UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

STEVE SPENCER,

Plaintiff-Appellee,

v.

CHRIS ABBOTT, PA – Physician's Assistant; CRAIG JENSEN, Medical Technician for UDC; JERRY MILLER, UDC Custody Officer; RODGER MACFARLANE, Med Tech,

Defendants-Appellants,

and

RICHARD GARDEN, Director of Clinical Services Bureau for UDC; STEVE MECHAM, Nurse; DALE WHITNEY, Correctional Officer,

Defendants.

No. 16-4009
(D.C. No. 2:10-CV-00626-CW)
(D. Utah)

ORDER AND JUDGMENT*

(Filed Dec. 5, 2017)

Before **KELLY** and **HOLMES**, Circuit Judges.**

Following a severe stroke in July 2008, a former inmate at Utah State Prison, Brian Maguire,[1] asserted claims under 42 U.S.C. § 1983 against various medical and non-medical prison staff – including physician's assistant Chris Abbott, emergency medical technicians ("EMTs") Craig Jensen and Rodger MacFarlane, and a

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

** The Honorable Neil Gorsuch heard oral argument in this appeal, but has since been confirmed as an Associate Justice of the United States Supreme Court; he did not participate in the consideration or preparation of this order and judgment. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in resolving the appeal. *See* 28 U.S.C. §46(d); *see also United States v. Wiles*, 106 F.3d 1516, 1516 n.* (10th Cir. 1997) (noting this court allows remaining panel judges to act as a quorum to resolve an appeal); *Murray v. Nat'l Broad. Co.*, 35 F.3d 45, 47-48 (2nd Cir. 1994) (remaining two judges of original three-judge panel may decide petition for rehearing without third judge), *cert. denied*, 513 U.S. 1082 (1995).

[1] Following Mr. Maguire's death, the district court substituted Steve Spencer, the personal representative of Mr. Maguire's estate, as the plaintiff. For the sake of clarity, we – like the parties and the district court – will continue to refer to Mr. Maguire as the plaintiff, rather than Mr. Spencer.

prison guard (occupying the position of Sergeant) who worked on Mr. Maguire's cell block, Jerry Miller (collectively, "Appellants") – for deliberate indifference to his serious medical needs in violation of the Eighth Amendment and the Utah Constitution.[2]

Following limited discovery, Appellants moved for summary judgment on qualified-immunity grounds, but the district court denied the motion, finding that the Appellants' qualified-immunity claims depended on the resolution of disputed facts. Appellants now appeal, arguing that their actions fall far short of establishing a violation of a clearly established constitutional right.

For the reasons that follow, we **DISMISS** Mr. Miller's appeal for lack of appellate jurisdiction. Exercising jurisdiction over the remainder of this appeal under 28 U.S.C. § 1291, we **REVERSE** the district court's denial of summary judgment on qualified-immunity grounds as to Mr. Abbott and the two EMTs, Mr. Jensen and Mr. MacFarlane, and **REMAND** with instructions to enter judgment in their favor.

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[2] In addition, Mr. Maguire brought claims against Mr. Abbott's supervisor, Dr. Richard Garden, and a prison nurse, Steven Mecham. The district court, however, found that these individuals were entitled to summary judgment on qualified-immunity grounds, and Mr. Maguire mounts no challenge to that determination on appeal.

I

A[3]

On July 3, 2008, Mr. Abbott (a physician's assistant) performed an intake examination of Mr. Maguire before releasing him into the prison population. During that assessment, Mr. Maguire explained that he had been on a methadone treatment program for opiate addiction, and he requested that he be placed on a methadone-tapering regimen. However, Mr. Abbott informed Mr. Maguire that the prison did not prescribe methadone and, instead, gave him medicine to reduce the deleterious effects of methadone withdrawal. Mr. Maguire spent the next week in and out of the prison infirmary, with complaints of an array of physiological and psychological problems.

On July 15, 2008, Mr. Maguire submitted an Inmate Health Request Form, claiming that he was "losing the[] use" of his "left arm and hand" and that he was "very worried and suffering mentally and physically." *See* Aplts.' App., Vol. IV, at 446 (Mem. Decision & Order Granting in Part and Den. in Part Defs.' Mot. for Summ. J., filed Dec. 15, 2015) (quoting the record). Later that day, a prison guard escorted him to Mr. Abbott, and informed Mr. Abbott that Mr. Maguire appeared to be dragging his left leg. In addition, Mr. Maguire himself expressed difficulty with controlling

[3] The district court recited the facts in the light most favorable to Mr. Maguire and Appellants generally accept that recitation, except as explained *infra*, for purposes of the pending appeal. We, in turn, track the factual narrative that the district court recounted.

the left side of his body, including his left arm and extremities. While massaging Mr. Maguire's upper body, Mr. Abbott noticed a prominent spasm in his left trapezius muscle and applied pressure on the associated trigger point. Following that treatment, Mr. Maguire reported immediate relief. As a result, Mr. Abbott determined that Mr. Maguire suffered from a muscle spasm and prescribed a muscle relaxant and physical therapy.

That evening, however, Mr. Maguire's left arm began seizing, his left leg became numb, and he began convulsing. As a result, Mr. Maguire yelled for the other inmates to call "man down," and a prison guard, Mr. Miller, and EMTs Jensen and MacFarlane responded to the cell and witnessed Mr. Maguire convulsing. *Id*. The three men moved Mr. Maguire to the cell floor, where EMTs Jensen and MacFarlane checked his vital signs and determined that he had suffered a seizure. Mr. Maguire, however, disputed this diagnosis, because he had never experienced a seizure, remained lucid throughout the event, and never blacked out. Nevertheless, EMTs Jensen and MacFarlane maintained their diagnosis and placed Mr. Maguire's mattress on the floor to prevent him from falling from his bunk if he had another seizure. They further told Mr. Maguire that there was nothing else they could do at that time, but that he should inform prison guards if he experienced any additional issues and the guards would alert them.

Throughout that night until early the next morning, prison guards – including, according to Mr.

Maguire, Mr. Miller – passed by Mr. Maguire's cell to perform hourly inmate counts.[4] During each of these hourly counts, Mr. Maguire claims that he pleaded for assistance from the passing prison guards, but submits that each plea went unanswered. On the following morning – July 16, 2008 – prison guards found that Mr. Maguire had urinated in his jumpsuit during the night, having been unable to get himself off of the floor. As a result, prison guards transferred him to the University of Utah Medical Center, where doctors determined that he had suffered a severe stroke.

B

In the aftermath of this diagnosis, Mr. Maguire filed the underlying civil-rights complaint under 42 U.S.C. § 1983, asserting constitutional claims against Mr. Abbott, EMTs Jensen and MacFarlane, and Mr. Miller, among other individuals. Following limited discovery, Appellants moved for summary judgment on the grounds of qualified immunity. On December 15, 2015, however, the district court denied summary judgment to them.[5]

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[4] Mr. Miller argues that the district court's factual recitation on this point "blatantly contradicted" the underlying record. Aplts.' Opening Br. at 22-24. Nevertheless, we reject that notion for the reasons discussed *infra*.

[5] The district court did enter summary judgment, however, in favor of two defendants, Dr. Richard Garden and Steven Mecham, *see* Aplts.' App., Vol. IV, at 449-50, 453-54 (finding no evidence of deliberate indifference relative to these defendants), and in favor of Mr. Abbott, solely insofar as Mr. Maguire asserted a

Addressing the existence of a constitutional violation – the first prong of the qualified-immunity inquiry – the district court concluded that the evidence created a sufficient factual inference of deliberate indifference relative to Mr. Abbott, because he diagnosed Mr. Maguire's condition as "a simple muscle spasm," despite the evidence that Mr. Maguire had "los[t] control o[f] the entire left side of his body." Aplts.' App., Vol. IV, at 452. Given those facts, the district court determined that Mr. Abbott's "contrary diagnosis and treatment" could be deemed "patently unreasonable," because a reasonable jury could conclude that the "loss of control" constituted a symptom "so obviously inconsistent with a simple muscle spasm in [the] shoulder . . . and so obviously consistent with the symptoms of a stroke." *Id*. With respect to EMTs Jensen and MacFarlane, the district court found the record similarly sufficient to support an inference of deliberate indifference because the two men determined that Mr. Maguire had experienced a seizure (despite Mr. Maguire's contrary assertions) and, yet, failed to refer him to a medical specialist, opting instead to "simply place[ ] Maguire's mattress on the cell floor." *Id.* at 458-59. Finally, the district court found sufficient evidence that Mr. Miller acted with deliberate indifference, because the evidence suggested that he knew that "Maguire had suffered (at the very least) a seizure" and of his

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claim "against Abbott for [his] involvement [in] the decision to discontinue Maguire's methadone prescription," *id*. at 451 n.7. The propriety of these rulings is not at issue here.

subsequent requests for medical assistance, but failed to notify medical professionals. *Id*. at 462.

Turning then to the question of clearly established law – the second prong of the qualified-immunity inquiry – the district court found it "clearly established" (1) that when Mr. Abbott confronted "symptoms obviously indicative of a stroke and inconsistent with a mere shoulder muscle spasm, the decision to merely treat the muscle spasm would evidence deliberate indifference to a serious medical condition," *id*. at 464; (2) that when EMTs Jensen and MacFarlane confronted "what they believed to be a seizure, they had an obligation to provide Maguire meaningful treatment or at least access to an appropriate health care provider," *id*.; and (3) that, when Mr. Miller confronted Mr. Maguire's requests for "further medical assistance" – "with the understanding that Maguire had suffered a seizure" – "he had the obligation to provide Maguire access to necessary medical personnel" *and* "fair notice that failing to provide such access would be sufficient to show a constitutional violation," *id.*

Accordingly, the district court denied summary judgment on the basis of qualified immunity to Mr. Abbott, EMTs Jensen and MacFarlane, and Mr. Miller. This appeal followed.

II

Appellants' appeal is interlocutory and, before reaching its merits, we must address whether we properly have jurisdiction. *See Franklin Sav. Corp. v.*

United States (In re Franklin Sav. Corp.), 385 F.3d 1279, 1286 (10th Cir. 2004) ("Jurisdictional issues must be addressed first and, if they are resolved against jurisdiction, the case is at an end.").

A

Federal appellate courts typically lack "jurisdiction to review denials of summary judgment motions," *Cox v. Glanz*, 800 F.3d 1231, 1242 (10th Cir. 2015) (quoting *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1150 (10th Cir. 2006)), but we may review "[t]he denial of qualified immunity to a public official . . . to the extent [the denial] involves abstract issues of law," *id*. (first alteration in original) (quoting *Fancher v. Barrientos*, 723 F.3d 1191, 1198 (10th Cir. 2013)); *see also Henderson v. Glanz*, 813 F.3d 938, 947 (10th Cir. 2015). Specifically, we have interlocutory "jurisdiction 'to review "(1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation."'" *Cox*, 800 F.3d at 1242 (quoting *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 753 (10th Cir. 2013)).

Applying that analytical framework, we have "no interlocutory jurisdiction to review 'whether or not the pretrial record sets forth "genuine" issues of fact for trial,'" *Henderson*, 813 F.3d at 948 (quoting *Johnson v. Jones*, 515 U.S. 304, 320 (1995)), because that inquiry would require "second-guessing the district court's determinations of evidence sufficiency," *id.* (quoting

Medina v. Cram, 252 F.3d 1124, 1130 (10th Cir. 2001)); *see also Cox*, 800 F.3d at 1242 (explaining that "'whether or not the pretrial record sets forth a "genuine" issue of fact for trial' is *not* an abstract legal question that we may review" (quoting *Johnson*, 515 U.S. at 320)).

