FILED
United States Court of Appeals
Tenth Circuit

October 24, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JASON BROOKS,

Plaintiff - Appellant,

v.

COLORADO DEPARTMENT OF CORRECTIONS; CORRECTIONAL HEALTH PARTNERS; JOHN DOE, M.D., President and CEO of Correctional Health Partners; SUSAN TIONA, M.D., CDOC Chief Medical Officer,

Defendants - Appellees.

No. 22-1359
(D.C. No. 1:18-CV-02578-PAB-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **EID**, and **CARSON**, Circuit Judges.

Jason Brooks, proceeding pro se, asserts he received constitutionally inadequate medical care for a knee injury suffered while in custody of the Colorado Department of Corrections (CDOC), resulting in lifelong disability. The district court dismissed or granted summary judgment to all defendants. Brooks appeals

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

from the grant of summary judgment and certain other orders. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I. FACTUAL BACKGROUND

The parties do not dispute the following, which occurred in 2016 and 2017 when Brooks was incarcerated at CDOC's Fremont Correctional Facility.[1]

On October 8, 2016, Brooks hurt his right knee in a prison weightlifting competition. He did not immediately seek medical attention in hopes that the condition would resolve itself.

For the next two months, he could walk, but could not perform athletic activities because his knee would buckle. In December 2016, he met with a prison physician, Dr. Susan Tiona, who examined Brooks's knee. She did not observe significant swelling, crackling under the skin, or loosening of knee ligaments, but she noted that palpation produced tenderness. She gave Brooks an ace wrap for his knee, prescribed topical NSAID gel for pain and swelling, and ordered an x-ray that showed normal wear and tear and mild arthritis, but no fracture or other bony abnormality.

In early January 2017, Brooks requested an MRI. Dr. Tiona examined Brooks on January 12. She noted minimal visible swelling but conducted a McMurray test to

[1] Brooks was released on parole in 2021, but that does not affect our analysis of any issue raised on appeal.

determine the source of Brooks's pain.[2] The McMurray test suggested a meniscus injury. Dr. Tiona "thought that [Brooks] likely had bruised or perhaps torn his cartilage while deeply squatting in the weightlifting competition." Aplee. Suppl. R. vol. 1 at 52, ¶ 23. She recommended a steroid injection, to which Brooks consented, and she administered the injection during that visit. She also recommended self-administered physical therapy, and she gave Brooks detailed handouts describing the exercises he should perform.

Dr. Tiona examined Brooks again on February 27. Brooks told her his knee had improved, and he could play basketball with no swelling or pain. Dr. Tiona noted this in her medical records but stated that she would continue to monitor his condition.

On April 18, Brooks saw Dr. Tiona with worsening symptoms. He could not run or walk quickly, and he experienced increasing pain going up and down stairs. Dr. Tiona submitted an MRI request. That was her last clinical visit with Brooks.

MRI requests submitted by CDOC practitioners must be approved by Correctional Health Partners (CHP), a private organization under contract with CDOC to review requests for inmate medical services that CDOC itself does not provide. CHP approved Dr. Tiona's MRI request on April 22. The MRI occurred on

[2] "A McMurray test is a procedure to evaluate a likely source of a patient's knee pain, and is conducted by systemically rotating a patient's knee to identify where tears in the cartilage (called the meniscus) may have occurred or developed in the knee." Aplee. Suppl. R. vol. 1 at 51, ¶ 21.

June 9 and revealed "a large degenerative osteochondral defect of the medial compartment." *Id.* at 54, ¶ 40.

In July, CHP approved a request for Brooks to visit an orthopedic surgeon. Then, in September, CHP received the surgeon's request to repair Brooks's knee, which CHP approved. The surgeon repaired Brooks's knee in October 2017, but purportedly told Brooks that he will eventually require a knee replacement. Brooks claims he cannot exercise or play sports without significant pain in his knee.

II. PROCEDURAL HISTORY

A. Brooks's Complaint

Brooks filed this lawsuit in the United States District Court for the District of Colorado in October 2018, naming CDOC, Dr. Tiona, and CHP as defendants. Brooks's basic theory was that Dr. Tiona deferred, without medical judgment, to a CHP policy requiring conservative therapy before requesting an MRI. Her deference, he alleges, caused his knee injury to progress from something reparable to something permanent. He also alleged that Dr. Tiona's January 2017 cortisone injection simply masked the pain caused by the injury, leading him to engage in strenuous activities that medical standards of care would have counseled against. In his view, those post-injection activities probably exacerbated the injury, and that exacerbation is probably why the surgeon could not fully repair his knee.

