Appendix A

Decision of the United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 25, 2019
Lyle W. Cayce
Clerk

No. 17-20435

STEVEN KURT BAUGHMAN,

Plaintiff - Appellant

v.

DOCTOR MICHAEL SEALE; M. GUICE; DOCTOR LAMBI; DOCTOR HOWARD; DETENTION OFFICER J. RAMIREZ; DETENTION OFFICER M. Z. SACKS; DRAKE NARENDORF; NURSE SCOTT; KATHY ROSSI; EL FRANCO LEE; HARRIS COUNTY; BOBBY DAVIS,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:14-CV-3164

Before HIGGINBOTHAM, ELROD, and HO, Circuit Judges.

PER CURIAM:*

A parolee arrested and held in pretrial detainment brings this action alleging constitutional violations and torts arising from jail officials' management of his diabetes, as well as alleged retaliation. The detainee appeals pro se the district court's grant of summary judgment to the defendant.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

jail officials and to Harris County. We affirm the district court, deny the motion for appointment of counsel, and dismiss the case.

I.

Steven Baughman is a pretrial detainee at the Harris County Jail, the third largest jail in the United States, housing almost 10,000 individuals. The Jail's Health Services Division is responsible for Baughman's medical care. The Division operates several clinics for specialized care, including a Chronic Care Clinic, which provides care for, among other conditions, type 2 diabetes. Baughman is among the Jail's 105 to 120 inmates requiring care for diabetes.

A.

Type 2 diabetes is a disease of the endocrine system in which the pancreas does not produce adequate amounts of insulin, a hormone that lowers blood-glucose concentrations to maintain the normal range of 60 to 100 mg/dL.[1] When blood-glucose concentrations rise above this normal range, a person experiences a condition known as hyperglycemia, which can result in heart attack, stroke, loss of eyesight, kidney failure, diabetic coma, and death. A diabetic's blood-glucose levels must be regulated by treatment, specifically, with injections of insulin or oral drugs such as metformin, glyburide, and glipizide. Diabetics often receive these drugs in connection with meals, when blood glucose is boosted by food consumption.

While diabetic treatment is primarily aimed to prevent hyperglycemia, patients also must avoid excessively low levels of blood glucose. If concentrations fall below 60 mg/dL, a person experiences a condition known as hypoglycemia. Initially, hypoglycemia presents with sweatiness, jitters,

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[1] Baughman's expert, Dr. David H. Madoff described the optimal fasting blood-glucose level as between 80 and 130 mg/dL.

fatigue, and dizziness. If left untreated, however, the situation can devolve into "severe hypoglycemia," a situation in which the diabetic patient requires assistance. Untreated, it can result in disorientation, seizures, brain damage, and even coma or death. Hypoglycemia is affected by the patient's balance of three variables: diet, specifically carbohydrate intake; physical activity; and drug dosage. If a patient's blood-glucose level is unexpectedly low, a normal insulin dose can trigger hypoglycemia. So, diabetics often keep sugary foods or glucose tablets ready to hand, to raise blood-glucose levels if their treatment unexpectedly triggers hypoglycemia.

To keep blood-glucose levels within the normal range, when diabetics use drugs like insulin they must know the status of their current blood-glucose levels, assessing the need for an increase or decrease. Many diabetics, particularly those who have lived with the condition for at least two years, have developed the ability to sense low blood-glucose levels, feeling telltale dizziness or shakiness. Where they feel these symptoms, diabetics may decline a scheduled insulin dose, so as not to lower blood-glucose levels, or they may consume a sugary food to raise blood-glucose levels into the normal range.

While a diabetic may sense a low blood-glucose level, there are technologies that offer more precise measurement. One is the A1C hemoglobin test, a blood test which measures a patient's average blood-glucose level over the preceding seven- to twelve-week period. Another method is the "fingerstick test," a device which pricks the patient's finger to draw a drop of blood, applies the blood to a test strip, and quantifies the current blood-glucose level. Outside jail, fingerstick tests are usually self-administered. Since blood-glucose levels can fluctuate, a combination of the A1C hemoglobin test and periodic fingerstick measurements allow a medical provider to define patterns of blood-glucose variability, and in light of these patterns adjust diabetes-drug regimens to keep a patient within the normal range.

More frequent measurement allows for a more detailed understanding of blood-glucose patterns. Accordingly, many professional sources recommend daily of use of blood-glucose tests. The Federal Bureau of Prisons' Clinical Practice Guidelines states that "[f]requent monitoring of blood glucose (three times per day) is optimal for most patients with . . . type 2 diabetes who are on insulin." The American Diabetes Association's Position Statement on diabetes management in correctional institutions likewise insists that "[p]atients with type 2 diabetes need to monitor at least once daily, and more frequently based on their medical plan," although "frequency of monitoring will vary by patients' glycemic control and diabetes regimes." The Institute for Clinical Systems Improvement, an organization that compiles medical care guidelines, recommends that "[p]atients using multiple insulin injections perform [self-monitoring of blood glucose] three or more times daily," although it adds that frequent testing is particularly important where the patient is "using glucose to guide mealtime insulin dosing."

B.

At the Harris County Jail, nurses circulate with an insulin cart to diabetic inmates' cells twice a day, first around 3–4 a.m., and then again around 3–4 p.m. The carts carry insulin and oranges or apples, which are provided to inmates for consumption if they feel their glucose levels are too low. Though not on the carts, medical staff have glucose tablets for patients as needed. Another nurse circulates among the patients with a fingerstick testing device. Nurses administer insulin injections and undertake fingerstick testing as assigned by a list provided by the Jail's licensed doctors and nurse practitioners ("medical providers"), specifying which patients are to receive which treatment or test on each round.

