee and his claims for injunctive and declaratory relief related to both his right elbow and left shoulder injuries against Defendants Annucci and Koenigsmann, the successors to Defendants Fischer and Wright. (JA 12-13). On January 10, 2014, after Defendants filed their first motion for summary judgment in this case (JA 15), the Court issued an order of dismissal upon being advised that the parties had reached a settlement. (JA 17). However, on May 23, 2014, the Court re-opened the case because the settlement agreement previously reached by the parties had broken down. (JA 19). Subsequently, Defendants filed their second summary judgment motion. (JA 19, 111-215). On March 4, 2015, Judge Furman granted Defendants' summary judgment motion and dismissed the Amended Complaint solely on the ground that Mr. Zappulla's failure to name future defendants in his grievances constituted non-exhaustion under the PLRA. (JA 254-255). Accordingly, Mr. Zappulla filed a timely Notice of Appeal on March 12, 2015. (JA 257). Betsy Ginsberg of the Benjamin N. Cardozo School of Law Civil Rights Clinic filed an appearance in this Court on April 3, 2015.

STATEMENT OF FACTS

Plaintiff-Appellant Guy Zappulla was incarcerated at Clinton Correctional Facility ("Clinton") and temporarily at Green Haven Correctional Facility ("Green Haven") at all times relevant to this case. (JA 244-45). His Eighth Amendment claims for deliberate indifference to his serious medical needs currently on appeal involve medical care for his right elbow and for his left shoulder. His claim relating to his right shoulder was dismissed on April 5, 2013 and is not on appeal. (JA 10).

In September or October 2009, after numerous complaints about his right elbow, x-rays were taken of Mr. Zappulla's right elbow. (JA 246). Doctors determined that he had a degenerative joint disease and loose bodies in the elbow joint. (JA 95, 224, 246). He was finally scheduled for surgery in March 2010 at which point he was brought to the hospital, placed under anesthesia and then awoken to be told that his condition was far worse than originally thought and that his elbow needed to be rebuilt. (JA 101-105, 201, 246-47). It was not until the end of August 2010 that he was finally rescheduled for this surgery. (JA 247). Mr. Zappulla was brought to Green Haven so that the surgery could occur at a nearby hospital. (JA 247). Mr. Zappulla remained at Green Haven for a month post-surgery. (JA 226-27). His claim is based on DOCCS' failure to provide him with the prescribed physical therapy either at Green Haven or when he returned to

Clinton, a failure that he states has resulted in his inability to fully extend his right arm. (JA 30-32, 77); P. Opp. Def. Mot. Recons. at 2 (Docket entry # 68).

When he did not receive his post-surgical physical therapy, Mr. Zappulla filed a grievance on September 5, 2010 requesting that treatment. (JA 158). Plaintiff timely appealed the denial of his grievance to the Superintendent on October 3, 2010. (JA 159). The Superintendent also denied his grievance, stating that plaintiff did not require physical therapy. Plaintiff timely appealed the Superintendent's decision to the Central Office Review Committee ("CORC") on November 5, 2010.[1] (JA 162).

In addition to his claim about his right elbow, Mr. Zappulla seeks relief for the inadequate care for his left shoulder. (JA 245). In his Complaint he states that he was diagnosed at Clinton with a torn rotator cuff. (JA 35, 116). Over the course of the next several months, he continued to seek treatment for his shoulder, to no avail. *Id*. Mr. Zappulla's left shoulder was imaged and he was diagnosed by a doctor with degenerative joint disease of the acromioclavicular ("AC") joint. (JA 107). Furthermore, his medical records note that the physical therapist at Clinton believed his rotator cuff was torn. (JA 35); P. Opp. Summ. J., Ex. 6.

[1] The district court's decision in this case states that Mr. Zappulla filed his appeal to CORC in 2014 rather than 2010. (JA 248). This appears to be a typographical error, as the underlying document relied on by the district court indicates that the appeal was filed in 2010. (JA 162).

On April 26, 2010, Mr. Zappulla filed a grievance objecting to the treatment of his left shoulder and requesting that it be repaired and that he be seen by the orthopedic surgeon. (JA 202-03). This grievance also addressed his right elbow. *Id*. In response, the Inmate Grievance Review Committee ("IGRC") and, on a timely appeal, the Superintendent, addressed only the treatment of Plaintiff's right elbow. *Id*. In Plaintiff's timely appeal to CORC on May 20, 2010, he reiterated that his grievance had also included complaints about his shoulder and requested that this issue be addressed. (JA 204). CORC ruled that Plaintiff was receiving proper care for his shoulder. (JA 199).