Rather, we may review "the *legal* question of whether a defendant's conduct, as alleged by the plaintiff, violates clearly established law." *Cox*, 800 F.3d at 1242 (emphasis added) (quoting *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1186 (10th Cir. 2001)). Hence, our jurisdiction becomes "clear" when "the defendant does not dispute the facts alleged by the plaintiff" *or* concedes the version of events most favorable to the plaintiff, and raises instead only *legal* challenges to the denial of qualified immunity based on those facts. *Id.* (quoting *Farmer v. Perrill*, 288 F.3d 1254, 1258 n.4 (10th Cir. 2002)).

Where a defendant challenges the district court's factual findings, "we may assess the case based on our own de novo view of which facts a reasonable jury could accept as true," *if* the record "blatantly contradict[s]" the version of events that the district court has found, viewing the evidence in the light most favorable to the plaintiff. *Henderson*, 813 F.3d at 948 (quoting *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir. 2010)); *see York v. City of Las Cruces*, 523 F.3d 1205, 1210 (10th Cir. 2008) (noting that "a court may not adopt a 'blatantly contradicted' version of the facts for summary judgment purposes" (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007))). However, the blatantly-contradicted

exception imposes, by its very terms, a heavy burden, requiring that the district court's findings "constitute 'visible fiction.'" *Lynch v. Barrett*, 703 F.3d 1153, 1160 n.2 (10th Cir. 2013) (quoting *Scott*, 550 U.S. at 380-81); *see Roosevelt-Hennix*, 717 F.3d at 759 (explaining the "limited nature" of the blatantly-contradicted exception); *Green v. Post*, 574 F.3d 1294, 1296 n.4 (10th Cir. 2009) (declining to accept the district court's factual recitation that the traffic light was red, when "[t]he videotape of the collision, obtained from the camera on [the officer-defendant's] vehicle, shows that the light was yellow"); *see also Cordero v. Froats*, 613 F. App'x 768, 769 (10th Cir. 2015) (unpublished) (noting that the exception covers only the "rare" and "exceptional" case).

B

1

In light of these principles, we conclude that Mr. Abbott, and EMTs Jensen and MacFarlane have presented appellate arguments over which we have jurisdiction, because they accept Mr. Maguire's version of the facts relating to them – more specifically, the facts as the district court recited them – for purposes of this appeal, and argue their legal entitlement to qualified immunity under *that* factual narrative.[6] *See Cox*, 800

[6] The district court framed its summary-judgment conclusions in terms of findings regarding what a "reasonable jury" could draw from the factual record *and* with respect to the existence of genuinely disputed issues of material fact. Aplts.' App., Vol. IV, at 452-53 (finding, with respect to Mr. Abbott, that "a

F.3d at 1243-44 (finding appellate jurisdiction where the defendant "accepted the truth of [the plaintiff's] version of the facts for purposes of an appeal," and requested that we address "the legal issues presented by [those] agreed-upon set of facts").

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reasonable jury could conclude" that he acted with deliberate indifference and that the record contained "genuine dispute[s] of fact" relative to deliberate indifference); *id*. at 458-60 (finding, with respect to EMTs Jensen and MacFarlane, that "a reasonable jury could conclude" that they acted with deliberate indifference and that the record contained "genuine disputes" relative to deliberate indifference); *id*. at 462-63 (finding, with respect to Mr. Miller, that "a reasonable jury could conclude" that he acted with deliberate indifference and that the record contained "genuine disputes of fact" relative to deliberate indifference). We are constrained to observe that, insofar as the district court's analysis focused on the existence of genuine disputes of material fact – it is not congruent with "our established qualified-immunity approach" – the "principal purpose" of which is "to determine whether plaintiff's factual allegations are sufficiently grounded in the record such that they may permissibly comprise the universe of facts that will serve as the foundation for answering the *legal* question before the court." *Cox*, 800 F.3d at 1243 (quoting *Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1326 (10th Cir. 2009) (Holmes, J., concurring)). Nevertheless, because Appellants (with the exception of Mr. Miller) have accepted the truth of Mr. Maguire's version of the facts for purposes of this appeal – a version of the facts that the district court embraced – we may reach the *legal* questions of qualified immunity based on that version of the facts, despite the noted deficiency in the district court's methodology. *See Cox*, 800 F.3d at 1243 (reaching the legal issues in the context of a qualified-immunity, summary-judgment inquiry despite the district court's deficient "fact-based" "mode of analysis").

2

An inquiry into our jurisdiction over Mr. Miller's appeal cannot be resolved with the same ease. That is because Mr. Miller contends that the district court's factual recitation as to him is "blatantly contradicted" by the summary-judgment record on two grounds. Aplts.' Opening Br. at 22-24; *accord* Aplts.' Reply Br. at 4-7, 28. First, he claims that, contrary to the district court's reading of the record, Mr. Maguire actually "d[id] not allege that Sgt. Miller was the officer who performed the [night] rounds." Aplts.' Reply Br. at 4 (quoting the record). Second, he submits that the evidence the district court used to buttress its "version of events neither mentions nor identifies Miller as an officer who performed the hourly counts." *Id.* at 5; *accord* Aplts.' Opening Br. at 23-24. Our review of the evidence, however, reveals no blatant contradiction of the district court's assessment regarding these matters.

Tracing a factual narrative in Mr. Maguire's favor, the district court stated that, "prison guards – including, according to Maguire, defendant Miller – passed by Maguire's cell to perform hourly counts" following the "man down" incident, and explained that Mr. Maguire pleaded with prison guards "[d]uring each of these counts . . . to summon the EMTs because he was experiencing twitching and cramping throughout the left side of his body." Aplts.' App., Vol. IV, at 446-447. Based on this version of events, the district court found "sufficient evidence . . . for a reasonable jury to conclude [that] Miller personally performed at least one of the nightly counts and . . . had actual knowledge" of

Mr. Maguire's various requests for medical assistance. *Id*. at 461. In reaching this conclusion, the district court noted that Mr. Maguire did not point "to this evidence in his briefing," and instead took the "*litigation position* that Miller [could] be liable even if he did not personally perform the [hourly] counts." *Id*. at 461 n.10 (emphasis added). Nevertheless, the district court emphasized that it must "consider the record evidence" at the summary-judgment phase, and need not constrain its inquiry to Mr. Maguire's "legal arguments." *Id*.

The essential thrust of Mr. Miller's first challenge relates to the district court's failure to take into account that Mr. Maguire did not contest a purported statement of undisputed fact relating to Mr. Miller's lack of participation in the hourly counts that Appellants averred in their summary-judgment briefing. However, in acknowledging a certain group of factual statements in Appellants' briefing to be "undisputed," Mr. Maguire did not explicitly address Appellants' statement regarding Mr. Miller's lack of participation in the counts. Aplts.' App., Vol. III, at 243 (Pl.'s Mem. in Opp'n to Defs.' Mot. for Summ. J, filed May 15, 2015). As such, Mr. Maguire's response hardly resembles the sort of intentional factual stipulation – or admission – that our precedent prohibits district courts from disregarding. *See Stubblefield v. Johnson-Fagg, Inc.*, 379 F.2d 270, 272 (10th Cir. 1967) (explaining that the "trial court may not disregard facts stipulated to by the parties or require evidence to support them" (quoting *United States v. Sommers*, 351 F.2d 354, 357 (10th Cir. 1965))). Perhaps more importantly, Mr. Maguire's

substantive summary-judgment arguments squarely presented his *factual* position that Mr. Miller did indeed perform the hourly counts. *See* Aplts.' App., Vol. III, at 262 (arguing that Mr. Miller either "failed to follow up on Mr. Maguire's condition by avoiding checking in on [him] or he *did* check in but failed to obtain help when requested"); *see also* Aplee.'s App., at 51 (Tr. of Hr'g on Mot. Summ J., dated Oct. 22, 2015) (arguing that the evidence impliedly creates an inference that Mr. Miller performed hourly counts).

Aside from all that, the district court clearly had the discretion, in any event, to inquire into the factual record in areas that the parties left underdeveloped. *See* FED. R. CIV. P. 56(c)(3) ("The court need only consider the cited materials, *but may consider other materials in the record*." (emphasis added)); *Green v. Northport*, 599 F. App'x 894, 895 (11th Cir. 2015) (unpublished) ("The district court could consider the record as a whole to determine the undisputed facts on summary judgment."); *Ayazi v. United Fed'n of Teachers Local 2*, 487 F. App'x 680, 681 (2d Cir. 2012) (unpublished) ("[W]hen assessing a summary judgment motion, a District Court 'may consider other materials in the record.' Thus, there was no error in the magistrate judge considering and relying on evidence not specifically cited by the [summary-judgment movant]. . . .") (quoting FED. R. CIV. P. 56(c)(3)).

Turning then to Mr. Miller's second challenge, he essentially posits that the district court mischaracterized record evidence in concluding that a "reasonable jury [could] conclude [that] Miller personally

performed at least one of the nightly counts." Aplts.' App., Vol. IV, at 461. On this point, the district court explained that,

> [i]n Maguire's sworn affidavit, he stated that "Officer 5," responded to the "man down" call and helped the EMTs place Maguire's mattress on the floor. The record shows, and Miller concedes, that he was one of the officers who responded to Maguire's cell during the "man down" call. Maguire's affidavit further states that the EMTs instructed him to *alert* "*Officer 5*" if he had any other problems throughout the night. Maguire later clarified that *Miller was the officer whom the EMTs indicated he should alert if he had any further problems during the night.* Therefore, a reasonable jury could infer that "Officer 5" in Maguire's affidavit refers to Miller. And importantly, Maguire stated in his affidavit that during "[e]very hourly count, *at some of which Maguire recognized Officer 5*[,] Maguire asked the counting officer to please call medical."

Id. at 461-62 (first and second emphases added) (citations omitted). With these facts in mind, the district court concluded that "a reasonable jury could infer" that Mr. Miller performed "some of the hourly counts and heard Maguire's pleas for help." *Id*. at 462.

In challenging these factual observations and inferences, Mr. Miller claims only that "the deposition testimony cited by the district court" makes no mention of Mr. Miller, and identifies by name instead *only* (non-party) Officer Mau. Aplts.' Opening Br. at 23-24;

accord Aplts.' Reply Br. at 4-5. Mr. Miller's position, however, brushes aside the fact that, in his affidavit, Mr. Maguire specifically averred that he "recognized Officer 5" as *one* of the officers who performed "*some*" of the hourly counts. Aplts.' App., Vol. IV, at 332 (Aff. of Brian Maguire, dated Aug. 23, 2010). And it is undisputed that Mr. Miller is the only prison guard who responded to the "man down" call. *Compare id.* at 331 (explaining that, during the "man down" incident, "Officer 5 moved the mattress to the floor and put Maguire on [the] mattress"), *and* Aplee.'s Br. at xi (stating that "three" individuals responded to the "man down" call: Mr. Miller, and EMTs Jensen and MacFarlane), *with* Aplts.' App., Vol. II, at 194 (recounting, as part of Appellants' summary-judgment submissions, Mr. Miller's role during the "man down" call); Aplts.' Opening Br. at 9 ("Miller responded to the man down call and called for medical assistance").

As we see it, the underlying evidence created the reasonable inference that Mr. Miller responded to the "man down" call *and* performed *some* of the hourly counts that evening. The fact that Mr. Maguire singled out Officer Mau in his deposition with respect to one of the many counts – that is, the 8:30 AM hourly count – does not undercut the reasonableness of this inference, especially given the equivocal, tentative nature of Mr. Maguire's identification of Officer Mau. *See* Aplts.' App., Vol. IV, at 378 (Dep. of Brian Maguire, dated Jan. 15, 2015) ("At the 8:30 count when the count come [sic] through, the officer that counted, and I'm not sure, I'm not sure who that was, but I think it might have been

Mau, officer Mau. Maybe, I'm not positive about that. But anyway, he told me that I needed to stand up for count and I told him 'I can't stand up, I can't even sit up. I can't get up to do it.'").