The Jail has no universal requirement regarding the frequency of fingerstick testing. The frequency of testing is governed in the first instance by

the medical provider's clinical judgment as to a patient's needs, although as will be seen, this judgment is not the final word. The Jail's former Executive Medical Director, Dr. Michael Seale, and its current interim Executive Medical Director, Dr. Marcus Guice, concede that the Jail's delegation of fingerstick testing frequency to medical providers can—and does—result in less frequent testing than recommended by the Federal Bureau of Prisons, American Diabetes Association, and Institute for Clinical Systems Improvement. Sharon Lambi, a physician assistant in the Chronic Care Clinic, describes thrice daily fingerstick tests as the standard of care. Seale, however, states that professional bodies' recommendations are not generalizable to jails where inmates are subject to 24-hour monitoring, diet is regular and largely controlled. That is, more frequent testing may be an optimal, but not a necessary, precondition to the effective and safe management of type 2 diabetes. The record is unclear on whether budgetary or logistical constraints would have limited the Jail from providing thrice daily fingerstick tests to all type 2 diabetic inmates.

The Jail's use of fingerstick testing is one part of a larger system of inmate diabetes management. When a diabetic inmate first arrives at the Jail, medical providers assess the insulin regimen that the detainee followed prior to coming to the Jail. Providers test patterns in the individual's blood-glucose variability, and prescribe a treatment regimen. In prescribing insulin dosages and schedules, providers also consider the patterns of Jail life: patients are served meals at regular times. Patients can receive guidance from a dietician and can be prescribed diets tailored to their condition. Patients can purchase food items from the commissary; however, where these choices interfere with treatment, providers have discretion to impose commissary restrictions.

Following intake, patients receive regular evaluation. If the patient is managing his diabetes well, the providers will see the patient a minimum of

once every three months; if the patient's diabetes management is less successful, providers will see the patient more often, with no limit to the frequency of appointments. With these evaluations, medical providers measure A1C hemoglobin levels and order a series of fingerstick tests (twice a day for three consecutive days) to gather data needed to evaluate appropriateness of a patient's insulin regimen. Providers retain the discretion to order additional fingerstick testing where they feel it clinically necessary to reevaluate a patient's insulin regimen. Additionally, if a patient needed insulin injections or testing more frequently than could be provided by the circulating nurses, medical providers can place the patient in the Jail's infirmary for more intensive treatment.

Medical providers' prescriptions are the starting point for diabetes management, but nurses and patients also have input. The Jail's circulating nurses exercise discretion in administering insulin injections. During their rounds, where they judge that a patient's blood-glucose levels might not be high enough to allow for safe administration, they can refuse to administer the injection. Patients also exercise discretion in their care. The patient can decline an insulin injection where he feels hypoglycemic, or alternatively can consume the glucose-rich foods provided by the insulin cart—oranges or apples—where he senses the onset of hypoglycemic symptoms. Where a patient declines an insulin injection, the administering nurse will report the refusal to the Clinic; a medical provider will decide whether in light of the refusal the patient should be administered a fingerstick test for a more precise quantification of glucose. In addition to declining drugs, patients can also request to be seen at the Chronic Care Clinic outside of regular appointment hours, or seek more immediate care from the Jail's general clinic, where diabetic patients reporting hypoglycemia are treated immediately. The patient's ability to request treatment is not restricted to the daily rounds: medical staff are available at

all times. A patient can request additional blood-glucose testing in two ways. First, the patient can simply request the test from the nurse making the rounds with the fingerstick device; the nurse provides the test at his or her discretion. The patient can also submit a "sick call" request, an official form routed to one of the Jail's medical providers for evaluation and approval.

The Harris County Jail has been accredited by the National Commission of Correctional Health Care (NCCHC) since 1985. As part of the accreditation process, the NCCHC evaluates all of the Jail's health policies—including its use of fingerstick tests—and monitors via on-site surveys every three years. On summary judgment, Baughman casted doubt on the meaningfulness of the NCCHC's approval, pointing to damning reports of inadequate medical care at the Jail during the period of accreditation. Specifically, in 2009, while the Jail was NCCHC accredited, the Department of Justice issued a report critical of the Jail's provision of medical care, including for diabetes. The Report specifically discusses failures to diagnose diabetic inmates, failures to respond to diabetic emergencies, and a complete absence of a chronic care program. It appears from the record that at least some of the problems identified by the Report had been addressed before Baughman arrived at the Jail, and Baughman does not argue that the Report identifies problems applicable to his care.

C.

While on parole, Baughman was arrested on suspicion of participation in an aggravated assault with a deadly weapon, and arrived at the Jail on April 3, 2014 to await trial.[2] Baughman suffered from numerous health problems including obesity—he weighed 376 pounds—and type 2 diabetes. Baughman

[2] At the time of the district court's determination of the summary judgment motions, Baughman was still in pretrial detention at the Jail.

alleges that he is a "brittle" diabetic, meaning that his blood-glucose levels fluctuate widely over the long and short term.[3] Some of Baughman's diabetic caregivers characterize him as a stable diabetic, but his treatment history indicates that his blood-glucose levels were not in control, repeatedly exceeding the normal range. Upon his arrival, the Jail's Chronic Care Clinic considered Baughman's previous diabetic management regimen, tested his blood-glucose levels, and prescribed twice daily insulin injections.

Baughman's expert witness, Dr. David H. Madoff, an endocrinologist, opines that "within a reasonable degree of medical certainty, it [wa]s essential for Baughman's health and safety for HCSOJ to provide him with glucose monitoring a minimum of three times daily." This is because, Madoff says, "Mr. Baughman's healthcare team needs to know in a timely fashion if he is having either high or low blood sugars (hyperglycemia or hypoglycemia) to adjust his insulin doses accordingly and to prevent dangerous hypoglycemia." The frequency with which Jail medical staff tested Baughman's blood-glucose levels varied over the course of his detention, but it is not disputed that staff rarely measured Baughman's blood-glucose level three times in a day; on most days they did not conduct a fingerstick test at all. Between April 2014 and September 2016, on 165 days Baughman received at least two blood-glucose tests, and on 78 days he received one test; on 73 percent of days he received no fingerstick test. On multiple occasions Baughman went for extended periods without blood-glucose monitoring—up to 70 days, in the period between May and July 2015. Baughman requested additional fingerstick tests using the "sick call" request process: nine out of the ten times he requested a fingerstick test by this means it was provided. Baughman also requested fingerstick tests

[3] Defendant Harris County has admitted this allegation in its answer to the Fourth Amended Complaint.

from the circulating nurse—at times unsuccessfully[4]—and submitted multiple inmate complaint forms to a head nurse, some after the commencement of this litigation, complaining as a general matter about the frequency of fingerstick testing and demanding daily monitoring. The Jail did not accede to these general demands.