Proceeding under 42 U.S.C. § 1983, Brooks alleged all this amounted to deliberate indifference to his serious medical needs in violation of the Eighth Amendment. As to CHP specifically, Brooks claimed it could be liable as a

policymaker. *See Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1215–16 (10th Cir. 2003).

CDOC and Dr. Tiona moved to dismiss. The district court referred that motion to a magistrate judge for a recommendation. The magistrate judge recommended: (1) CDOC should be dismissed based on Eleventh Amendment immunity, but (2) the Eighth Amendment claim satisfied the pleading standard against Dr. Tiona and should go forward. No party objected, and the district court adopted the recommendation in full.

B. Brooks's Motion to Appoint an Expert

As discovery progressed, Brooks moved to appoint an expert so he could support his claims. The district court referred this motion to the magistrate judge, who denied it for reasons we will discuss below.

C. Summary Judgment and Related Proceedings

Following discovery, the remaining defendants moved for summary judgment. CHP argued Brooks could not show CHP's deliberate indifference as a policymaker, or that CHP caused any injury, because CHP approved every request for Brooks's outside medical care.

Dr. Tiona, in a separate motion, argued Brooks did not have evidence to support his claims. She submitted a declaration providing her view of the relevant events. Dr. Tiona claimed, based on her training and experience, that an MRI was unwarranted earlier than April 2017 because an MRI is generally a precursor to surgery, and surgery is usually not the first step when a patient presents with

symptoms such as Brooks's. Rather, such persons often reach asymptomatic status after three to six months. She stated that the current standard of care is conservative treatment, such as physical therapy, and surgery is only necessary if, despite that, the patient cannot "resume desired activities, his or her occupation, or a sport." Aplee. Suppl. R. vol. 1 at 88, ¶ 17. She also asserted she made medical decisions based on each individual patient's circumstances, not based on CHP policy.

Brooks's response briefs relied on a somewhat different theory than he had alleged in his complaint. Through discovery, he had obtained documents relating to the contract between CDOC and CHP. That contract required CHP to "establish, implement and maintain Utilization Management (UM) policies and procedures," including a document that set forth "policies and procedures used to evaluate medical necessity, criteria used, information sources, and the process used to review and approve the provision of medical services." Aplee. Suppl. R. vol. 3 at 24–25. Brooks requested the UM policies but no defendant produced any documents that they identified as UM policies. This ended up as a discovery dispute before the magistrate judge, who ruled there was no reason to disbelieve defendants' assertion that they had produced everything responsive in their possession.

Brooks interpreted the magistrate judge's order as establishing that UM policies do not exist, contrary to the contract between CDOC and CHP. Thus, in his summary judgment briefs, he argued the real problem was not that any CHP policy had prompted Dr. Tiona to try conservative therapy first, but that CHP's *lack* of UM policies led to "individuated interpretation by each CDOC medical provider," and

"[Dr.] Tiona's subjective interpretation of CHP's policy" was that "she had to exhaust conservative treatment prior to requesting an MRI." R. vol. II at 318. In other words, CHP "put[] CDOC medical providers under the impression they must exhaust conservative treatment prior to even requesting an MRI," which was "the motivating force behind Defendant Tiona's failure [at the January 2017 visit] to request an MRI for [Brooks]." *Id.* at 314. Brooks supported this claim with an interrogatory response from Dr. Tiona stating that CHP usually requires conservative therapy before approving an MRI.

To counter Dr. Tiona's claim that she had exercised her medical judgment, regardless of policy (or perceived policy), Brooks asserted that Dr. Tiona "appears to have made a custom[/]policy decision regarding [his] medical care," as "established by her ignoring twelve separate indicators warranting an MRI for Plaintiff on or before [the January 2017 visit]." *Id.* at 498. Brooks found those "indicators" in a document produced by CHP called the Milliman Care Guidelines. In Brooks's view, choosing not to request an MRI despite twelve Milliman indicators would allow a jury to infer Dr. Tiona acted according to the perceived conservative-therapy policy, and was deliberately indifferent (not merely negligent).