In neither of these grievances filed about his right elbow and his left shoulder, did Mr. Zappulla identify Defendants – Acting DOCCS Commissioner Anthony Annucci or DOCCS Chief Medical Officer Carl Koenigsmann or their respective predecessors Brian Fischer and Lester Wright, who were active in these roles at the time that the grievances were filed. (JA 158, 202-03).

SUMMARY OF THE ARGUMENT

The district court erred when it dismissed Mr. Zappulla's claims against Defendants Annucci and Koenisgsmann for non-exhaustion under the PLRA. The district court's sole basis for finding that Mr. Zappulla's grievances did not satisfy the PLRA's exhaustion requirement was that he did not name these future

Defendants or their predecessors in his grievances.[2] This decision completely ignores this Court's holding that "it is plain that a New York state prisoner is not required to name responsible parties in a grievance in order to exhaust administrative remedies." *Espinal v. Goord*, 558 F.3d 119, 126 (2d Cir. 2009). The *Espinal* Court relied on the Supreme Court's decision in *Jones v. Bock*, which held that the PLRA does not itself require prisoners to name future defendants in their grievances and that such a requirement could only be imposed where the prison system's own grievance procedures so specified. *See Jones v. Bock*, 549 U.S. 199, 217 (2007). This Court in *Espinal* held that the DOCCS grievance procedures at issue in this case do not impose a naming requirement. *Espinal* at 126. In arguing that Mr. Zappulla's failure to name Defendants Annucci and Koenigsmann in his grievances, Counsel for Defendants failed to alert the district court to *Jones* and *Espinal*, a failure that is particularly egregious here where the incarcerated Plaintiff was proceeding *pro se* and *in forma pauperis*. This failure

[2] In this appeal, Plaintiff-Appellant addresses only this issue of PLRA exhaustion which is the sole question decided by the district court because this Court ordinarily "will not review an issue the district court did not decide." *Macey v. Carolina Cas. Ins. Co*., 674 F.3d 125, 131 (2d Cir. 2012) (citations omitted) (declining to decide issues not addressed by the district court and remanding to that court for further proceedings); *Emilio v. Sprint Spectrum L.P*., 508 F. App'x 3, 6 (2d Cir. 2013) (same). Here, Defendants raised arguments, such as whether, on the factual record before the district court, Plaintiff's claims can survive on the merits (JA 119-22) which should be addressed by the district court in the first instance.

also constitutes a violation of New York's Rules of Professional Conduct and has unnecessarily multiplied these proceedings. *See* N.Y.R. Prof. Conduct 3.3(a)(2). Given that Defendants' argument is wholly without merit and constitutes an ethical violation, this Court should impose sanctions under 28 U.S.C. § 1927.

LEGAL ARGUMENT

I. The District Court Erred in Dismissing Mr. Zappulla's Claims Because Second Circuit and Supreme Court Precedent Establish That the PLRA Does Not Require a DOCCS Prisoner to Name Future Defendants in a Grievance.

The district court's dismissal of Mr. Zappulla's claims for non-exhaustion under the PLRA solely because he failed to name future defendants in his grievances directly contradicts Supreme Court and Second Circuit precedent. *See Jones v. Bock*, 549 U.S. 199, 217 (2007); *Espinal v. Goord*, 558 F.3d 119 (2d Cir. 2009). In *Jones*, the Supreme Court held that "nothing in the [PLRA] imposes a 'name all defendants' requirement" and that "such a rule lacks a textual basis in the PLRA." *Id*. at 217. The Court relied on its own previous interpretation of the PLRA's exhaustion requirement in holding that it is the prison grievance procedures, not the PLRA, that determine what constitutes proper exhaustion for purposes of the PLRA. *Id*. (*citing Woodford v. Ngo*, 548 U.S. 81, 88 (2006)). The *Jones* Court held that where the state grievance procedures did not impose a requirement that future defendants be named in grievances, it was improper for the lower court to impose such a requirement. *Id*. at 218.