By February 2015, ten months after Baughman's arrival—and after this suit had commenced—Jail staff observed that he was not complying with dietary recommendations and had gained fifty pounds, now weighing 428 pounds. During a meeting on February 2, 2015, Jail dietician Cathy Rossi confronted Baughman with records of his purchases of high carbohydrate foods from the commissary. Rossi suggested better choices and encouraged diet compliance.

On March 30, 2015, Baughman submitted a letter to the Texas Commission on Jail Standards (TCJS), a body appointed by the Governor of Texas to develop rules and oversee Texas county jails. In the letter Baughman raised concerns regarding "healthcare violations and safety violations" at the Jail, including the denial of daily fingerstick testing, denial of a diabetic diet, as well as inadequate provision of storage for inmates' legal materials and unsanitary meal trays. At the time, Dr. Seale, the Jail's Executive Medical Director, was also a commissioner on the TCJS. Baughman's letter argues that Seale's dual roles posed a conflict of interest. Dr. Seale does not specifically recall reviewing Baughman's letter, but states that he probably did review it, since medical complaints were usually routed to him.

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[4] Jail medical staff exercised discretion in granting Baughman's requests for further care in connection with diabetes management as well as several other health problems he reported, for example, chronic pain, tinnitus, potential brain tumors, potential bone cancer, and ear pain from the excessive noise generated by fellow inmates.

On April 13, 2015, on instructions from her supervisor, Health Services Division Medical Administrator Bobby Davis, Rossi imposed commissary restrictions on Baughman. These restrictions included a "low sodium" restriction—potentially tied to his hypertension—as well as a dialysis restriction and a "no solids" restriction. During an appointment at the Chronic Care Clinic on April 28, 2015, nurse practitioner Beverly Howard explained to Baughman that the restrictions had resulted from providers' observations that, notwithstanding repeated discussions of diet, Baughman's weight, blood pressure, and blood glucose were not in control. The dialysis and no-solids restrictions appear to be mismatched with Baughman's medical needs. Dr. Seale does not recall any involvement or communication regarding the commissary restrictions, and is aware of no connection between Baughman's letter and the restrictions. Neither Davis nor Rossi were aware of Baughman's letter at the time Rossi imposed the restrictions.

D.

On November 5, 2014, Baughman filed a complaint pro se in the district court, bringing claims against a list of twenty one officials of the Harris County Jail, including under the First and Fourteenth Amendments and 42 U.S.C. § 1983. After Baughman submitted several amendments to his claims, the district court appointed counsel, and Baughman filed a Fourth Amended Complaint. In this operative complaint, Baughman sues Harris County and diabetic caregivers at the Jail, alleging that they denied him adequate medical care, violating his rights under the Eighth and Fourteenth Amendments, and also are liable for negligent provision of medical care. Baughman also sues the County and six individual dental care providers at the Jail for their allegedly negligent and unconstitutional denial of adequate of dental care, violating his rights under the Eighth and Fourteenth Amendments. Baughman sues the County and supervisory officials at the Jail for failure to supervise and train

staff to provide adequate medical and dental care. Finally, Baughman sues three individual Jail officials—Seale, Davis, and Rossi—alleging they unlawfully retaliated against him for the complaint submitted to the Texas Commission on Jail Standards, violating his rights under the First and Fourteenth Amendments.

Defendants filed separate motions for summary judgment. Harris County filed a motion for summary judgment, arguing that no reasonable juror could find municipal liability on Baughman's constitutional claims and that his state-law claims were barred by sovereign immunity. Five diabetic caregivers—Seale, Guice, Davis, Lambi, and Howard—moved for summary judgment on the basis of qualified immunity. The dietician Rossi together with the dentists moved for summary judgment also asserting the defense of qualified immunity. The district court granted the motions, with the exception of the dentists' motion on the dental care claims. The parties later settled the dental care claims.

Baughman appeals the district court's grant of summary judgment on the diabetic caregivers', Harris County's, and Rossi's motions.

II.

A movant shall prevail on summary judgment where he "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[5] A factual issue is genuine if the summary judgment record provides evidence on which a reasonable jury could return a verdict for the nonmoving party, and is material if the resolution of the issue in favor of one party might affect the outcome of the suit under governing law.[6]

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[5] FED. R. CIV. P. 56(a).

[6] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Where the movant demonstrates that there is no genuine issue of material fact, the non-movant bears the burden of demonstrating "specific facts showing that there is a genuine issue for trial."[7] The court reviews a district court's order granting summary judgment de novo, viewing the evidence and drawing all factual inferences from the evidence in the light most favorable to the non-movant.[8] The court construes pro se briefs liberally, though a litigant's pro se status does not relieve him of the procedural obligation to present evidence creating a genuine issue of material fact to survive summary judgment.[9]

A.

Public officials acting within the scope of their authority generally are shielded from a suit for monetary damages by the doctrine of qualified immunity.[10] To overcome qualified immunity, a plaintiff must establish that the defendant officials violated a statutory or constitutional right and that the right was "clearly established" at the time of the violation.[11] "A good-faith assertion of qualified immunity alters the usual summary judgment burden of proof, shifting it to the plaintiff to show that the defense is not available."[12]

"The constitutional rights of a pretrial detainee flow from the procedural and substantive due process guarantees of the Fourteenth Amendment."[13] "This Court has recognized that there is no significant distinction between pretrial detainees and convicted inmates concerning basic human needs such

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[7] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[8] *Smith v. Regional Trans. Auth.*, 827 F.3d 412, 417 (5th Cir. 2016).