Brooks also moved to amend his complaint to assert a breach-of-contract theory. He alleged he was a third-party beneficiary of the CDOC-CHP contract, which CHP had breached because it never established UM policies. According to Brooks, this meant the MRI approval process must have been "*ad hoc*, illusory, and not premised upon any objective standard," *id.* at 250, ¶ 5, to his detriment.

The district court referred the summary judgment motions and the motion to amend to the magistrate judge. The magistrate judge assumed for summary judgment purposes that the delay in treatment caused Brooks to suffer a significant injury. The magistrate judge ruled, however, that Brooks could not rely on the Milliman guidelines to establish Dr. Tiona's deliberately indifferent state of mind because he lacked qualifications to opine on the guidelines' significance. The magistrate judge also concluded Brooks had no evidence to show Dr. Tiona made a decision based on a policy rather than her medical judgment, and thus CHP could not be liable as a policymaker. The magistrate judge therefore recommended granting Dr. Tiona's and CHP's summary judgment motions and denying the motion to amend as futile.

Brooks objected, emphasizing that the magistrate judge had earlier denied his motion to appoint an expert but then recommended granting summary judgment based, in part, on a lack of expert testimony to interpret the Milliman guidelines. The district court adopted the magistrate judge's recommendations, granted summary judgment in defendants' favor, denied Brooks's motion to amend, and entered final judgment.

III. ANALYSIS

A. Procedural Rulings that Affected Summary Judgment

Brooks argues that the district court's procedural rulings unfairly hamstrung his ability to oppose summary judgment.

1. Denial of Motion to Appoint Expert Witness

Federal Rule of Evidence 706(a) states, "On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed . . . ." Brooks moved under this authority, claiming that without an expert he could not support some of his claims.

The magistrate judge denied Brooks's motion. The magistrate judge observed that Brooks sought expert testimony "to counter Defendants' experts," whereas "Rule 706 is not intended to further partisan interests of any party, but to aid the Court, through the services of an impartial expert in its assessment of technical issues." Aplee. Suppl. R. vol. 1 at 44 (internal quotation marks omitted). Nor did the issues appear "overly complex, technical, or scientific," meaning "both the Court and a jury would be able to understand the medical issues presented in this case without the assistance of a court-appointed expert." *Id.*

The district court agreed with the magistrate judge. The purpose of appointing a Rule 706 expert, the district court explained, is to assist the court, but the court saw no need for assistance given Dr. Tiona's declaration "explaining [Brooks's] medical records, medical conditions, and course of treatment." R. vol. III at 48.

On appeal, Brooks attacks the district court's handling of the expert-witness issue. We review the district court's denial of a Rule 706 motion for abuse of discretion. *Rachel v. Troutt*, 820 F.3d 390, 397 (10th Cir. 2016). Brooks primarily argues an abuse of discretion can be found in the fact that, in his view, he "was specifically advised by the [magistrate judge] and reasonably understood—as long as

he provided documentary evidence of his claims—the evidence would be considered." Aplt. Opening Br. at 14. And by "documentary evidence," Brooks means the Milliman guidelines.

These assertions appear connected to a due-process argument he makes several pages later in his brief. In that context, he argues the district court should have either appointed an expert or given him a chance to find his own expert, "especially after he was directly misadvised by the district court that these issues were simple enough to consider." *Id.* at 29.

Whether framed as an abuse of discretion or a violation of due process, Brooks's argument turns on the idea that the magistrate judge's Rule 706 order reasonably led him to believe he could introduce and interpret medical literature without an expert. We cannot agree. The magistrate judge ruled, "based on a review of the record," that "both the Court and a jury would be able to understand the medical issues presented in this case without the assistance *of a court-appointed expert*." Aplee. Suppl. R. vol. 1 at 44 (emphasis added). And by "court-appointed expert," the magistrate judge meant someone "impartial," not someone "to counter Defendants' experts." *Id.* (internal quotation marks omitted). Thus, the magistrate judge ruled only that the court did not need *independent* expert assistance, not that lay testimony would suffice. And the magistrate judge's order contains nothing authorizing Brooks to give lay opinion about the Milliman guidelines. Thus, we reject the argument that the district court abused its discretion on this account, or that the course of proceedings violated Brooks's right to due process.