In *Espinal v. Goord*, this Court applied *Jones* to a case involving a grievance filed pursuant to DOCCS' grievance procedures. 558 F.3d at 125-28. The *Espinal* court addressed the question of whether, under the rule decided in *Jones*, New York State's prison grievance process requires prisoners to name individual future defendants in their grievances in order to properly exhaust the administrative remedy. This Court examined the New York State prison system's grievance procedures and found that they impose no such requirement, holding that "[w]here New York's grievance procedures do not require prisoners to identify the individuals responsible for alleged misconduct, neither does the PLRA for exhaustion purposes." *Espinal v. Goord*, 558 F.3d 119, 127 (2d Cir. 2009).

DOCCS' Inmate Grievance Program ("IGP") provides for a three-tiered process for adjudicating inmate complaints. First, the prisoner files a grievance with the Inmate Grievance Resolution Committee ("IGRC"). N.Y.C.R.R.,Title 7, § 701.5. Next, the prisoner may appeal a decision by the IGRC to the facility superintendent. *Id*. Finally, the prisoner may then appeal the superintendent's decision to the CORC. *Id*. The IGP regulations state that the "the grievance must contain a concise, specific description of the problem and the action requested and indicate what actions the grievant has taken to resolve the complaint." *Id*. As noted in *Espinal*, these regulations "do not state that a prisoner's grievance must name the responsible party." *Espinal*, 558 F. 3d at 126. Furthermore, "the

complaint form does not instruct the inmate to name the officials allegedly responsible for misconduct." *Id*. The *Jones* Court found a similarly worded grievance regulation not to require identification of future defendants. *See Espinal* at 124-25 (citing *Jones*, 549 U.S. at 218). This finding by the *Jones* Court led the *Espinal* Court to hold that because "New York's IGP does not articulate an identification requirement, it is plain that a New York state prisoner is not required to name responsible parties in a grievance in order to exhaust administrative remedies."[3] *Id.* at 126.

Given the clear holdings of *Espinal* and *Jones*, the district court here was simply wrong to hold that Mr. Zappulla did not properly exhaust his remedies under the PLRA solely because he did not name Defendants Annucci or Koenigsmann or their predecessors[4] in his grievances. The district court did not find that Mr. Zappulla's grievances were deficient in any other way or that any other argument exists in favoring a finding of non-exhaustion. (JA 254-56). Nor would the facts have supported any such argument. Mr. Zappulla filed grievances

[3] Although the *Espinal* Court noted that the regulations it was examining had later been amended in 2006, it noted that its analysis was "equally applicable" to the then current regulations, which were the regulations in place when Mr. Zappulla filed and appealed his grievances. *See Espinal* at 125.

[4] Plaintiff originally sued Defendants Brian Fisher and Lester Wright for prospective relief in their official capacities. During the pendency of the litigation, both Defendants left their positions and the district court substituted their respective successors Anthony Annucci and Carl Koenigsmann, as Defendants, presumably pursuant to Fed. R. Civ. P. 25(d). (JA 88).

about both his right elbow and left shoulder. He described the issue with ample specificity and he timely appealed each of these grievances all the way to the CORC. (JA 109, 158-62, 202-205). The District Court did not attempt to distinguish *Espinal* or *Jones*. It erroneously decided the issue without any reference to either decision and is the only known court in this circuit to have dismissed a New York State prisoner's claim for non-exhaustion on these grounds since before the Supreme Court decided *Jones* more than eight years ago.[5]

II. Defendants' Failure to Alert the District Court to *Espinal* and *Jones* Constitutes a Violation of New York's Rules of Professional Conduct, a Lack of Fairness to a Pro Se Litigant, and an Unnecessary Waste of Court Resources.

New York's Rules of Professional Conduct require that a lawyer not knowingly "fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." N.Y. R. Prof. Conduct 3.3(a)(2). The rule requiring disclosure of adverse controlling authority is crucial, "especially in the district courts, where its faithful observance by attorneys assures that judges are not the victims of

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[5] All of the cases cited below by the state defendants in support of their exhaustion argument either preceded *Jones* and *Espinal*, addressed grievance systems of other jurisdictions, or dismissed for non-exhaustion on other grounds. See (JA 151-51) citing *Skyers v. United States*, No. 12 CIV. 3432, 2013 WL 3340292, at *8-9 (S.D.N.Y. July 2, 2013) (addressing exhaustion in a case involving the Federal Bureau of Prisons grievance system); *Singh v. Lynch*, 460 F. App'x 45, 47 (2d Cir. 2012) (dismissing prisoner's assault claim where grievance never mentioned he was ever assaulted).

lawyers hiding the legal ball." *Transamerica Leasing, Inc. v. Compania Anonima Venezolana de Navegacion*, 93 F.3d 675 at 676 (9th Cir. 1996) (addressing ethical rule virtually identical to New York's). This consideration is particularly salient where, as here, the party against whom the position was taken was an incarcerated person proceeding *in forma pauperis* and without the assistance of counsel.