[9] *Perez v. Johnson*, 122 F.3d 1067, at *1 (5th Cir. 1997) (unpublished).

[10] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[11] *Id.*

[12] *King v. Handorf*, 821 F.3d 650, 653 (5th Cir. 2016).

[13] *Gibbs v. Grimmette*, 254 F.3d 545, 548 (5th Cir. 2001).

as medical care."[14] A pretrial detainee's due process rights are at least as great as the Eighth Amendment protections available to a convicted prisoner.[15] "The State's exercise of its power to hold detainees and prisoners . . . brings with it a responsibility under the U.S. Constitution to tend to essentials of their well-being," including an affirmative duty to provide adequate medical care.[16] Pretrial detainees may challenge the episodic acts or omissions of individual officials where these officials act with deliberate indifference.[17] A prison official acts with deliberate indifference where he or she knows of a substantial risk of serious harm to the detainee, and disregards that risk.[18] The detainee need not show that the risk was realized—that he was harmed—but only that the official subjected him to the requisite level of risk.[19] "Deliberate indifference is an extremely high standard to meet."[20] An incorrect prescription or even a "failure to alleviate a significant risk that [the official] should have perceived, but did not" is insufficient to show deliberate indifference.[21] Disagreement about medical treatment is not sufficient for a constitutional violation.[22] Rather the plaintiff must establish "that the officials refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in

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[14] *Id.*

[15] *Hare v. City of Corinth*, 74 F.3d 633, 638–39 (5th Cir. 1996) (en banc).

[16] *Id.*

[17] *Id.* at 644–45.

[18] *Domino v. Texas Dep't of Criminal Justice*, 239 F.3d 752, 755 (5th Cir. 2001) (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

[19] *See id.* For this reason, we agree with Baughman that the district court erred in citing the absence of harm in its finding of no constitutional violation.

[20] *Id.* at 756.

[21] *Id.* (alteration in the original).

[22] *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991).

any similar conduct that would clearly evince a wanton disregard for any serious medical needs."[23]

Baughman challenges the acts and omissions of individual medical care providers at the Jail, arguing that their failure to order thrice daily fingerstick tests exposed him to substantial risks of severe hypoglycemia, including diabetic coma or death. Individual defendants Michael Seale, Marcus Guice, Bobby Davis, Sharon Lambi, and Beverly Howard are all Jail officials who oversaw Baughman's diabetes management at the Jail. They assert the defense of qualified immunity. To survive summary judgment, Baughman must rebut the defense by establishing on the summary judgment record that a reasonable juror could find these defendants violated his constitutional rights and acted unreasonably in light of clearly established law.[24] Baughman "need not present 'absolute proof,' but must offer more than 'mere allegations.'"[25]

There is no dispute that hypoglycemia can in some situations result in serious harms such as coma and death. If Baughman had been injected with insulin indiscriminately—with complete ignorance as to his blood-glucose level—and without an ex post means of mitigating hypoglycemia, this conduct would expose him to a substantial risk of serious harm. These are not the facts of this case. Upon arrival at the Jail, Baughman was evaluated by medical staff who identified his diabetic condition, measured patterns of blood-glucose fluctuation, considered his past treatment, and on that basis prescribed a regimen of diabetes management. In the two and a half years Baughman spent at the Jail before summary judgment, Baughman received regular attention

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[23] *Domino*, 239 F.3d at 756.

[24] *King*, 821 F.3d at 654.

[25] *Id.*

and evaluation of his diabetes management. He saw medical providers 78 times during both regularly scheduled appointments and walk-ins initiated by Baughman. On several of these occasions his insulin regimen was adjusted, each time informed by providers' observation of blood-glucose level tests, both during regularly scheduled quarterly tests and tests at other non-scheduled times. To the extent Baughman's diabetes was uncontrolled and required adjustment of the insulin regimen, the record suggests that elevated blood-glucose, not hypoglycemia, was the problem.

On over 73 percent of his days in detention between his arrival and September 2016, Baughman received no fingerstick test, a marked deviation from the optimum. To determine whether the infrequency of fingerstick testing exposed Baughman to a substantial risk of serious harm, we examine the frequency of testing in the context of the Jail's overall system of managing Baughman's diabetes. Other components of essential care as defined by Baughman's expert Madoff were indisputably present. Madoff opines "it must be possible to have staff available at all hours that are trained to perform glucose monitoring to detect and treat dangerous hypoglycemic events." The parties do not dispute that Baughman was under 24-hour surveillance, that he had 24-hour access to medical services, with security guards and triage nurses present in his cellblock in the event of a medical emergency. Jail nurses administering insulin could identify signs of hypoglycemia, even without a fingerstick test, and retained discretion to deny Baughman insulin had they observed these signs.

Madoff also observes that it was essential that Baughman have access to glucose to fend off hypoglycemia if he perceived its early symptoms, such as glucose tablets. The Jail did not supply inmates with tablets (these were kept in the clinic), but nothing in Madoff's report indicates that the Jail's provision of apples and oranges was an insufficient substitute. Nor did Baughman

dispute that he was able to recognize the signs of hypoglycemia—albeit with less precision than a fingerstick device—and mitigate them with sugary foods provided by the insulin cart. The record indicates as much: for example, in March 2015, Baughman refused to eat bran flakes he was served for breakfast, and then told Chronic Care Clinic staff that he felt shaky, but that he "had food/fruit given at insulin administration available for rescue if needed." Indeed, the record indicates that Baughman stockpiled sources of supplemental glucose provided by the clinic. Complementing his ability to perceive, communicate, and mitigate hypoglycemic symptoms, the record also indicates that Baughman was aware that he could refuse insulin injections, and that he exercised this option on at least one occasion.