Brooks further claims an abuse of discretion because, after development of the summary judgment record, the district court said the issues were not complex enough to require an expert given that Dr. Tiona had submitted a summary judgment declaration relying on her personal medical expertise. Brooks argues this was self-contradictory, as if the district court had said expert testimony is both necessary and not. We again disagree.

The district court concluded the issues were not "so complex as to require a medical expert *to assist the Court*, particularly where Dr. Tiona submitted her own . . . declaration explaining [the medical issues]." R. vol. III at 48 (emphasis added). Brooks, of course, wanted an expert to assist *him*. He couched his request in terms of assistance to the court, but his underlying intent was clear. He sought an expert to validate his theory that a physician who chooses not to order an MRI when facing twelve potential Milliman indicators must be acting according to some non-medical consideration (like an inflexible conservative-therapy policy).

The district court did not abuse its discretion by denying Brooks's request for a Rule 706 expert. True, the medical information before it was one-sided—it did not address the Milliman guidelines, for example—but the district court did not abuse its discretion in choosing not to solicit an independent second opinion. Indeed, seeking an expert in hopes of finding someone to confirm Brooks's theory could improperly position the district court as Brooks's advocate and therefore "dislodg[e] the delicate balance of the juristic role." *Rachel*, 820 F.3d at 398 (internal quotation marks omitted); *see also id.* (in an Eighth Amendment medical-care case, noting the

prisoner's argument that "he needed expert testimony to rebut the defendants' arguments about the alleged adequacy of his medical treatment," but explaining that "it cannot follow that a court must therefore appoint an expert under Rule 706 whenever there are allegations of medical malpractice" (internal quotation marks omitted)). We therefore do not disturb the court's handling of the expert issue.

2. Denial of Motion for a Copy of Brooks's Deposition Testimony

Brooks says the district court also limited his ability to oppose summary judgment by denying his request that defendants provide Brooks with a copy of his deposition transcript. He says he could not obtain his own copy because he could not afford the fee charged by the transcription company ($405.90).

The magistrate judge, to whom the district court referred the motion, denied this motion and warned Brooks of the consequences of failing to object. Brooks did not file an objection. We therefore apply firm waiver and do not reach this issue. *See Sinclair Wyo. Refin. Co. v. A & B Builders, Ltd.*, 989 F.3d 747, 781 n.23 (10th Cir. 2021).

B. Summary Judgment

We now turn to the substance of the district court's ruling that Brooks failed to raise a triable issue of fact on his Eighth Amendment claim. We review the district court's decision de novo. *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 766 (10th Cir. 2013).

1. Dr. Tiona

"[T]o state a cognizable claim [for an Eighth Amendment violation due to inadequate medical care], a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). This standard

> involves both an objective and a subjective component. The objective component is met if . . . [the medical need] has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. The subjective component is met if a prison official knows of and disregards an excessive risk to inmate health or safety.

Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir. 2000) (internal quotation marks and citations omitted). The deliberate indifference standard is stricter than negligence. *See Estelle*, 429 U.S. at 106.

The district court assumed for summary judgment purposes that the objective component was undisputed. As to the subjective component, the district court viewed the issue as a question of what insight the Milliman guidelines could offer, if any, to Dr. Tiona's state of mind concerning the need for an MRI. The court concluded those guidelines only showed

> that Dr. Tiona at most disagreed with [Brooks's] lay application of the indicators. The [guidelines state] that a knee MRI "may" be indicated when certain factors are present, not that an MRI is always indicated or that it is a dereliction of a doctor's duty of care not to order an MRI in such a case.

R. vol. III at 44. The court further ruled that the evidence as a whole could lead a reasonable jury to find, at worst, that Dr. Tiona treated Brooks negligently, but not with deliberate indifference.

Brooks claims the district court's ruling relies on a conclusion that Dr. Tiona is credible. *Cf. Fogarty v. Gallegos*, 523 F.3d 1147, 1165 (10th Cir. 2008) ("On summary judgment, a district court may not weigh the credibility of the witnesses."). Dr. Tiona claimed she, at all times, exercised her medical judgment, rather than deferring to any policy about conservative therapy. Brooks claimed the opposite: she made no medical judgment, and instead blindly followed the perceived policy.[3] The district court accepted that Dr. Tiona made a medical judgment (which was, at worst, negligent). Brooks claims this was an improper credibility judgment.