Based on this evidence, the district court drew reasonable and supported inferences in Mr. Maguire's favor, and "we must accept 'as true' the district court's determination 'that a reasonable jury could find certain specified facts in favor of the plaintiff.'" *Pahls v. Thomas*, 718 F.3d 1210, 1217 (10th Cir. 2013) (quoting *Lewis*, 604 F.3d at 1225). In short, the district court's findings regarding Mr. Miller's participation in at least *some* of the hourly counts is not blatantly contradicted by the record. Indeed, even if we were to conclude that the evidence that Mr. Miller relies on demonstrates some contradiction with the district court's relevant factual recitation, that would not permit Mr. Miller to carry his burden of demonstrating that this recitation is a "visible fiction."[7] *Lynch*, 703 F.3d at 1160 n.2

[7] Nor do we find this case to be analogous to the Supreme Court's *Scott* decision – which is the subject of the parties' dueling contentions. There, the "videotape quite clearly contradict[ed] the version of the story told by [the plaintiff] and adopted by the [court]." 550 U.S. at 378-80 (describing the video as "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury," while the plaintiff's version of events stated that the car chase involved "little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [the plaintiff] remained in control of [the] vehicle") (quoting *Harris v. Coweta Cty., Ga.*, 433 F.3d 807, 815 (11th Cir. 2005)). Here, the underlying record supports the version of events proffered by Mr. Maguire and adopted by the district court, as explicated *supra*.

(quoting *Scott*, 550 U.S. at 380-81). Therefore, we lack jurisdiction over Mr. Miller's interlocutory appeal because it "would [impermissibly] require second-guessing the district court's determinations of evidence sufficiency." *Henderson*, 813 F.3d at 949-50 (quoting *Medina*, 252 F.3d at 1130) (dismissing an interlocutory appeal for lack of jurisdiction, because the record did not blatantly contradict the district court's factual determinations).

For these reasons, we **DISMISS** Mr. Miller's appeal for lack of appellate jurisdiction.

III

Turning to the merits, we address the substantive assertions of the qualified-immunity defense of Mr. Abbott, and EMTs Jensen and MacFarlane.

A

"The defense of qualified immunity 'protects governmental officials from liability for civil damages insofar as their own conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."'" *A.M. v. Holmes*, 830 F.3d 1123, 1134 (10th Cir. 2016) (quoting *Weise v. Casper*, 593 F.3d 1163, 1166 (10th Cir. 2010)). Qualified immunity "not only protects public employees from liability, [but] also protects them from the burdens of litigation." *Id.* (alteration in original) (quoting

Allstate Sweeping, LLC v. Black, 706 F.3d 1261, 1266 (10th Cir. 2013)).

"We review the denial of a summary judgment motion raising qualified immunity questions de novo." *Medina*, 252 F.3d at 1128; *accord Apodaca v. Raemisch*, 864 F.3d 1071, 1076 (10th Cir. 2017). When a defendant raises the qualified-immunity defense, the plaintiff bears the burden of demonstrating "(1) that the official violated a statutory or constitutional right, *and* (2) that the right was 'clearly established' at the time of the challenged conduct." *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015) (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 735 (2011)). We address the two prongs of qualified immunity in either order; "if the plaintiff fails to establish either prong of the two-pronged qualified-immunity standard, the defendant prevails on the defense." *Id.*; *see Medina*, 252 F.3d at 1128 ("In short, although we will review the evidence in the light most favorable to the nonmoving party, the record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to qualified immunity." (citation omitted)).

B

On appeal, Mr. Abbott challenges only the first prong of the district court's qualified-immunity determination, while EMTs Jensen and MacFarlane raise issues with respect to both aspects of the district court's qualified-immunity assessment. More specifically, Mr. Abbott asserts that Mr. Maguire's allegations

demonstrate *at most* that he committed "an error in medical judgment" rising "no higher than negligence or [inadvertent] misdiagnosis" – *not* the deliberate indifference required for purposes of an Eighth Amendment claim. Aplts.' Opening Br. at 29-37; *accord* Aplts.' Reply Br. at 10-16. Similarly, EMTs Jensen and MacFarlane take the position that their diagnosis and treatment amounted to no more than "negligence" or "gross negligence"; they also submit that no clearly established law revealed that their actions rose to the level of a constitutional deprivation. Aplts.' Opening Br. at 38-51; *accord* Aplts.' Reply Br. at 16-28.

Mr. Maguire argues, by contrast, that the relevant record demonstrates deliberate indifference on the part of Mr. Abbott, because he dismissed "Mr. Maguire's obvious signs of a stroke as mere muscle spasms," by ignoring plainly-presented symptoms and, generally, provided "patently unreasonable" treatment. Aplee.'s Br. at 18-21. Relatedly, Mr. Maguire takes the view that the "evidence establishing Jensen and Mac[F]arlane's deliberate indifference *abounds*," *id.* at 22, because in the face of a purported seizure, EMTs Jensen and MacFarlane simply "put Mr. Maguire onto the floor, closed the door, and left him there" without determining the cause of the purported "seizure," *id.* at 23, and without referring him "to desperately-needed medical care," *id*. at 25.

We elect to focus solely on the first prong of the qualified-immunity standard – that is, on whether Mr. Maguire has demonstrated that Mr. Abbott and EMTs Jensen and MacFarlane violated his constitutional

rights, specifically, his Eighth Amendment rights. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."). We conclude that Mr. Maguire has not carried his summary-judgment burden as to any of these officials. Consequently, we reverse the district court's denial of summary judgment to Mr. Abbott, and EMTs Jensen and MacFarlane, and remand with instructions to enter judgment in their favor. *See, e.g.*, *Cortez v. McCauley*, 478 F.3d 1108, 1129 (10th Cir. 2007) (en banc) ("Even taking Plaintiffs' allegations as true and viewing the evidence in the light most favorable to Plaintiffs, Plaintiffs have not established that Defendants' use of force against Rick Cortez violated his Fourth and Fourteenth Amendment right to be free from the use of excessive force. In other words, the Defendants are entitled to qualified immunity on Rick Cortez's excessive force claim because no constitutional violation occurred."); *Clark v. Bowcutt*, 675 F. App'x 799, 805 (10th Cir. 2017) (unpublished) ("We elect to focus on the first prong – *viz.*, whether the defendant committed a constitutional violation – and it proves dispositive.").

C

1

The Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amendment, prohibits deliberate indifference to an inmate's serious medical needs, *see Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Mitchell v. Maynard*, 80 F.3d 1433, 1440 (10th Cir. 1996), and "involves both an objective and a subjective component." *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005) (quoting *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000)). In this case, Mr. Abbott and EMTs Jensen and MacFarlane concede that the objective component is satisfied, and so we turn our attention directly to the subjective aspect of the deliberate-indifference standard. *See* Aplts.' Opening Br. at 28 ("Defendants conceded below that the objective prong is satisfied.").

In order to satisfy the subjective prong, the prison official must have a sufficiently culpable state of mind – meaning that the plaintiff must establish that the prison official "kn[e]w of and disregard[ed] an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *see also Mata*, 427 F.3d at 751 (citing *Farmer* for the same premise). Stated another way, the subjective component requires proof that a defendant official was both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" *and* that the official actually "dr[ew] the inference." *Farmer*, 511 U.S. at 837. Accordingly, "allegations of 'inadvertent failure to provide

adequate medical care' or of a 'negligent . . . diagnos[is]' simply fail to establish the requisite culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 299 (1991) (citation omitted); *accord Duffield v. Jackson*, 545 F.3d 1234, 1238 (10th Cir. 2008) (explaining that a medical provider's "negligent diagnosis or treatment of a medical condition do[es] not constitute a medical wrong under the Eighth Amendment" (alteration in original) (quoting *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980))). Similarly, "[a] prison medical professional who serves 'solely . . . as a gatekeeper for other medical personnel capable of treating the condition' may be held liable under the deliberate indifference standard [only] if [the professional] 'delays or refuses to fulfill that gatekeeper role.'" *Mata*, 427 F.3d at 751 (quoting *Sealock*, 218 F.3d at 1211).

Nevertheless, "[d]eliberate indifference does not require a finding of express intent to harm," *Mitchell v. Maynard*, 80 F.3d 1433, 1442 (10th Cir. 1996), nor must a plaintiff "show that a prison official acted or failed to act believing that harm actually would befall an inmate," *Mata*, 427 F.3d at 752 (quoting *Farmer*, 511 U.S. at 842). Rather, the plaintiff must show that "the official acted or failed to act *despite his knowledge of a substantial risk* of serious harm." *Id*. (quoting *Farmer*, 511 U.S. at 842). Thus, "[a]n official 'would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist.'" *Id*. (quoting *Farmer*, 511 U.S. at 843 n.8).

2

Applying the foregoing principles here, we conclude that Mr. Maguire's allegations fail to demonstrate that Mr. Abbott acted with deliberate indifference to Mr. Maguire's serious medical needs. Rather, Mr. Maguire's version of events demonstrates, *at most*, that Mr. Abbott exercised reasonable medical judgment, but ultimately misdiagnosed Mr. Maguire's condition.

Specifically, Mr. Maguire expressed problems controlling the left side of his body (including his left arm and hand), and the prison guard that escorted Mr. Maguire for treatment informed Mr. Abbott that Mr. Maguire appeared to be dragging his left leg. Based on that information, Mr. Abbott proceeded to massage the upper portion of Mr. Maguire's body, and immediately noticed "a prominent spasm in [his] left trapezius muscle." Aplts.' App., Vol. IV, at 446. Mr. Abbott consequently applied pressure to the associated trigger point, and Mr. Maguire reported "some immediate relief." *Id*. Given the palliative effect of the targeted massaging, Mr. Abbott determined – as a matter of medical judgment – that Mr. Maguire's symptoms related to a muscle spasm, and he prescribed a muscle relaxant and physical therapy for Mr. Maguire. *See id*.

Citing *Oxendine v. Kaplan*, 241 F.3d 1272 (10th Cir. 2001), *Blackmon v. Sutton*, 734 F.3d 1237 (10th Cir. 2013), and *Estate of Booker v. Gomez*, 745 F.3d 405 (10th Cir. 2014), Mr. Maguire, however, advances the view – as did the district court – that Mr. Abbott

consciously disregarded his serious medical needs, by approaching "an obvious risk with patently unreasonable treatment." Aplee's Br. at 16. But we see things differently: Mr. Abbott's reasoned diagnosis and treatment hardly resembles the obviously unreasonable treatment scenarios that were sufficient to satisfy the subjective inquiry in *Oxendine*, *Blackmon*, and *Gomez*.

In *Oxendine*, for example, the prison doctor repaired a severed finger but failed to diagnose the onset of gangrene. *See* 241 F.3d at 1277-78. In finding the allegations sufficient to satisfy the subjective component of the deliberate-indifference inquiry (on a dismissal motion), we emphasized (1) that the inmate repeatedly claimed to be suffering considerable pain and informed the doctor that "his finger 'had turned jet black' " and that the reattached portion of his finger had begun to fall off; and (2) that the doctor himself recognized and noted the "necrosis" on the reattached finger, but took *no* action. *Id*. at 1278-79. Given the patent seriousness of the plaintiff's injury – upon visual inspection – which the plaintiff repeatedly validated by his complaints of pain, we reasoned that the situation involved more than a "mere disagreement between the parties" regarding the proper course of medical treatment, *id*. at 1277 n.7, and concluded that the allegations stated a claim for deliberate indifference to serious medical needs, *id*. at 1279. Put another way, we effectively concluded that under these circumstances a reasonable jury could find that the doctor was both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" *and* that the

doctor actually "dr[ew] the inference." *Farmer*, 511 U.S. at 837.