Madoff opines it was essential for Baughman to have "the ability to instantaneously have his blood glucose assessed in the event of potential hypoglycemia." There is no dispute that the Jail provided Baughman this opportunity. Nurses administering insulin could request fingerstick tests if they suspected hypoglycemia or otherwise questioned the appropriateness of an insulin dose. Even while Baughman submitted generic grievance forms complaining about the general infrequency of fingerstick tests, he also successfully requested additional tests using the "sick call" request process. Neither Madoff's opinions nor Baughman's arguments counter Dr. Seale's position that the professional bodies' recommended frequency of tests is not generalizable to the Jail, given its 24-hour monitoring, regularity, and control of diet.

Negligence or medical malpractice do not suffice for a constitutional tort: Baughman must point us to facts upon which a jury could find defendants' "wanton disregard" for his diabetic condition. He has failed to do so. We agree with the district court that Baughman has not established facts on which a reasonable jury could find he was exposed to a substantial risk of the serious

harms associated with untreated severe hypoglycemia. The record does not support Baughman's contention that his diabetes management forced a "Hobson's Choice" between hypoglycemic "Russian roulette" and potential coma or death by hyperglycemia. We affirm the district court's determination that Baughman has established no constitutional violation, and the five individual officials prevail on summary judgment.

B.

Municipalities can be sued directly under § 1983.[26] To succeed on a claim against a municipality, a plaintiff must demonstrate that an official policy promulgated by a municipal policymaker was the moving force behind a violation of the plaintiff's constitutional right.[27] A municipality can be liable for failure to train its employees where this failure amounts to deliberate indifference to the rights of persons with whom these employees come into contact.[28] Here, Baughman argues Harris County's official policy was the moving force behind Jail staff's constitutionally infrequent use of fingerstick tests. Additionally, Baughman argues the same constitutional violation is attributable to the County's failure to train Jail medical staff. Thus Baughman's municipal claims are premised on the same alleged constitutional violation addressed above. As with the claims against the individual Jail officials, there is no basis for Baughman's claim against Harris County. We affirm the district court's grant of summary judgment to Harris County.

C.

To prevail on a claim for unconstitutional retaliation, the plaintiff must establish the exercise of a specific constitutional right, the defendants' intent

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[26] *Connick v. Thompson*, 563 U.S. 51, 60 (2011).

[27] *Davidson v. City of Stafford*, 848 F.3d 384, 395 (5th Cir. 2017).

[28] *Connick*, 563 U.S. at 61.

to retaliate against him for the exercise of that right, a retaliatory act, and a causal nexus between his exercise of the right and the retaliatory act.[29] To establish causation, the plaintiff must establish that but for the retaliatory motive, the defendants' act of retaliation would not have occurred.[30] A plaintiff must "produce direct evidence of motivation" or "allege a chronology of events from which retaliation may plausibly be inferred."[31] Where defendants move for summary judgment, the plaintiff's conclusory allegations with respect to any of these four elements will not withstand the motion.[32]

Here, we need not look beyond the requirement of causation. Baughman's letter to the Texas Commission on Jail Standards was submitted on March 30, 2015 and was received on April 6, 2015. Rossi, at Davis's instruction, imposed commissary restrictions on Baughman on April 13, 2015. Baughman argues this is a chronology from which a reasonable juror could infer retaliation. He is wrong. Standing alone, the chronology does not eliminate the possibility of retaliation. But the dates cannot be viewed alone. To the extent there could have been a retaliatory motive, this would have originated from Seale, the only defendant who may have known of Baughman's letter—Seale does not remember the letter, but conceded that, as part of his role on the TCJS, he likely would have reviewed it. Though Seale, as Executive Medical Director, had authority to impose commissary restrictions, he had no involvement in the restriction imposed on Baughman. Baughman's commissary restriction was imposed by Rossi at the instruction of Davis. Neither Davis nor Rossi were aware of the letter's existence. It is unclear how

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[29] *McDonald v. Steward*, 132 F.3d 225, 231 (5th Cir. 1998).

[30] *Id.*

[31] *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995).

[32] *Id.*

Baughman understands the alleged retaliation to have occurred in these circumstances, but all we can conclude is that the district court was correct that on these facts no reasonable juror could find retaliation. We affirm the grant of summary judgment to Seale, Davis, and Rossi on this claim.

D.

Baughman also brings a state-law tort claim against Harris County, arguing that the County violated the medical standard of care in its treatment of his diabetes, and is liable for the negligence of the Jail's healthcare providers. The district court held that this claim was barred by sovereign immunity, because it did not fall within the Texas Tort Claims Act's narrow statutory waiver of immunity for "personal injury . . . so caused by . . . use of tangible personal . . . property. . . if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."[33] Baughman argues that the district court erred in finding his claim barred, because Jail officials' use of insulin and medical equipment constitutes a use of tangible property under the Act.

Baughman's argument fails. The district court was correct to find that the use of drugs and medical equipment while treating an inmate in its custody is not enough to satisfy the Texas Tort Claim Act's use of tangible property requirement. In *Texas Department of Criminal Justice v. Miller*, the Texas Supreme Court clarified as much: "[d]octors in state medical facilities use some form of tangible personal property nearly every time they treat a patient," but the state has not waived sovereign immunity "in every case in which medical treatment is provided by a public facility."[34] Rather, "[u]sing that property

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[33] TEX. CIV. PRAC. & REM. CODE § 101.021(2).

[34] 51 S.W.3d 583, 588 (Tex. 2001) (quotation marks omitted).

must have actually caused the injury."[35] Baughman has not demonstrated that a reasonable juror could find that the Jail staff's use of insulin and other medical equipment caused him injury. The district court correctly granted summary judgment to the County on this claim.

III.

Baughman has moved for appointment of counsel on appeal. Appointment is not necessary here, and the motion is denied.