Brooks misunderstands the credibility issue. "Practically speaking, [the rule against weighing credibility at summary judgment] means that the court may not grant summary judgment based on its own perception that one witness is more credible than another; these determinations must be left for the jury." *Id.* at 1165–66. But if the nonmoving party's case relies on convincing a jury that a witness is not

[3] Brooks takes his theory from *Swan v. Physician Health Partners, Inc.*, 212 F. Supp. 3d 1000 (D. Colo. 2016), where a CDOC inmate sued a CHP reviewing physician for requiring conservative therapy before authorizing an MRI (which, he claimed, made the injury worse). *See id.* at 1004–05. At the motion-to-dismiss phase, the district court held that if the CHP reviewing physician "denied the MRI test without making an actual medical decision and in complete disregard to Plaintiff's medical condition, then the subjective prong of the deliberate indifference test would be satisfied." *Id.* at 1008. We are not sure this theory accurately reflects the subjective prong of the deliberate-indifference test, but Dr. Tiona does not challenge it, so we will accept it for purposes of this appeal.

credible, the nonmoving party must raise "a material *question* regarding the [witness's] credibility." *Id.* at 1166; *see also Helget v. City of Hays*, 844 F.3d 1216, 1223 n.3 (10th Cir. 2017) ("[W]here a nonmoving party (who has the burden of persuasion at trial) fails to provide admissible evidence rebutting testimony offered by the moving party, the question is not one of credibility, but rather the absence of evidence creating a triable issue of fact.").

The evidence in the summary judgment record that Dr. Tiona could have been blindly adhering to a policy was the following: 1) Dr. Tiona believed CHP would likely require conservative therapy first, *see* R. vol. II at 510 (responding to an interrogatory about her understanding of CHP's MRI-approval policies by stating that "[t]here are many non-emergent clinical situations in which an MRI might be approved without exhaustion of conservative treatment options," but "in general a third-party payor such as CHP is likely to request that conservative treatment options are fully pursued prior to approving an MRI in clinical circumstances similar to those in this case"); and 2) the Milliman guidelines say, "Knee MRI may be indicated for 1 or more of the following," *id.* at 443, and twelve of the potential indicators allegedly applied to Brooks.

We will discuss the Milliman guidelines first. The guidelines list dozens of potential indicators, comprising about two pages' worth of small-print bullet points. *See id.* at 443–45. Brooks does not have an expert to interpret these guidelines. If Brooks means to argue that a lay jury is competent to interpret the guidelines, we disagree.

We do not mean to say a lay jury cannot understand any of the individual Milliman indicators (*e.g.*, "stiffness," "swelling," "giving way or buckling"). *Id.* at 443–44. The problem is that a lay jury cannot interpret the significance of the twelve indicators allegedly present in Brooks's case. Nor could a lay jury, unassisted by an expert, conclude that a physician who does not request an MRI despite these twelve Milliman indicators has violated the standard of care so egregiously that non-medical considerations must have motivated the physician's decision.

Brooks argues, however, that Dr. Tiona was contractually required to follow the Milliman guidelines. Brooks refers to the contract between CDOC and CHP. We do not agree with Brooks's interpretation of the contract, but that is immaterial. Brooks still needs an expert to establish that Dr. Tiona's decision egregiously deviated from the Milliman guidelines.

Brooks also sometimes suggests this case has nothing to do with the true standard of care, because, as he puts it, the Milliman guidelines are "Defendants['] own standards of care." Aplt. Opening Br. at 24. This appears to refer to one of the theories that prompted him to move for appointment of an expert, *i.e.*, that the Milliman guidelines are "self-created, made-up criteria." Aplee. Supp. R. vol. 1 at 38, ¶ 4. Brooks seems to be saying the jury need not hear the real standard of care, and therefore no expert is needed. The jury, he believes, can look at the standard of care defendants imposed on themselves and decide the significance of not ordering an MRI when faced with twelve indicators.

We recognize CHP produced the Milliman guidelines in discovery and identified them as "the basis for determining the medical necessity respecting a request for an MRI." R. vol. II at 31. Contrary to Brooks's assertions, however, it is unclear whether any defendant authored the guidelines, or whether CDOC physicians (as distinct from CHP reviewers) consider the Milliman guidelines when deciding on MRIs.

In any event, the argument fails because the jury would have no basis to make the inference Brooks desires. The guidelines merely say, "Knee MRI may be indicated for 1 or more of the following." *Id.* at 443. It would be sheer speculation for the jury to conclude that deciding not to request an MRI despite the presence of twelve indicators that might reflect an accepted standard of care shows anything about a medical decision-maker's state of mind.