Similarly, in *Blackmon*, an eleven-year-old child at a juvenile detention facility exhibited mental health issues, and the mental health unit supervisor and a counselor *knew* of his "obvious" mental health issues, *knew* that his incarceration exacerbated those problems, and *knew* that their response to his mental health issues – strapping him in a restraint chair – offered no help. 734 F.3d at 1244-45. Nevertheless, the officials denied him, or caused delay in his receipt of, access to mental health treatment, despite his *known* and "serious suicidal and self-harm problems." *Id*. at 1245. In light of these striking circumstances, we determined that the record was sufficient "to suggest conscious disregard of a substantial risk of serious harm," because the officials "failed to provide him with access to obviously needed medical care for what was clearly a life-threatening condition." *Id*. at 1245-46.

Finally, in *Gomez*, officers put an arrestee in a "carotid restraint" – a technique that "compresses the carotid arteries and the supply of oxygenated blood to the brain" and renders "a person unconscious within 10-20 seconds." 745 F.3d at 413. The officers' training materials warned that "*[b]rain damage or death could occur*" if used "*for more than one minute*." *Id*. (alteration in original). Nevertheless, officers applied the technique to a prisoner for nearly three minutes and then turned to other "pain compliance technique[s]," all while the prisoner remained "motionless on the floor." *Id*. at 413-15. The officers then carried his "limp and

unconscious" body to a holding cell, *id*. at 431, and "placed him face down on the cell floor" without checking his vital signs or attempting to determine whether he needed medical attention, *id.* at 415. When the nurse finally arrived – approximately five minutes after the officers' use of force – attempts to resuscitate the prisoner proved unsuccessful, and an autopsy reported the cause of death as "cardiorespiratory arrest during physical restraint." *Id*. at 416.

In affirming the denial of qualified immunity, we reasoned in *Gomez* that the officers "had a front-row seat to [the prisoner's] rapid deterioration" and knew the "substantial risk" their pain-compliance techniques posed to the prisoner's "health and safety," yet delayed for what – under the particular circumstances there – amounted to a substantial amount of time before providing him with obviously necessary medical attention. *Id*. at 431-33. Accordingly, we concluded that the factfinder could "conclude that [the officers] subjectively knew of the substantial risk of harm by circumstantial evidence" or by the obviousness of the risk. *Id*. at 433 (quoting *Martinez v. Beggs*, 563 F.3d 1082, 1089 (10th Cir. 2009)).

In each of these cases – *Oxendine*, *Blackmon*, and *Gomez* – we concluded that a reasonable jury could find that the defendant official possessed a culpable state of mind primarily because the "facts from which the inference could be drawn that a substantial risk of serious harm exists," *Farmer*, 511 U.S. at 837, were remarkably obvious and the defendant had, in the words of *Gomez*, a "front-row seat" to observe them, 745 F.3d

at 431. While Mr. Abbott did directly interact with Mr. Maguire, the circumstances here are otherwise markedly different.

Though the parties do not dispute that Mr. Maguire had a "sufficiently serious" medical need, *Farmer*, 511 U.S. at 834 (i.e., the objective component of the deliberate-indifference standard), the facts from which Mr. Abbott could have inferred the existence of that medical need – and, consequently, known the "substantial risk" that "serious harm" would befall Mr. Maguire, if that need were not addressed, *id.* at 837 – were not obvious, when viewed through the prism of *Oxendine*, *Blackmon*, and *Gomez*. Notably, Mr. Maguire visually presented to Mr. Abbott in part with a prominent spasm in his left trapezius muscle. Rather than his condition continuing to decline before Mr. Abbott's eyes – *see Oxendine*, 241 F.3d at 1278 (noting that the inmate repeatedly claimed to be suffering considerable pain and informed the doctor that the reattached portion of his finger had begun to fall off); *Gomez*, 745 F.3d at 431 (noting that officers "had a front-row seat to [the plaintiff's] rapid deterioration"); *Blackmon*, 734 F.3d at 1245 (observing that the defendants "were aware those [mental health] problems [of the plaintiff] grew worse during his stay") – Mr. Maguire experienced immediate relief from Mr. Abbott's physical application of pressure to the associated trigger point. Given this positive clinical response, Mr. Abbott reasoned that muscle spasms were the root cause of Mr. Maguire's concerns regarding mobility on the left side of his body. And, unlike the defendants in *Oxendine*, *Blackmon*,

and *Gomez*, Mr. Abbott did not ignore the medical need that he perceived; rather, he affirmatively acted to address it by prescribing a muscle relaxant and physical therapy.

To be sure, in light of Mr. Maguire's subsequent stroke, a plausible argument could be made that Mr. Abbott's conclusion that Mr. Maguire suffered from muscle spasms was off-base; in other words, that he misdiagnosed Mr. Maguire. But the fact that Mr. Abbott's reasoning may have amounted to negligence is immaterial for purposes of the subjective component of the deliberate-indifference standard. *See, e.g.*, *Estelle*, 429 U.S. at 106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); *Self v. Crum*, 439 F.3d 1227, 1234 (10th Cir. 2006) ("[M]isdiagnosis, even if rising to the level of medical malpractice, is simply insufficient under our case law to satisfy the subjective component of a deliberate indifference claim."); *see also Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003) ("Even if the conclusion [the prison official] drew from his investigation was erroneous or negligent, it does not rise to the level of an Eighth Amendment violation based on deliberate indifference. Deliberate indifference requires more than a showing of simple or heightened negligence."); *Shannon v. Graves*, 257 F.3d 1164, 1168 (10th Cir. 2001) (rejecting the plaintiff's subjective-component argument

by noting that her "complaints suggest negligence – not a wanton and obdurate disregard for inmate health and safety").

More specifically, our caselaw firmly establishes that a doctor's exercise of "considered medical judgment" fails to fulfill the subjective component, "absent an *extraordinary* degree of neglect" – *viz.*, where a prison physician "responds to an obvious risk" with "patently unreasonable" treatment. *Self*, 439 F.3d at 1232 (emphasis added). "[I]n the circumstances of a missed diagnosis or delayed referral," we have only found a sufficiently extraordinary degree of neglect under three circumstances: *first*, where a doctor "recognizes an inability to treat the patient due to the seriousness of the condition and his corresponding lack of expertise" but refuses or unnecessarily delays a referral; *second*, where a doctor *fails* to treat a medical condition "so obvious that even a layman would recognize the condition"; and *finally*, where a doctor entirely denies care "although presented with recognizable symptoms which potentially create a medical emergency." *Id.*

Mr. Maguire's argument is essentially predicated on the second circumstance. He contends that the partial loss of motor control constitutes an "obvious sign [] of a stroke." Aplee.'s Br. at 18. Importantly, however, Mr. Maguire mounts no attack on the notion that the loss of motor control also may be suggestive of a muscle spasm, nor does he dispute that Mr. Abbott's pressure-point treatment provided him with immediate relief. Rather, Mr. Maguire advances the view that Mr. Abbott

should have recognized his symptoms as being *more consistent* with a stroke, and submits that his failure to do so constitutes deliberate indifference. We are not persuaded.

We limit our subjective inquiry "to consideration of the [medical professional's] knowledge at the time he prescribed treatment for the symptoms presented, *not to the ultimate treatment necessary*," *Self*, 439 F.3d at 1233, and the fact that Mr. Maguire's symptoms could have *also* pointed to other, more serious conditions fails "to create an inference of deliberate indifference" on Mr. Abbott's part, *id.* at 1235. *See also Farmer*, 511 U.S. at 838 (noting that an "official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment"); *Self*, 439 F.3d at 1234 ("Where a doctor faces symptoms that could suggest either indigestion or stomach cancer, and the doctor mistakenly treats indigestion, the doctor's culpable state of mind is not established even if the doctor's medical judgment may have been objectively unreasonable."). Indeed, where the medical professional "provides a level of care *consistent* with the symptoms presented by the inmate, absent evidence of *actual knowledge or recklessness*, the requisite state of mind cannot be met." *Self*, 439 F.3d at 1233 (emphases added). In this case, Mr. Maguire has presented no evidence of actual knowledge or recklessness, and the "negligent failure to provide adequate medical care, even one constituting medical malpractice, does not give rise to a

constitutional violation." *Id*. (quoting *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999)).

In sum, we do not believe that a reasonable fact-finder could infer that Mr. Abbott possessed the requisite culpable state of mind to satisfy the deliberate-indifference standard, even if he misdiagnosed Mr. Maguire's condition. Mr. Maguire was required to present evidence – not conjecture or speculation – that Mr. Abbott displayed a "conscious disregard of a substantial risk of serious harm arising from [his] symptoms." *Id.* at 1233. This he has not done.[8] *See id.* at 1235

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[8] Mr. Maguire argues that Mr. Abbott "completely ignored symptoms Mr. Maguire exhibited," because his "simple-spasm" diagnosis explained only the issues Mr. Maguire experienced in his left arm, and not any issue with his left leg. Aplee.'s Br. at 19-20. In making that argument, however, Mr. Maguire points to no actual evidence that Mr. Abbott consciously disregarded any symptom *at the time of the examination*, and instead simply speculates, without support, that Mr. Abbott's alleged misdiagnosis leads to the ineluctable conclusion that he *consciously disregarded* Mr. Maguire's complaints concerning his left leg. To the contrary, the record evidence reflects that Mr. Abbott reviewed Mr. Maguire's symptoms, conducted an examination, and prescribed a course of treatment based upon Mr. Maguire's favorable response to targeted massage treatment. Accordingly, we find that Mr. Maguire's argument misses the mark.

Relatedly, Mr. Maguire argues that, based on "Abbott's knowledge of Mr. Maguire's age," a "reasonable jury could presume that Mr. Abbott knew of Mr. Maguire's serious medical need" and responded to it in a "deliberately indifferent manner." Aplee.'s Br. at 20. Mr. Maguire, however, never raised this argument before the district court, and he has not argued for plain error on appeal; therefore, the argument is effectively waived. *See, e.g.*, *Richison v. Ernest Grp. Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) ("[T]he failure to argue for plain error and its application on appeal – surely

(finding the evidence of the subjective component wanting where a doctor treated the plaintiff for a respiratory condition (a misdiagnosis), when his symptoms also suggested a heart condition called endocarditis (his actual condition)); *see also Sealock*, 218 F.3d at 1208-12 (finding the subjective component not met where a prison nurse misdiagnosed an inmate's chest pains, because the facts indicated "at most" negligent diagnosis or treatment); *Heidtke v. Corr. Corp. of Am.*, 489 F. App'x 275, 282-85 (10th Cir. 2012) (unpublished) (citing *Self*, and finding that a medical professional's misdiagnosis did not evidence deliberate indifference, because the medical professional took measures to address the symptoms he perceived).

For the foregoing reasons, we reverse the district court's denial of qualified immunity to Mr. Abbott on Mr. Maguire's Eighth Amendment deliberate-indifference claim and remand with instructions to enter summary judgment in favor of Mr. Abbott.

3

With respect to EMTs Jensen and MacFarlane, we similarly conclude that Mr. Maguire has failed to establish the subjective component of the deliberate-indifference standard. Based on our review of the summary-judgment record, and guided by the legal standards explicated *supra*, we can conclude that

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marks the end of the road for an argument for reversal not first presented to the district court.").

EMTs Jensen and MacFarlane exercised considered medical judgment in determining that Mr. Maguire had experienced a minor seizure, and, relatedly, we cannot discern any significant ground for the contrary view that they "consciously disregarded a substantial risk of harm" to Mr. Maguire. *Self*, 439 F.3d at 1235. Accordingly, Mr. Maguire's Eighth Amendment deliberate-indifference claim against EMTs Jensen and MacFarlane also must fail.

Like the plaintiff in *Self*, Mr. Maguire "cannot argue he was denied medical treatment. He was not." *Id.* at 1234. Recall that EMTs Jensen and MacFarlane responded to the "man down" call for emergency medical assistance, witnessed Mr. Maguire convulsing, checked his vital signs, and assessed his overall condition. Aplts.' App., Vol. IV, at 446. Considering his symptoms, and the fact that he remained lucid and communicative throughout their assessment, they determined that Mr. Maguire had experienced a seizure.[9] Although Mr. Maguire quarreled with that diagnosis, Mr. Maguire demonstrated no symptoms suggesting that he needed immediate or emergency medical treatment.