IV.

We AFFIRM the district court's grants of summary judgment on the basis of qualified immunity to individual officials Seale, Guice, Davis, Howard, and Lambi on the medical care claim; and to Seale, Davis, and Rossi on the retaliation claim; as well as the district court's grant to Harris County on claims for municipal liability and the negligence claim; and dismiss the case. Baughman's motion for appointment of counsel is DENIED.

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[35] *Id.*

Appendix B

Decision of the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEVEN KURT BAUGHMAN, SPN #505318,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-14-3164
SHERIFF ADRIAN GARCIA, *et al.*,	§	
Defendants.	§	

MEMORANDUM AND ORDER

The plaintiff, Steven Kurt Baughman (SPN #505318), is presently in custody at the Harris County Jail (the "Jail"), which is operated by the Harris County Sheriff's Office ("HCSO") in Houston, Texas. Baughman has filed this lawsuit under 42 U.S.C. § 1983, asserting claims of inadequate medical care for type 2 diabetes, inadequate dental care, and retaliation for lodging a complaint about the level of medical and dental care that he has received. Baughman sues Harris County and the following defendants in their individual or personal capacity as supervisory officials and health care providers employed by HCSO at the Jail: (1) former Harris County Sheriff Adrian Garcia; (2) former Harris County Sheriff Ron Hickman; (3) former Executive Medical Director Dr. Michael Seale; (4) former Medical Administrator Bobby Davis; (5) Interim Executive Medical Director Dr. Marcus Guice; (6)

Physician's Assistant Sharon Lambi; (7) Dentist Dr. Edwin Chin; (8) Dentist Dr. Alan Harper; (9) Nurse Practitioner Beverly Howard; (10) Dietitian Cathy Rossi; and (11) Dietitian Renee Hinojosa.[1]

Five of the above-referenced defendants employed at the Jail in a supervisory capacity (Dr. Seale, Dr. Guice, Davis, Lambi, and Howard) have filed a joint motion for summary judgment [Doc. # 179], arguing that they are entitled to qualified immunity from Baughman's claims against them. The dentists (Drs. Chin and Harper) and one of the dietitians (Rossi) have filed a separate motion for summary judgment [Doc. # 183], which also raises the defense of qualified immunity. Harris County has filed a motion for summary judgment on its own behalf, arguing further that Baughman fails to make a valid claim for municipal liability under any theory against it [Doc. # 181]. Baughman has filed separate responses to these motions [Docs. # 188, # 190]. The defendants have filed several replies [Docs. # 193, # 195, # 196].

After considering all of the pleadings, the exhibits, and the applicable law, the motion for summary judgment filed by Drs. Chin and Harper is **DENIED**, in part, with respect to Baughman's claim that he was denied adequate dental care for tooth decay with deliberate indifference to a serious medical need in violation of 42 U.S.C. § 1983. The motions for summary judgment are **GRANTED** with respect to all other

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[1] Fourth Amended Complaint [Doc. # 134], at ¶¶ 2-13.

claims for the reasons discussed below.

I. BACKGROUND

For the purpose of addressing the claims asserted in this case, it is helpful to first describe the plaintiff, his ailments, and the role, if any, played by the defendants in the medical and dental treatment that he has received at the Jail. Unless otherwise noted, this portion of the Court's decision is based on facts that are undisputed by the parties. All facts are viewed in the light most favorable to the plaintiff, as non-movant.[2]

A. The Plaintiff

Plaintiff Baughman has been in continuous custody of Harris County at the Jail since he was arrested on April 3, 2014.[3] The average length of stay for detainees at the Jail is estimated at 74 days.[4] A previously convicted felon who was on parole at the time of his arrest,[5] Baughman has now been detained at the Jail for over three years and is still awaiting trial on the criminal charges that remain pending against

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2 *See Tolan v. Cotton*, — U.S. —, 134 S. Ct. 1861, 1866 (2014).

3 Fourth Amended Complaint [Doc. # 134], at ¶ 16.

4 *See* Guice Dep. [Doc. # 188, Ex. 1], at 136:20-23 (estimating that the length of stay is between 73 and 75 days on average); *but see* Seale Dep. [Doc. # 188, Ex. 2], at 121:23-122:13 (estimating that the average length of stay is 40 days).

5 Fourth Amended Complaint [Doc. # 134], at ¶ 16.

him in state court.[6]

When Baughman arrived at the Jail he reportedly alerted officials that he suffered from type 2 diabetes, which required insulin injections, and that he had "severe" pain due to several broken and decaying teeth.[7] Baughman's pre-arrest history of severe tooth decay had already resulted in the extraction of more than ten teeth.[8] Baughman, who is presently 57 years of age, also arrived at the Jail with a host of other pre-existing conditions, including opioid dependence, chronic back pain, chronic kidney disease, gout, hypertension (high blood pressure), hyperlipidemia (high cholesterol), diabetic neuropathy, and morbid obesity.[9]

Baughman initially filed this case *pro se* on November 4, 2014, against

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[6] Court records reflect that Baughman currently has two active felony cases stemming from his April 2014 arrest. Those cases are pending in the 174th District Court for Harris County, Texas, in *State of Texas v. Baughman*, Cause No. 153285001010 (aggravated assault with a deadly weapon), and *State of Texas v. Baughman*, Cause No. 142342101010 (felon in possession of a firearm). A trial is reportedly scheduled for June 5, 2017. *See* Harris County District Clerk's Office website, located at: www.hcdistrictclerk.com (last visited May 24, 2017).

[7] *See* Baughman Decl. [Doc. # 190, Ex. 8], at 1-2; *see also* Inmate Complaint Form [Doc. # 190, Ex. 5], at 1 (Bates No. HC/Baughman 8268); Inmate Complaint Form [Doc. # 190, Ex. 9], at 1 (Bates No. HC/Baughman 8106).