In sum, without an expert, Brooks's interpretation of the Milliman guidelines "cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). So the only evidence Brooks possesses to persuade a jury that Dr. Tiona made a completely non-medical decision was her acknowledgment that she believed CHP would probably require conservative therapy before approving an MRI.

We agree with the district court that no reasonable jury could decide in Brooks's favor on this evidence. It is simply not enough to raise a material question about Dr. Tiona's credibility when she says she made a medical judgment, not a policy judgment.

For these reasons, we affirm the district court's grant of summary judgment to Dr. Tiona.

2. CHP[4]

Brooks seeks to hold CHP liable as a policymaker—or, more accurately, for failing to promulgate UM policies but still somehow leading CDOC providers to conclude that they must prescribe conservative therapy before CHP will approve an MRI. Because Brooks does not have enough evidence to show he suffered an Eighth Amendment injury, it follows that CHP cannot be liable. *See Crowson v. Wash. Cnty.*, 983 F.3d 1166, 1191 (10th Cir. 2020) ("[T]here must be a constitutional violation, not just an unconstitutional policy, for a municipality to be held liable.").

Brooks points out, *see* Aplt. Opening Br. at 38, that "even where the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights," *Quintana v. Santa Fe Cnty. Bd. of Comm'rs*, 973 F.3d 1022, 1033–34 (10th Cir. 2020) (internal quotation marks omitted). But this is not a case about combined acts. Here, only one person—Dr. Tiona—might have acted according to CHP's policy, or perceived policy.

[4] Brooks not only claimed policymaker liability against CHP, but he separately asserted a cause of action for civil conspiracy between CDOC and CHP to do all the things underlying his Eighth Amendment claim. Our analysis of CHP's Eighth Amendment liability necessarily disposes of the civil conspiracy claim as well.

We therefore affirm the district court's grant of summary judgment to CHP.[5]

C. Dismissal of CDOC

Early in the case, CDOC moved to have itself dismissed on sovereign-immunity grounds. The magistrate judge recommended granting that motion and warned the parties of the consequences of failing to object. No party objected, and the district court adopted the recommendation. Brooks argues that dismissing CDOC was error, but we apply firm waiver and do not reach the issue. The matter is moot in any event, given Brooks's inability to prove an Eighth Amendment injury.

D. The Motion to Amend

During summary judgment proceedings, Brooks moved to amend his complaint to assert a breach-of-contract theory, and the magistrate judge recommended denial. The magistrate judge gave various independent reasons, including because summary judgment was warranted on all other claims—meaning that permitting amendment would insert a non-diverse state-law claim into the case when all federal-law claims had been dismissed. *See* 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if

[5] Brooks's complaint also named "John Doe, M.D., President and CEO of [CHP]" as a defendant. R. vol. I at 99 (capitalization normalized). He apparently meant to identify the person responsible for overseeing the relationship between CDOC and CHP at the time of his injury and medical care. When CHP answered the complaint, it identified Jeff Archambeau as its president and CEO. Brooks argues Archambeau was not the person he had in mind. But Brooks cannot prove CHP's liability as a policymaker, so the dispute about Archambeau is moot.

. . . the district court has dismissed all claims over which it has original jurisdiction . . . ."). The magistrate judge treated this as an issue of futility—it would be pointless to allow addition of a claim over which the district court would not exercise jurisdiction.

Brooks objected to parts of the magistrate judge's recommendation but did not object to the jurisdictional futility reasoning. The district court then adopted that reasoning, finding no clear error.

The firm-waiver rule applies to a general failure to object and to an objection that is not "sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute." *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996). It therefore applies here, and we do not reach Brooks's argument that the district court improperly denied his motion to amend based on jurisdictional futility.

Brooks also says the district court erred by dismissing his breach-of-contract claim with prejudice, instead of without prejudice (based on lack of jurisdiction). But the district court did not dismiss any breach-of-contract claim, either with prejudice or without. Rather, it never permitted the claim to become part of the case. Thus, there is no error to reverse.

IV. CONCLUSION

We affirm the district court's judgment. We grant Brooks's motion to proceed on appeal without prepayment of costs or fees.

Entered for the Court

Joel M. Carson III
Circuit Judge