Espinal and *Jones* are directly adverse to the position taken by the Office of the Attorney General ("OAG") in this case. There can be no interpretation of these cases that is not "directly adverse" to the OAG's position that Mr. Zappulla's grievances were deficient under the PLRA for failing to name future defendants. *See supra 9-12*. These decisions were known[6] to counsel because they are published and heavily cited Second Circuit and Supreme Court decisions and because *Espinal* was litigated by the OAG. *Espinal* at 120. In fact, both cases were cited in a Magistrate Judge's Report and Recommendation concerning PLRA exhaustion in a case in which the Assistant Attorney General who failed to cite these cases below had represented the state defendants. (JA 279). Moreover, *Espinal's* holding that individuals need not be named in DOCCS grievances has been acknowledged and applied numerous times by the district courts throughout this state since its announcement by this Court. *See, e.g., Williams v. King*, 56 F.

[6] Under New York's Rules of Professional Conduct, knowledge can be inferred from the circumstances. N.Y. R. Prof. Conduct 1.0(k) (defining knowledge in the Rules).

Supp. 3d 389 (S.D.N.Y. 2014); *Stewart v. Fischer*, No. 11 CIV. 2184 HB, 2013 WL 5637715, at *6 (S.D.N.Y. Oct. 15, 2013); *Green v. Gunn*, No. 06-CV-6248-CJS, 2009 WL 1809932, at *4 (W.D.N.Y. June 24, 2009). Finally, these cases were not disclosed by Plaintiff, who went unrepresented before the district court and filed his brief from prison. (JA 216).

Counsel for Defendants-Appellees hid the "legal ball" from the district court below by failing to disclose *Jones* and *Espinal*, no doubt causing the district court to erroneously dismiss Mr. Zappulla's claims as unexhausted. Such behavior is particularly egregious where the opposing party, as here, appeared *pro se*. *See Large v. Hilton*, No. CV-11-01127 (PHX) (GMS), 2013 WL 694662, at *3 (D. Ariz. Feb. 26, 2013) (characterizing a similar failure to disclose controlling legal authority as an attempt to "sneak an argument by the Court and by a pro se plaintiff."). The OAG's failure to alert the district court to this authority has no doubt multiplied these proceedings and prevented Mr. Zappulla from continuing to seek the medical care that he needs.

Because counsel for Defendants' actions in the district court were wholly without merit and needlessly caused delay in this case, this Court should award Plaintiff attorneys' fees and costs for this appeal pursuant to 28 U.S.C. § 1927. Section 1927 provides that a court may assess costs and fees against any attorney who "multiplies the proceedings in any case unreasonably and vexatiously." 28

U.S.C. § 1927; *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986). To sanction an attorney under this statute, a court must find that the attorney acted in bad faith. *Id*. at 1273. A court may infer bad faith where an attorney's action was "completely without merit." *In re 60 E. 80th St. Equities, Inc*., 218 F.3d 109, 116 (2d Cir. 2000).

Counsel's argument in the district court that the PLRA requires prisoners to name individual defendants in their grievances was completely without merit. *Supra 9-12*. Moreover, counsel's ethical failure to alert the district court to the Second Circuit and Supreme Court cases that directly and unequivocally contradict her argument was unreasonable and likely the cause for the district court's opinion finding non-exhaustion for failing to name defendants. *Id*. Therefore, fees and costs pursuant to 28 U.S.C. § 1927 are appropriate here.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's decision dismissing Plaintiff-Appellant's claims against Defendants-Appellees Annucci and Koenigsmann because the district court's decision, that the PLRA required Mr. Zappulla to name these individual Defendants, was incorrect under Supreme Court and Second Circuit precedent.

Dated: New York, New York
June 18, 2015

Respectfully submitted,

_____/s/_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 3,671 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the typestyle requirements of Fed. R. App. P. 32(a)(6), and the form requirements of Fed. R. App. P. 32(c)(2), because the brief has been prepared using Microsoft Word in 14-point Times New Roman font.

Dated: New York, New York
June 18, 2015

By: _____/s/_____
Betsy Ginsberg