[8] HCSO Health Services Bureau Dental: Annual and Juvenile Exam Form [Doc. # 190, Ex. 14], at 1-2 (Bates No. HC/Baughman 5917) (filed under seal).

[9] Guice Aff. [Doc. # 179-4], at ¶¶ 13, 15.

numerous defendants employed by Harris County and HCSO.[10] After Baughman submitted several amended and supplemental versions of his claims,[11] the Court appointed counsel to assist him with his claims of inadequate medical and dental care, which potentially implicate more than one policy or practice in place at the Jail.[12]

B. The Defendants

The lead defendant, Adrian Garcia, was the elected Harris County Sheriff from the time Baughman was booked into the Jail until late 2015. Ron Hickman, who was appointed to succeed Garcia as Sheriff, left the office at the end of 2016.[13] While serving as Harris County Sheriff, Garcia and Hickman were in charge of the Jail,[14] which is one of the largest in the United States.[15] During the time this lawsuit has

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10 *See* Original Complaint [Doc. # 1].

11 *See* Amended Complaint [Doc # 11]; Second Amended Complaint [Doc. # 29]; Third Amended Complaint [Doc. # 114].

12 *See* Memorandum and Order dated Feb. 24, 2016 [Doc. # 110], at 4-5.

13 In late 2016, Ed Gonzalez succeeded Hickman as the elected Harris County Sheriff. To date, Gonzalez has not been served or named as a defendant in this case.

14 *See* TEX. LOC. GOV'T CODE § 351.041(a) ("The sheriff of each county is the keeper of the county jail.").

15 The Harris County Jail includes four major facilities with a design capacity of 9,800 detainees, as well as several satellite locations operated by HCSO, which increase the Jail's available capacity overall. *See* U.S. Dep't of Justice, Civil Rights Div., Memorandum dated June 4, 2009 [Doc. # 190, Ex. 24], at 2. "With a population approaching 10,000 detainees, the Jail is one of the largest detention facilities in the country." *Id.* at 16.

been pending, the Jail's average daily population has been around 8,600 inmates.[16]

At the time Baughman was booked into the Jail, Dr. Seale was employed as the Executive Medical Director for the Jail's Health Services Division.[17] Dr. Seale attained that position originally in 1994, when he was employed by the University of Texas Health Services Center, which was providing care to detainees at the Jail pursuant to a contractual arrangement.[18] Dr. Seale became employed directly by HCSO in 2010, when Harris County decided to provide all medical care for the Jail "in house."[19]

During his tenure as Executive Medical Director, Dr. Seale oversaw all facets of the Health Services Division at the Jail, including medical, mental health, pharmacy, and laboratory operations.[20] The Health Services Division, which currently employs approximately 300 medical personnel,[21] operates a "general clinic" that is

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16 Texas Comm'n on Jail Standards Annual Jail Reports, 2014-2016 [Doc. # 179-4], at 14, 22, 26.

17 Seale Aff. [Doc. # 179-3], at ¶ 2.

18 Seale Dep. [Doc. # 188, Ex. 2], at 14:22-16:9, 17:19-20, 18:16-24, 22:15-23.

19 *Id.* at 15:23-16:22.

20 Seale Aff. [Doc. # 179-3], at ¶¶ 2-3.

21 Guice Aff. [Doc. # 179-4], at ¶ 3.

open to treat inmates and provide care 24 hours a day, seven days a week.[22] The Health Services Division also operates several clinics that offer specialized care, including a Dental Clinic and a Chronic Care Clinic, which provides care for chronic diseases like hypertension, asthma, and diabetes.[23]

As Executive Medical Director, Dr. Seale was responsible for ensuring that all components of the Health Services Division complied with criteria promulgated by the Texas Commission on Jail Standards ("TCJS"), which has regulatory authority over all county jails in Texas, and for ensuring that all policies and procedures in place are consistent with applicable standards or "best practices" established by the National Commission on Correctional Health Care ("NCCHC"), which has continually accredited the Jail since 1985.[24] Dr. Seale left the position of Executive Medical Director to take a similar job elsewhere at the end of September 2015.[25] Since that time, Dr. Guice, who started working as a physician at the Jail in 1988, and previously served as the Assistant Medical Director under Dr. Seale, has been serving as Interim

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22 Guice Dep. [Doc. # 188, Ex. 1], at 19:10- 23:22 (describing medical infirmary, general clinic, specialty clinics, and services).

23 *Id.* at 21:6-23:2.

24 Seale Aff. [Doc. # 179-3], at ¶ 3; Guice Aff. [Doc. # 179-4], at ¶ 5.

25 Seale Dep. [Doc. # 188, Ex. 2], 17:19-18:24.

Executive Medical Director until a permanent replacement can be found.[26] As Interim Director, Dr. Guice also has been responsible for overseeing and revising Jail policies on medical care for the Health Services Division and its many operations.[27]

Sharon Lambi is a licensed physician's assistant who is in charge of the Chronic Care Clinic during second shift.[28] Beverly Howard is a licensed nurse practitioner who also works in the Chronic Care Clinic.[29] Both Lambi and Howard are considered supervisors at the Chronic Care Clinic.[30]

The Chronic Care Clinic is charged with monitoring the blood glucose levels of diabetic detainees on a regular basis, and ensures that detainees receive routine care from the Optometry Clinic and the Dental Clinic for issues that commonly affect diabetics.[31] During the time this lawsuit has been pending, the Jail has housed

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[26] Guice Aff. [Doc. # 179-4], at ¶ 1; Guice Dep. [Doc. # 188, Ex. 1], at 13:20-22, 15:2-16:16, 125:19-126:8 (noting that he does not intend to stay on permanently as the Executive Director).

[27] Guice Dep. [Doc. # 188, Ex. 1], at 144:10-20.

[28] Lambi Aff. [Doc. # 179-5], at ¶ 6; Lambi Dep. [Doc. # 188, Ex. 3], at 17:21-18:10.