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[9] In their appellate briefing, EMTs Jensen and MacFarlane argue that Mr. Maguire suffered a "simple partial seizure," and urge us to take judicial notice of their asserted definition of the technical medical term "simple partial seizure." Aplts.' Reply Br. at 18 n. 4; *see also id*. at 18-19 (defining a "simple partial seizure" as "localized motor symptoms on one side of the body (muscle jerks, isolated twitching, and tingling, numbness, or weakness of arm or leg)"). Nevertheless, because we conclude that Mr. Maguire's allegations fail to demonstrate deliberate indifference (regardless of the precise definition of "seizure"), we decline their invitation.

Accordingly, EMTs Jensen and MacFarlane left Mr. Maguire's cell after moving his mattress to the floor for safety, instructing him to contact the guards if his condition changed. Even with the benefit of all favorable inferences, these facts fail to rise to the level of deliberate indifference.

Mr. Maguire's two arguments to the contrary are unavailing. First, he argues that EMTs Jensen and MacFarlane effectively denied him medical care or, at a minimum, provided him with woefully inadequate medical care under the circumstances. Even Mr. Maguire's version of events, however, demonstrates the opposite. As noted, EMTs Jensen and MacFarlane evaluated Mr. Maguire's symptoms and determined, as a matter of medical judgment, that he suffered a seizure.[10] Under the circumstances, that diagnosis presented no obvious risk of immediate danger, particularly given Mr. Maguire's ongoing coherence throughout their assessment. Nevertheless, EMTs Jensen and MacFarlane specifically advised Mr. Maguire to notify the guards if he experienced any additional issues. Accordingly, they provided *actual* medical treatment to a conscious and lucid individual who displayed symptoms they recognized as reflective of a

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[10] Although Mr. Maguire disputed the diagnosis, "a prisoner who merely disagrees with a diagnosis or a prescribed course of treatment *does not* state a constitutional violation." *Perkins*, 165 F.3d at 811 (emphasis added); *accord Ramos*, 639 F.2d at 575 ("[A] mere difference of opinion between the prison's medical staff and the inmate as to the diagnosis or treatment which the inmate receives does not support a claim of cruel and unusual punishment.").

seizure. This conduct is easily distinguishable from circumstances involving a medical professional's complete denial of obviously necessary medical care or provision of patently unreasonable medical treatment – which *Self* tells us militate in favor of a finding of deliberate indifference. *See Self*, 439 F.3d at 1232-33; *cf. Blackmon*, 734 F.3d at 1244 (finding that prison mental health professionals were not entitled to summary judgment on qualified-immunity grounds where they failed to provide a pretrial detainee with "any meaningful mental health care, despite his obvious need for it"). Even assuming *arguendo* the diagnosis of EMTs Jensen and MacFarlane under the circumstances then before them (rather than as later developed) was wrong, it is beyond peradventure that "a misdiagnosis, even if rising to the level of medical malpractice, is simply insufficient under our case law to satisfy the subjective component of a deliberate indifference claim." *Self*, 439 F.3d at 1234; *see also Berry v. City of Muskogee, Okla.*, 900 F.2d 1489, 1495 (10th Cir. 1990) (noting that "[d]eliberate indifference" requires "a higher degree of fault than negligence, or even gross negligence").

And, second, Mr. Maguire essentially contends that EMTs Jensen and MacFarlane failed to fulfill their gatekeeper function by improperly denying him access to further medical treatment. *See Sealock*, 218 F.3d at 1211 (explaining that a medical professional may act with deliberate indifference if he serves "as a gatekeeper for other medical personnel capable of treating the condition [] and . . . delays or refuses to

fulfill that gatekeeper role" in the face of an obvious need for additional treatment or referral); *see also Self*, 439 F.3d at 1232 (same). Significantly, gatekeeper liability only attaches "where the need for additional treatment or referral to a medical specialist is obvious." *Self*, 439 F.3d at 1232. Here, again, Mr. Maguire has not demonstrated that his symptoms were inconsistent with an episodic seizure of the kind that EMTs Jensen and MacFarlane diagnosed him as having – which required no additional treatment or referral for further treatment. *Cf. Mata*, 427 F.3d at 755, 758 (finding that a nurse "completely refused to fulfill her duty as [a] gatekeeper" where she observed obvious signs of a medical emergency (e.g., *unexplained* chest pains), but "neither administered first aid nor summoned medical assistance despite [the inmate's] plea for medical attention"). Accordingly, the decision of EMTs Jensen and MacFarlane not to refer Mr. Maguire for an additional medical assessment and treatment fails to meet the "high evidentiary hurdle" for deliberate indifference under a gatekeeper theory. *Self*, 439 F.3d at 1232.

For all of these reasons, we reverse the district court's order denying qualified immunity to EMTs Jensen and MacFarlane, and remand with instructions to enter summary judgment in their favor.

IV

Based on the foregoing, we **DISMISS** Mr. Miller's appeal for lack of appellate jurisdiction, and we

REVERSE the district court's denial of summary judgment on qualified-immunity grounds to Mr. Abbott and EMTs Jensen and MacFarlane, and **REMAND** with instructions to enter judgment in their favor.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

BRIAN E. MAGUIRE, Plaintiff, v. THOMAS E. PATTERSON et al., Defendants.	**MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** (Filed Dec. 15, 2015) Case No. 2:10-cv-00626-CW Judge Clark Waddoups

Plaintiff Brian Maguire suffered a severe stroke while incarcerated at the Utah State Prison. He filed this civil rights action alleging numerous prison officials violated his constitutional rights by acting with deliberate indifference to his serious medical needs. (Dkt. No. 31); (Dkt. No. 61). The defendants have now filed a renewed motion for summary judgment (Dkt. No. 175),[1] and the court heard oral argument on that

[1] Some of the defendants previously filed a motion for summary judgment. (Dkt. No. 108). The court denied that motion, but allowed the defendants to file a renewed motion once all of the defendants had been served and a *Martinez* report had been filed. (Dkt. No. 141).

motion. After carefully considering the parties' briefs and oral arguments, the court now GRANTS in part and DENIES in part the defendants' renewed motion for summary judgment.

BACKGROUND[2]

Maguire's medical treatment at the prison began on July 3, 2008 when Chris Abbott, a physician's assistant, performed an intake examination to determine Maguire's general physical condition. (Dkt. No. 185-1, p. 4).[3] At that time, Maguire informed Abbott he was on a methadone treatment program for his history of opiate addiction. (*Id.*). Because methadone is a highly abused narcotic that can present safety concerns to inmates when prescribed to them, Abbott told Maguire that methadone is only prescribed to pregnant women and others in very limited circumstances. (*See* Dkt. No. 180-1, p. 51); (Dkt. No. 185-1, p. 4). Nevertheless, Maguire requested he be placed on a methadone-tapering regimen. (Dkt. No. 185-1, p. 4). Abbott called his supervisor, Dr. Richard Garden, who confirmed Maguire should not be given methadone. (*Id.*). Maguire alleges that during this conversation, Garden told Abbott that

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[2] The court recites the facts of this case – including those facts that are genuinely in dispute – in the light most favorable to Maguire. *See Macon v. United Parcel Service, Inc.*, 743 F.3d 708, 712 (10th Cir. 2014) (at the summary judgment stage, the court must "view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party").

[3] There are numerous page numbers found on each of the docket files. The court uses the page numbers that correspond to the docketed filing.

even though the methadone withdrawals may make Maguire wish he were dead, they would not actually kill him. (*Id.*). Abbott then prescribed Maguire the drug clonidine to reduce the effects of the withdrawals. (Dkt. No. 180-1, p. 51).

Maguire began experiencing psychotic episodes related to the methadone withdrawals. (*Id.*). Consequently, he spent the next week in and out of the prison infirmary. (*Id.*, pp. 51-52). During this period, Maguire alleges prison officials found him on the floor of the observation cell with extremely low blood pressure, apparently due to severe dehydration. (Dkt. No. 185-1, p. 7). Prison nurse Steven Mecham and his supervisor administered an IV, which successfully revived Maguire. (*Id.*). Rather than send him to a hospital, they released Maguire back into the infirmary observation cell. (*Id.*). The next morning, July 14, 2008, a prison physician examined Maguire, who reported that he felt "pretty much okay." (*Id.*, p. 38); (Dkt. No. 81-1, 711). Prison officials released Maguire to his regular holding cell that same day. (*Id.*, p. 7).[4]

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[4] Maguire's opposition to summary judgment contends he was released into general population immediately after the IV incident. But this representation is contradicted by Maguire's medical records and deposition testimony, which reflect that he was in observation during this period and only released into general population after he confirmed to the prison doctor that he was feeling "pretty much okay." (Dkt. No. 81-1, p. 711; 185-1, p. 7). Although the court must view the facts in the light most favorable to Maguire, the court cannot accept allegations that are unsupported and contradicted by record evidence. *See James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

On July 15, 2008, Maguire noticed he was having trouble controlling his left arm. (*Id.*). He filled out an emergency healthcare request form, which read, "my left arm and hand are losing their use and I [am] very worried and suffering mentally and physically." (Dkt. No. 180-1, p. 52). Abbott saw Maguire later that afternoon. (*Id.*). When Maguire arrived at the appointment, the prison guard who accompanied him informed Abbott that Maguire appeared to be dragging his left leg. (Dkt. 180-1, p. 62). Additionally, Maguire told Abbott that he was having difficulty controlling the left side of his body, including his left arm and extremities. (Dkt. No. 185-1, p. 8). Abbott began to treat Maguire by massaging his upper body. While doing so, Abbott noticed a prominent spasm in Maguire's left trapezius muscle and applied pressure on the associated trigger point. (*Id.*). Maguire reported this provided him some immediate relief. (Dkt. No. 180-1, p. 52). Abbott diagnosed Maguire with a muscle spasm and prescribed a muscle relaxant and physical therapy. (*Id.*, pp. 52-53).

That night, Maguire's left arm began seizing and his left leg became completely numb. (Dkt. No. 185-1, p. 8). He began convulsing and called for the other inmates to yell "man down" so prison guards and medical personnel would respond to his cell. (*Id.*, pp. 8-9). Prison Sergeant Jerry Miller and emergency medical technicians (EMTs) Craig Jensen and Rodger MacFarlane responded to the man down call and witnessed Maguire convulsing. (Dkt. No. 103-3, pp. 1-2). The three men helped Maguire to the cell floor. Jensen and MacFarlane checked his vital signs and informed

Maguire he was having a seizure. (Dkt. No. 185-1, p. 9); (Dkt. No. 180-1, p. 76); (Dkt. No. 180, p. 36). Maguire responded that he did not believe he was having a seizure because he had never had a seizure before and was lucid throughout the event. Maguire explained that he had been around people having seizures and when they had seizures, they blacked out, which he did not. Nevertheless, Jensen and MacFarlane told him there was nothing else they could do except place his mattress on the floor so that he would not fall off his bunk if it happened again. They told Maguire that if he needed any additional help, he should inform the officers, including Sergeant Miller, who would alert the EMTs. (Dkt. No. 180, p. 36); (Dkt. No. 185-1, p. 9).

Throughout that night until early the next morning, prison guards – including, according to Maguire, defendant Miller – passed by Maguire's cell to perform hourly inmate counts. (Dkt. No. 185-1, pp. 9-10). During each of these counts, Maguire claims he pled with the guards to summon the EMTs because he was experiencing continued twitching and cramping throughout the left side of his body. (*Id.*). Maguire's pleas went unanswered and eventually the guards stopped passing by his cell entirely. (*Id.*). Finally, on the morning of July 16, 2008, prison officials found Maguire sitting in his cell, unable to stand up. During the night, Maguire had urinated in his jumpsuit because he was unable to get up off the floor. (*Id.*, pp. 10; 43). Prison officials transferred him to the University of Utah Medical Center, where doctors determined that he had suffered a severe stroke. (*Id.*, p. 11).

Maguire filed this civil rights action against Garden, Abbott, Mecham, Jensen, MacFarlane, and Miller (collectively, Defendants), asserting claims for violations of the Eighth Amendment of the U.S. Constitution and the Unnecessary Rigor Clause of the Utah Constitution. Defendants collectively seek summary judgment, claiming they are entitled to qualified immunity on Maguire's § 1983 claims. They also ask the court to grant summary judgment on Maguire's claims under the Utah Constitution because Maguire has an adequate remedy under federal law. (Dkt. No. 175). The court begins by considering whether Defendants are entitled to qualified immunity on Maguire's § 1983 claims before turning to Maguire's state law claims.[5]

ANALYSIS

A. Qualified Immunity

"Public officials are immune from suit under 42 U.S.C. § 1983 unless they have violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *City & Cty. of S.F. v. Sheehan*, ___ U.S. ___, 135 S. Ct. 1765, 1774 (2015) (internal quotation marks omitted). "When a defendant asserts qualified immunity at the summary judgment stage, the burden shifts to the plaintiff, who must clear two hurdles to defeat the defendant's motion." *Lundstrom v. Romero*, 616 F.3d 1108, 1118 (10th Cir.

[5] Maguire passed away while the case was proceeding in this court and is now represented by the executor of his estate. For clarity's sake, the court refers to Maguire in the present tense.

2010). "The plaintiff must demonstrate, on the facts alleged, that (1) the defendant violated a constitutional right, and (2) the right was clearly established at the time of the alleged unlawful activity." *Id.* The court addresses each of these prongs in turn, applying Maguire's version of the facts. *See Quinn v. Young*, 780 F.3d 998, 1007 (10th Cir. 2015) (recognizing the court has the freedom to decide which of the two prongs to examine first).

1. Constitutional Violation

The constitutional right implicated here is Maguire's right to adequate medical treatment in prison. To state a § 1983 claim for inadequate medical care, Maguire must demonstrate prison officials were deliberately indifferent to his serious medical needs. *See Martinez v. Garden*, 430 F.3d 1302, 1304 (10th Cir. 2005) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). "Deliberate indifference involves both an objective and a subjective component." *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000). The objective inquiry asks whether "the deprivation alleged [is], objectively, sufficiently serious." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted). "A medical need is sufficiently [objectively] serious if it is one that 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." *Sealock*, 218 F.3d at 1209 (internal quotation marks omitted).

The subjective inquiry asks whether the defendant acted with the requisite state of mind, defined as one of "deliberate indifference" to "an excessive risk to inmate health or safety." *Id.* "The deliberate indifference standard lies 'somewhere between the poles of negligence at one end and purpose or knowledge at the other.'" *Mata v. Saiz*, 427 F.3d 745, 752 (10th Cir. 2005) (quoting *Farmer*, 511 U.S. at 836). "The Supreme Court in *Farmer* analogized this standard to criminal recklessness, which makes a person liable when [he] consciously disregards a substantial risk of serious harm." *Id.* Under this standard, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [he] must also draw the inference." *Id.* Whether a defendant was aware of, and consciously disregarded, a substantial risk is a "question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Gonzalez v. Martinez*, 403 F.3d 1179, 1183 (10th Cir. 2005) (emphasis omitted). For instance, "the factfinder may conclude that a prison official knew of a substantial risk *from the very fact that the risk was obvious*." *Estate of Booker v. Gomez*, 745 F.3d 405, 430 (10th Cir. 2014) (emphasis added). Because Defendants concede Maguire has satisfied the objective seriousness prong, the court considers whether any defendant was subjectively deliberately indifferent to Maguire's serious medical needs.

a. Richard Garden

Maguire's claim against Garden stems from Garden's decision not to taper Maguire off methadone. According to Maguire, this decision evidences deliberate indifference to a substantial risk of serious harm because Garden knew the withdrawals would be so painful, they may make Maguire wish he were dead. *See, e.g.*, *Mata*, 427 F.3d at 755 (recognizing extreme pain and suffering can establish a sufficiently serious harm to be cognizable under the Eighth Amendment). The court is not persuaded.

An inmate is not entitled to any particular course of treatment while incarcerated. *See Callahan v. Poppell*, 471 F.3d 1155, 1160 (10th Cir. 2006); *Perkins v. Kan. Dep't of Corrs.*, 165 F.3d 803, 811 (10th Cir. 1999) (stating that "a prisoner who merely disagrees with a diagnosis or a prescribed course of treatment does not state a constitutional violation"). Rather, a prison doctor is "free to exercise his or her independent professional judgment" in assessing the medical treatment necessary. *Callahan*, 471 F.3d at 1160. Accordingly, the Tenth Circuit has held that the decision by jail officials to discontinue an inmate's prescribed methadone does not constitute deliberate indifference where the inmate is given clonidine as a replacement to treat the withdrawal symptoms. *Boyett v. Cty. of Wash.*, 282 F. App'x 667, 674 (10th Cir. 2008).[6]

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[6] Though not binding, the court finds unpublished decisions of the Tenth Circuit persuasive. *See* 10th Cir. R. 32.1(A)

As in *Boyett*, here Garden exercised his medical judgment to determine Maguire should not be placed on a methadone-tapering program. Although methadone may have been Maguire's preferred method of treatment, Garden was entitled to weigh the potential severity of the withdrawals against the risks of prescribing methadone, including the risk of physical abuse from other inmates. Moreover, Maguire was given clonidine to assist with the withdrawal symptoms. Thus, even assuming Maguire's withdrawal pains were sufficiently serious to give rise to a constitutional claim, a reasonable jury could not find that prison officials were deliberately indifferent to that pain. Garden is therefore entitled to summary judgment.

b. Chris Abbott

Maguire's claim against Abbott stems from Maguire's emergency medical visit to Abbott's office on July 15, 2008.[7] Maguire alleges that Abbott was deliberately indifferent to his serious medical needs when he failed to diagnose Maguire's symptoms as the onset of a stroke and instead treated him for a muscle spasm. In response, Abbott claims his failure to diagnose accurately Maguire's symptoms constitutes a mere

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("Unpublished decisions are not precedential, but may be cited for their persuasive value.").

[7] Maguire also brings a claim against Abbott for Abbott's involvement [in] the decision to discontinue Maguire's methadone prescription. Abbott is entitled to summary judgment on this claim for the same reasons Garden is entitled to summary judgment.

medical misdiagnosis, which is insufficient to establish subjective deliberate indifference. *See Self v. Crum*, 439 F.3d 1227, 1233 (10th Cir. 2006) (holding that "a misdiagnosis, even if rising to the level of medical malpractice" is insufficient to establish the subjective component of a deliberate indifference claim). The court rejects Abbott's arguments.

Although Abbott is correct that a mere misdiagnosis is generally insufficient to establish deliberate indifference to a serious medical need, this principle is not absolute. The Tenth Circuit has explained that a medical provider does not act with deliberate indifference where he or she fails to diagnose a serious medical condition by relying on symptoms that are consistent with a less severe ailment. *See id.* at 1234 ("Where a doctor faces symptoms that could suggest either indigestion or stomach cancer, and the doctor mistakenly treats indigestion, the doctor's culpable state of mind is not established even if the doctor's medical judgment may have been objectively unreasonable."); *accord Burnett v. Miller*, No. 14-7069, 2015 WL 7352007, at *7 (10th Cir. Nov. 20, 2015) (recognizing that where "an inmate's symptoms could suggest multiple different diagnoses, the fact a medical provider mistakenly treated the wrong condition" does not establish deliberate indifference). But the Tenth Circuit has also recognized that a jury may infer conscious disregard where a provider misdiagnoses an obvious risk and then responds to that risk with treatment that is patently unreasonable. *See, e.g.*, *Blackmon v. Sutton*, 734 F.3d 1237, 1245 (10th Cir. 2013) (citing *Westlake v.*

Lucas, 537 F.2d 857 (6th Cir. 1976)) (evidence was sufficient to show conscious disregard to a substantial risk of serious harm where prison staff provided an inmate with mild antacids in response to a badly bleeding ulcer); *Oxendine v. Kaplan*, 241 F.3d 1272, 1278-79 (10th Cir. 2001) (holding that a prison doctor could be liable for deliberate indifference when, in response to a gangrenous finger, insisted the finger was healing and prescribed Tylenol to treat the pain). Considering the facts in the light most favorable to Maguire, genuine disputes exist regarding whether Abbott's misdiagnosis in this case was so obviously unreasonable that it could evidence deliberate indifference.

For example, Abbott knew Maguire had lost control of his left arm and hand. Given these symptoms, diagnosing a muscle spasm in Maguire's shoulder might not be unreasonable (even if ultimately incorrect) because such a diagnosis may be consistent with those symptoms. But there is also evidence in the record that Abbott knew Maguire had lost control of the left side of his body. Indeed, Maguire testified he told Abbott he was "having a difficult time controlling the left side of my body, my left hand, my left extremities." (Dkt. No. 185-1, p. 8). Maguire further claims the guard observed Maguire dragging his left leg and reported this observation to Abbott. In light of this fact, a reasonable jury could conclude Maguire's loss of control on the entire left side of his body was so obviously inconsistent with a simple muscle spasm in his shoulder – and so obviously consistent with the symptoms of a stroke – that Abbott's contrary diagnosis and

treatment was patently unreasonable. *Cf. Sealock*, 218 F.3d at 1208 (nurse was not deliberately indifferent when she diagnosed inmate with the flu rather than as having a heart attack because inmate was having chest pain, could not breathe, had throat pain, and had nausea and vomiting); *Burnett*, 2015 WL 7352007, at *6 (concluding registered nurse was not deliberately indifferent where she failed to diagnose chest pain as indicative of a heart attack because it was unclear whether the pain was cardiac, musculoskeletal or pleuritic, and when the nurse administered the ECG, the test was normal). For this reason, the court finds a genuine dispute of fact exists as to whether Abbott was deliberately indifferent to Maguire's serious medical needs in violation of the Eighth Amendment.

c. Steven Mecham

Maguire's claim against Mecham is based on Mecham's failure to provide adequate follow-up treatment after Maguire was found unconscious in the prison infirmary. Additionally, Maguire claims that Mecham violated his rights by failing to record the IV incident. These claims fail.

On this record, there is insufficient evidence from which a jury could find that Mecham was deliberately indifferent to the potentially serious medical condition presented by Maguire's unconsciousness. Rather, when Maguire was found unconscious, Mecham and his supervisor determined that the proper course of treatment was to attempt to revive him with an IV rather

than immediately transport him to a hospital. (Dkt. No. 185-1, p. 7). Maguire concedes the IV successfully revived him, after which they returned him to the infirmary observation cell until he could be seen by a physician. It was only after Maguire saw the physician and told him he felt "pretty much okay" that he was returned to his regular cell.[8] (Dkt. No. 81-1, p. 711; 185-1, p. 7). Mecham was "free to exercise his . . . independent professional judgment" in assessing the medical treatment necessary for Maguire's unconsciousness, *see Callahan*, 471 F.3d at 1160, and nothing in the record indicates the course of treatment was inconsistent with Maguire's symptoms or otherwise unreasonable, *see Self*, 439 F.3d at 1232-33 (stating that "where a doctor orders treatment consistent with the symptoms presented and continues to monitor the patient's condition, an inference of deliberate indifference is unwarranted"). Thus, Maguire's claim that Mecham was deliberately indifferent to his serious medical condition cannot survive summary judgment.

Maguire's claim that Mecham violated his constitutional rights by failing to record the IV incident is also unavailing. Maguire has presented no evidence to show how the failure to record in this instance resulted in the denial of adequate medical care. *See, e.g.*, *Davis*

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[8] As explained, the court does not consider Maguire's unsupported contention that Mecham released him into the general population rather than keep him in observation. But even assuming this fact were genuinely in dispute, Maguire's claim of deliberate indifference would still fail because he does not identify any harm that resulted from the decision to place him in general population rather than in the prison infirmary.

v. Caruso, No. 07-CV-11740, 2009 WL 878193, at *2 (E.D. Mich. Mar. 30, 2009) (recognizing that Eighth Amendment violations stemming from inadequate, incomplete, inaccurate, or mislaid medical documents are typically reserved for claims alleging "systematic inadequacies in a jail's or prison's systems of medical record keeping"); *Ferguson v. Corr. Med. Servs., Inc.*, No. 5:05CV00078 GHBD, 2007 WL 707027, at *3-4 (E.D. Ark. Mar. 1, 2007) (granting summary judgment to defendant where inmate failed to demonstrate that prison doctor's failure to place a note of a procedure in a chart gave rise to a grave risk of unnecessary pain and suffering). Likewise, Maguire presents no evidence to show Mecham acted with deliberate indifference in failing to record the incident. Thus, Mecham is entitled to summary judgment on Maguire's claims.

d. Craig Jensen and Rodger MacFarlane

Maguire claims EMTs Jensen and MacFarlane were deliberately indifferent when they responded to Maguire's cell, diagnosed him as having a seizure, and failed to provide any follow-up treatment. Jensen and MacFarlane have moved for summary judgment on two grounds. First, they argue Maguire's claim is procedurally barred because he initially erroneously named them as John Does believed to be "Med. Tech. Craig" and "Rogers," and consequently failed to serve them within the applicable statute of limitations. Next, they argue Maguire failed to show they were deliberately indifferent to his serious medical needs.

Accordingly, the court addresses the statute of limitations before turning to the merits of Maguire's claims.

i. Statute of Limitations

For a § 1983 claim that arises in Utah, the statute of limitations is four years. *Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir. 1995). Although Maguire filed his complaint in 2010, two years after the incident, it is undisputed that Maguire did not serve Jensen and MacFarlane until 2014, six years after the incident. Nevertheless, Maguire asks the court to find that the statute of limitations should be equitably tolled.

The court must look to Utah law to determine whether Maguire is entitled to equitable tolling. *See Harrison v. United States*, 438 F. App'x 665, 668 (10th Cir. 2011) (holding that "[s]tate law ordinarily governs the application of equitable tolling in a federal civil-rights action"). In Utah, the doctrine of equitable tolling does not permit courts to simply "rescue litigants who have inexcusably and unreasonably slept on their rights." *Garza v. Burnett*, 321 P.3d 1104, 1107 (Utah 2013) (internal quotation marks omitted). Rather, it "prevent[s] the expiration of claims to litigants who, *through no fault of their own*, have been unable to assert their rights within the limitations period." *Id.* (internal quotation marks omitted). For this reason, Utah courts have limited the doctrine to instances in which it would be manifestly unjust to apply the statute of limitations. *See, e.g.*, *id.* at 1108 (holding that the statute of limitations should be equitably tolled where a

claim that would have been timely filed became untimely because of a subsequent Supreme Court ruling that shortened the statutory time period); *Berneau v. Martino*, 223 P.3d 1128 (Utah 2009) (recognizing that the equitable discovery rule may toll a statute of limitations where the plaintiff did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action within the limitations period, and either 1) the plaintiff was not aware of the cause of action because of the defendant's concealment or misleading conduct or 2) the case presents exceptional circumstances).

Viewing the present case in light of Utah's equitable tolling jurisprudence, the court finds the undisputed record supports equitable tolling to allow Maguire to pursue his claims against Jensen and MacFarlane. To begin, Maguire's failure to name these defendants accurately was based on his review of prison records that confusingly identified Jensen and MacFarlane only by their first names: Craig and Rodger. (Dkt. No. 103-2). Further, once the prison informed Maguire that Med. Techs "Craig" and "Rogers" did not exist, Maguire attempted numerous times to identify the correct defendants. These efforts include, but are not limited to, attempting to serve the parties in a pre-litigation internal review and filing a Government Records Access and Management Act request, which officials denied. (Dkt. No. 180, p. 32). When these efforts proved unavailing, Maguire enlisted this court's assistance. The court then ordered the U.S. Marshals to serve the appropriate parties and directed the

prison to provide the information necessary to effect service. (*Id.*, pp. 32-33). It was only in 2013, after the limitations period would have expired, that the State first indicated Med Techs "Craig" and "Rogers" may be Jensen and MacFarlane. In short, therefore, the court cannot conceive of anything more Maguire could have done to identify and serve Jensen and MacFarlane within the required time.[9] Thus, Maguire's failure to serve Jensen and MacFarlane was through no fault of his own; it was the result of the apparent unwillingness of prison officials – who were in sole control of the necessary information – to identify the correct defendants.

Likewise, Jensen and MacFarlane have failed to establish they suffered any prejudice as a result of the belated service. They identify no specific evidence, arguments, or problems with proof occasioned by the delay. To the contrary, evidence in the record shows the State was investigating this case and actively making arguments on behalf of Jensen and MacFarlane before

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[9] The court is unpersuaded by Defendants' argument that Maguire had the information necessary to identify Jensen and MacFarlane because they were identified in his medical records. These records contain nearly 800 pages of Maguire's medical history and list countless individuals who attended to Maguire at some time during his incarceration. Additionally, and most importantly, the medical history does not contain any record of Maguire's "man down" incident. Therefore, although Jensen's name does appear throughout the records, it does not appear in any relation to the relevant incident. Furthermore, MacFarlane's name never appears in Maguire's medical records. Thus, Maguire cannot have been expected to identify Jensen and MacFarlane from his medical records.

they were even served. Indeed, the State argued that Jensen and MacFarlane were entitled to summary judgment on statute of limitations grounds in December 2012, shortly after the limitations period would have expired. Where the defendants have identified no prejudice from the belated service and Maguire's failure to serve them sooner was due to the prison's own deficiencies, the court finds it would be manifestly unjust to preclude a merits-based review of Maguire's claims. *Compare Myers v. McDonald*, 635 P.2d 84, 86-87 (Utah 1981) (equitably tolling the statute of limitations where, despite plaintiffs' efforts to discover their ward's whereabouts, they had no knowledge of his death or that a cause of action existed and the defendants were not prejudiced by the delay in filing suit), *with Ottens v. McNeil*, 239 P.3d 308, 328 (Utah Ct. App. 2010) (holding that equitable tolling was not appropriate where plaintiff waited until less than twenty days before the four-year limitations period expired before filing her complaint, which hampered her ability to identify and name the correct party and resulted in the loss of evidence). Equitable tolling is therefore appropriate in this case.

ii. Deliberate Indifference

Having found the statute of limitations has been tolled, the court considers the merits. Maguire appears to invoke two forms of deliberate indifference against Jensen and MacFarlane: their failure to treat properly his serious medical condition, and their failure as gatekeepers to provide him access to further medical care.

See Self, 439 F.3d at 1232 (recognizing deliberate indifference claims where the health official provides inadequate medical care or, if a prison health official serves as a gatekeeper for other medical personnel capable of treating the condition, delays or refuses to provide access to adequate medical care). In response, Jensen and MacFarlane argue they were not deliberately indifferent because they merely misdiagnosed Maguire as having a seizure and treated him accordingly. (Dkt. No. 175, p. 24). Additionally, they posit they did not deny Maguire access to necessary care because Jensen reported the incident to a charge nurse and Maguire received care the next morning. (Dkt. No. 180-1, pp. 77, 82). Jensen's and MacFarlane's arguments are not persuasive.

First, a jury could reasonably conclude Jensen and MacFarlane were deliberately indifferent in assuming Maguire was having a seizure that required no further treatment. Maguire told them he did not think he was having a seizure because he had no history of seizures and he did not black out, which he knew is common for seizures. He also told them he was lucid throughout the entire event, another symptom inconsistent with a seizure. This is confirmed by Miller's declaration, which states that Maguire remained conscious and communicative throughout the episode. (Dkt. No. 103-3, p. 2). Given these facts, a reasonable jury could conclude that Jensen's and MacFarlane's determination that Maguire was having a seizure was so patently unreasonable that it evidences deliberate indifference.

Second, even assuming Jensen and MacFarlane acted reasonably in misdiagnosing Maguire's medical condition as a seizure rather than a stroke, a reasonable jury could conclude Jensen's and MacFarlane's treatment in response to what they perceived to be a seizure evidences a conscious disregard to a serious medical condition. Indeed, a seizure is objectively serious because a layperson would realize the need for a doctor's attention. *See Sealock*, 218 F.3d at 1209; *see, e.g.*, *King v. Kramer*, 680 F.3d 1013, 1018 (7th Cir. 2012) (recognizing that "medical conditions much less serious than seizures have satisfied" the objective seriousness standard). But in response to the apparent seizure, Jensen and MacFarlane did not attempt to assess the seizure's cause, take any action to prevent further seizures, or continue to monitor Maguire's condition. Rather, Jensen and MacFarlane simply placed Maguire's mattress on the cell floor and informed him to call for the guards if he needed additional medical attention. Thus, contrary to Defendants' arguments, Jensen and MacFarlane did not merely misdiagnose and treat what they perceived to be a seizure; they essentially provided no treatment at all. In these circumstances, a reasonable jury could conclude this conduct was deliberately indifferent to a serious medical need. *See, e.g.*, *Blackmon*, 734 F.3d at 1244 (holding that prison mental health professionals were not entitled to summary judgment on qualified immunity grounds where they failed to provide a pretrial detainee with "any meaningful mental health care, despite his obvious need for it"); *Self*, 439 F.3d at 1232 (recognizing that a jury can infer conscious disregard

where "a medical professional completely denies care although presented with recognizable symptoms which potentially create a medical emergency").

Similarly, Maguire has presented sufficient evidence to show genuine questions of fact exist regarding whether Jensen and MacFarlane failed as gatekeepers to provide Maguire access to the necessary treatment for what they believed to be a seizure. As explained, a reasonable jury could find that, when confronted with a seizure, the need for additional treatment or referral to a medical specialist is obvious. *See Self*, 439 F.3d at 1232 (holding that a claim for gatekeeper liability is actionable "where the need for additional treatment or referral to a medical specialist is obvious"); *cf. Richards v. Daniels*, 557 F. App'x 725, 728 (10th Cir. 2014) (holding officials were not deliberately indifferent where they responded to an inmate's seizure by providing him with prompt medical attention and medicine to treat seizures); *Boyett*, 282 F. App'x at 675 (holding officials were not deliberately indifferent where they transferred an inmate to a medical observation cell for continued monitoring after a fall they believed was caused by a seizure or other serious medical condition). Jensen and MacFarlane were aware that Maguire had never had a seizure previously, did not black out during the event, and did not believe he was having a seizure. Certainly these facts are sufficient to require further inquiry from a more knowledgeable medical professional to ascertain the seizure's potential cause and the appropriate treatment. But it is genuinely disputed whether Jensen or MacFarlane notified or

sought assistance from any prison medical professional regarding Maguire's condition.

Jensen claims that, pursuant to prison policy, he notified the charge nurse of Maguire's seizure. (Dkt. No. 180-1, p. 77). But there is no corresponding medical record to show any such notice. Likewise, Jensen's declaration does not provide supporting details such as the name of the charge nurse and there is no declaration from the charge nurse attesting that he or she was ever notified. Nor does MacFarlane's declaration – despite being similar to Jensen's declaration in every other material respect – contain any similar representation. Moreover, there is no evidence the charge nurse responded, gave assistance, or even gave Jensen guidance about how to respond to the situation, all of which a jury could reasonably conclude would have been expected if Jensen had in fact notified the charge nurse. At the summary judgment stage, the court is under no obligation to accept as true Jensen's self-serving statements, particularly when unsupported by record evidence. *See e.g. Parkhurst v. Lampert*, 339 F. App'x 855, 862 (10th Cir. 2009) (rejecting "a contention made in [a] summary judgment response brief, which was . . . a conclusory, self-serving statement unsupported by any evidence"); *Bennett v. Aetna Life Ins. Co.*, 2013 WL 4679482, at *11 (D. Utah Aug. 30, 2013) (rejecting defendants' argument that the plaintiff was seen by someone with appropriate medical credentials when there was no evidence to support this claim other than the defendants' self-serving declaration). Accordingly, the court finds that genuine disputes preclude

summary judgment on Maguire's claims against Jensen and MacFarlane for their actions in failing to appropriately diagnose, treat, or ensure Maguire had access to adequate medical care for his apparent seizure.

e. Jerry Miller

Finally, Maguire claims Miller was deliberately indifferent to his serious medical needs when he failed to alert the EMTs of Maguire's repeated pleas for help throughout the evening of July 15, 2008. In response, Miller contends Maguire has not presented sufficient evidence to show that Miller personally participated in any constitutional violation because there is no evidence to show Miller had knowledge of Maguire's requests for help. *See Trujillo v. Williams*, 465 F.3d 1210, 1227 (10th Cir. 2010) (holding that "[i]n order for liability to arise under § 1983, a defendant's direct personal responsibility for the claimed deprivation of a constitutional right must be established"). The court disagrees.

Contrary to Miller's representation, there is sufficient evidence in the record for a reasonable jury to conclude Miller personally performed at least one of the nightly counts and therefore had actual knowledge that Maguire had requested medical assistance.[10] In

[10] Maguire does not direct the court to this evidence in his briefing. Rather, he takes the litigation position that Miller can be liable even if he did not personally perform the counts because he had an affirmative duty to provide access to medical care arising out of his initial involvement with the man down call. At the

Maguire's sworn affidavit, he stated that "Officer 5," responded to the "man down" call and helped the EMTs place Maguire's mattress on the floor. (Dkt. No. 180-1, p. 63). The record shows, and Miller concedes, that he was one of the officers who responded to Maguire's cell during the "man down" call. (*See* Dkt. No. 103-3, p. 1-2). Maguire's affidavit further states that the EMTs instructed him to alert "Officer 5" if he had any other problems throughout the night. (Dkt. No. 180-1, p. 63). Maguire later clarified that Miller was the officer whom the EMTs indicated he should alert if he had any further problems during the night. (Dkt. No. 185-1, p. 9). Therefore, a reasonable jury could infer that "Officer 5" in Maguire's affidavit refers to Miller. And importantly, Maguire stated in his affidavit that during "[e]very hourly count, *at some of which Maguire recognized Officer 5*[,] Maguire asked the counting officer to please call medical." (Dkt. No. 180-1, p. 64) (emphasis added). From these facts, a reasonable jury

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summary judgment stage, the court is not bound by Maguire's legal arguments, but must instead consider the record evidence. *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1187 (10th Cir. 2003) (summary judgment "is warranted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law") (internal quotation marks omitted); *see also* Fed.R.Civ.P. 56(c)(3) ("The court need consider only the cited materials, *but may consider other materials in the record*.") (emphasis added).

could infer that Miller was present during some of the hourly counts and heard Maguire's pleas for help.[11]

Assuming Miller was personally aware Maguire had requested medical assistance, the court has little difficulty concluding Miller's failure to notify medical personnel of Maguire's requests for assistance is sufficient to show a constitutional violation. Here, the evidence establishes Miller had knowledge that Maguire had suffered (at the very least) a seizure, and that Jensen and MacFarlane had instructed Maguire to notify the guards if he needed further medical attention. Additionally, Miller knew Maguire's mattress had been placed on the floor, presumably to prevent him from falling from his bunk if he experienced a subsequent seizure. From these facts, a jury could infer Miller was aware that Maguire had suffered, and was likely to continue to suffer, seizures. A reasonable jury could therefore conclude that, given this awareness, Miller's subsequent failure to notify medical professionals that Maguire had requested additional medical assistance throughout the night was deliberately indifferent to the serious health risk presented by Maguire's repeated apparent seizures. *See, e.g.*, *Estelle*, 429 U.S. at 104-05 (holding prison guards may be liable for deliberate indifference by "intentionally denying or

[11] The court notes that Maguire's testimony that Miller was one of the counting officers is not contradicted by other record evidence. Miller's declaration is silent regarding his actions during the hourly counts. Additionally, it is undisputed that Miller was on duty that night and acted in a supervisory role, from which a jury could reasonably infer he would have been involved in the counts.

delaying access to medical care or intentionally interfering with the treatment once prescribed"); *Sealock*, 218 F.3d at 1210 (holding shift commander not entitled to summary judgment when he was told the plaintiff might be having a heart attack but refused to transport him to a doctor). Thus, genuine disputes of fact preclude summary judgment in Miller's favor on this claim.

2. Clearly Established Law

Having concluded Maguire has presented sufficient evidence to survive summary judgment on his constitutional claims against defendants Abbott, Jensen, MacFarlane, and Miller, the court now examines whether it was clearly established that these defendants' actions in these circumstances would constitute deliberate indifference to Maguire's serious medical needs. "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008) (internal quotation marks omitted). Although there need not be a case precisely on point, "the contours of a right [must be] sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Gomez*, 745 F.3d at 411 (internal quotation marks omitted). Accordingly, in assessing whether the right is clearly established, the court cannot define the right "at a high level of generality." *Cox v. Glanz*, 800

F.3d 1231, 1245 n.6, 1247 n.8 (10th Cir. 2015). Rather, the court must examine the specific facts of this case to determine whether the controlling cases establish each defendant took the alleged actions "with the requisite state of mind." *Id.* at 1249 (internal quotation marks omitted). Engaging in that inquiry, the court concludes the law was clearly established to put defendants Abbott, Jensen, MacFarlane, and Miller on notice that their actions in this case could be deliberately indifferent to Maguire's serious medical needs.

For instance, it was clearly established that when Abbott was confronted with symptoms obviously indicative of a stroke and inconsistent with a mere shoulder muscle spasm, the decision to merely treat the muscle spasm would evidence deliberate indifference to a serious medical condition. *See e.g. Blackmon*, 734 F.3d at 1245-46 (recognizing it was clearly established as early as 1976 that providing mild antacids in response to badly bleeding ulcers and failing to provide access to obviously necessary medical care would be sufficient to support a claim for deliberate indifference). Likewise, it was clearly established that when Jensen and MacFarlane were confronted with what they believed to be a seizure, they had an obligation to provide Maguire meaningful treatment or at least access to an appropriate health care provider. *See, e.g.*, *Al-Turki v. Robinson*, 762 F.3d 1188, 1194 (10th Cir. 2014) ("It has been clearly established in this circuit since at least 2006 that a deliberate indifference claim will arise when a medical professional completely denies care although presented with recognizable symptoms

which potentially create a medical emergency.") (internal quotation marks omitted); *Mata*, 427 F.3d at 755-59 (holding that the evidence was sufficient to support a deliberate indifference claim when an inmate presented symptoms of severe chest pain to a prison nurse, and the nurse, knowing that such symptoms were a sign of a potentially serious health risk, failed to refer the inmate to a physician). Finally, it was clearly established that when Miller – with the understanding that Maguire had suffered a seizure – was confronted with Maguire's requests for further medical assistance, he had the obligation to provide Maguire access to necessary medical personnel. Miller was therefore on fair notice that failing to provide such access would be sufficient to show a constitutional violation. *See, e.g.*, *Estelle*, 429 U.S. at 104-05 (deliberate indifference may be found when prison guards intentionally deny or delay an inmate access to medical care); *Sealock*, 218 F.3d at 1210 (holding prison guard could be liable for deliberate indifference when he was told that plaintiff might be having a heart attack and refused to transport him to a doctor).

For all these reasons, the court finds defendants Garden and Mecham are entitled to summary judgment on qualified immunity grounds, but that questions of fact exist as to whether defendants Abbott, Jensen, MacFarlane, and Miller violated Maguire's clearly established right to adequate medical treatment.

B. State Constitutional Claims

Having concluded Maguire survives summary judgment on his § 1983 claims against defendants Abbott, Jensen, MacFarlane, and Miller, the court now considers Maguire's claims against these defendants for violations of the Unnecessary Rigor Clause of the Utah Constitution. *See* Utah Const. art. I, § 9 ("Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.").[12]

Under Utah law, "there is no express statutory right to damages for one who suffers a constitutional tort." *Nielson v. City of S. Salt Lake*, 2009 WL 3562081 at *9 (D. Utah Oct. 22, 2009) (*quoting Spackman ex rel. Spackman v. Bd. Of Educ. of Box Elder Cty. Sch. Dist.*, 16 P.3d 533, 537 (Utah 2000)). Therefore, "a Utah court's ability to award damages for a violation of a self-executing constitution provision rests on the

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[12] For the same reasons explained in the court's discussion of Maguire's federal § 1983 claims, the court finds that Maguire has failed to put forward sufficient evidence to show defendants Garden or Mecham violated any state constitutional provision. *See Dexter v. Bosco*, 184 P.3d 592, 597 (Utah 2008) (holding that a violation of the Unnecessary Rigor Clause requires a showing that the plaintiff was "subject to unreasonably harsh, strict, or severe treatment" that was "clearly excessive or deficient and unjustified"); *Bott v. DeLand*, 922 P.2d 732, 741 (Utah 1996) *abrogated on other grounds by Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist*., 16 P.3d 533, 537 (Utah 2000) (same). Garden and Mecham are therefore entitled to summary judgment on these claims.

common law."[13] *Id.* (*quoting Spackman*, 16 P.3d at 538). In order to sustain a common law remedy for a constitutional violation, a plaintiff must establish that existing remedies do not redress his or her injuries. *Id.* Thus, the question in the present case is whether Maguire can avail himself of state common law remedies when, as explained, he has federal remedies available under § 1983.

Although the Utah Supreme Court has not yet decided whether the existence of federal relief can preclude state common law claims, *Spackman*, 16 P.3d at 538 n.10, courts in the Tenth Circuit agree that a plaintiff's viable § 1983 claim provides sufficient remedy to redress violations of Utah's Constitution. *See Nielson* 2009 WL 3562081 at *9 (the existing remedy element requires a plaintiff "to show that existing remedies under § 1983 do not redress her injuries"); *Cavanaugh v. Woods Cross City*, 2009 WL 4981591, at *6 (D. Utah Dec. 14, 2009) ("Plaintiffs cannot state a claim for damages under the Utah Constitution because their injuries can be fully redressed through their 42 U.S.C. § 1983 claim."). Because the court has ruled that Maguire has viable claims under § 1983 against defendants Abbott, Jensen, MacFarlane, and Miller, Maguire cannot recover for any alleged violations of the Unnecessary Rigor Clause of the Utah Constitution. Accordingly, these defendants are entitled to summary judgment.

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[13] The parties concede the Unnecessary Rigor Clause is a self-executing provision.

CONCLUSION

For the reasons stated herein, the Court **GRANTS** in part and **DENIES** in part Defendants' Renewed Motion for Summary Judgment (Dkt. No. 175). It **GRANTS** summary judgment to all Defendants on Maguire's claims under the Utah Constitution. It further **GRANTS** summary judgment as to defendants Garden and Mecham on Maguire's § 1983 claims. The court **DENIES** summary judgment as to defendants Abbott, Jensen, MacFarlane, and Miller on Maguire's § 1983 claims.

SO ORDERED this 14th day of December, 2015.

BY THE COURT:

/s/ Clark Waddoups
Clark Waddoups
United States District Court Judge