[29] Howard Aff. [Doc. # 179-6], at ¶ 3.

[30] Plaintiff's Response to the Individual Capacity Defendants' Motions for Summary Judgment [Doc. # 190], at 33 (alleging that, as "directors" in charge of the Chronic Care Clinic, Lambi and Howard were responsible for determining the frequency of blood glucose monitoring for diabetic inmates).

[31] Lambi Dep. [Doc. # 188, Ex. 3], at 32:10-33:3.

approximately 105 to 120 diabetics who require daily insulin injections,[32] which are administered by nurses on a twice-daily basis under the direction of a treating physician at the Chronic Care Clinic.[33]

When Baughman was admitted to the Jail in April 2014, Bobby Davis was employed by HCSO as a Medical Administrator.[34] As Medical Administrator, Davis oversaw all of the clinics at the Jail.[35] Davis served in that role until August 31, 2015, when he left to work as a private contractor.[36]

Rossi is a registered dietitian who shares responsibility with other medical providers for administering inmate diets.[37] Davis was Rossi's supervisor during the time relevant to the events of this lawsuit.[38]

During the time this lawsuit has been pending, Dr. Edward Chin and Dr. Alan Harper have been the only dentists employed by HCSO at the Dental Clinic, which is

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32 Guice Dep. [Doc. # 188, Ex. 1], at 41:11-42:11.

33 Seale Dep. [Doc. # 188, Ex. 2], at 83:4-14; *see also* Lambi Dep. [Doc. # 188, Ex. 3], at 86:3-88:21.

34 Davis Aff. [Doc. # 179-7], at ¶ 3.

35 *Id.*

36 *Id.*

37 Rossi Aff. [Doc. # 183, Ex. 3], at ¶ 2.

38 *Id.* at ¶ 9.

open between 6:00 a.m. and 2:00 p.m., Monday through Friday.[39] With help from two dental assistants, Drs. Chin and Harper provide dental care for all inmates at the Jail.[40] Dr. Chin worked at the Jail from 2006 through late 2016, when he left to devote more time to his private practice.[41] Dr. Harper started working at the Jail as an "agency employee" in 2012, and became a full-time Harris County employee in 2013.[42]

C. Allegations of Inadequate Medical Care for Diabetes

Baughman's primary claim is that he has been denied adequate medical care in the form of blood glucose monitoring for type 2 diabetes. Type 2 diabetes is a condition in which the pancreas does not produce enough insulin, which is the hormone that regulates the level of glucose or sugar in the blood stream.[43] Because patients with type 2 diabetes can produce some insulin, they are typically treated with a regimen that emphasizes a diet low in "sweets" along with exercise and weight loss, but they can also require the administration of insulin, if necessary.[44] By contrast, persons with type 1 diabetes are incapable of producing any insulin and must depend

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39 Chin Dep. [Doc. # 188, Ex. 6], at 20:13-25, 21:14-22.

40 *Id.* at 20:13-22, 22:9-10, 45:17-48:25.

41 *Id.* at 15:22-16:1.

42 Harper Aff. [Doc. # 183-2], at ¶ 2.

43 Guice Dep. [Doc. # 188, Ex. 1], at 33:4-9.

44 *Id.* at 48:23-49:5.

on regular insulin injections to control their blood sugar.[45]

As a result of his "severe obesity," Baughman depends on regular insulin injections to treat his type 2 diabetes.[46] Baughman characterizes himself as an "'unstable' or 'brittle' diabetic, meaning that his blood-sugar levels are difficult to control and can vary widely over both short and long periods of time."[47] Uncontrolled blood sugar levels in a diabetic can have serious medical consequences. If blood sugar levels are consistently high, a diabetic patient runs the risk of developing a number of serious conditions, including heart attacks, strokes, loss of eyesight (retinopathy), loss of teeth, kidney failure, and other complications.[48] There is also a danger of blood sugar dropping too low.[49] If blood sugar drops too low (below 60 mg/dL or milligrams per deciliter), a diabetic could develop hypoglycemia.[50]

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45 *Id.* at 34:8-22; Lambi Dep. [Doc. # 188, Ex. 3], at 56:14-24 (distinguishing type 2 and type 1 diabetes).

46 Expert Report of Dr. David H. Madoff ("Madoff Report") [Doc. # 190, Ex. 6], at 3 (filed under seal).

47 Fourth Amended Complaint [Doc. # 134], at ¶ 20.

48 Lambi Dep. [Doc. # 188, Ex. 3] at 57:7-22, 59:2-6; Guice Dep. [Doc. # 188, Ex. 1], at 35:4-19.

49 Lambi Dep. [Doc. #188, Ex. 3], at 58:7-14.

50 STEDMAN'S MEDICAL DICTIONARY 933 (28th ed. 2006) (noting that hypoglycemia may occur when blood glucose drops below the normal range, which is between 60 to 100 milligrams per deciliter).

Symptoms of hypoglycemia typically include sweating, trembling, feelings of warmth, anxiety, and nausea.[51] If left untreated, however, "severe hypoglycemia can cause altered mental status, confusion, coma, seizures, brain damage, and death."[52]

Baughman claims that providers at the Jail are not adequately monitoring his blood sugar levels to determine whether it is too low before giving him his twice-daily dose of insulin, placing him at risk for hypoglycemia. Although a diabetic patient can typically identify whether they have signs or symptoms of low blood sugar, glucose monitoring is considered to be the "more accurate" way to determine whether blood sugar is too low before administering insulin.[53] A glucose monitor is a portable device that can "instantaneously and accurately measure a patient's blood glucose," using the following methodology:

> To test a patient's blood sugar the patient's finger is pricked with a lancet device to express a small drop of blood. The small blood drop is then applied to a glucose test strip that has been inserted into a portable glucose monitor. The patient's blood glucose at that precise time is displayed on the glucose monitor.[54]

This procedure for testing blood sugar, which is known as the "fingerstick" technique,

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51 *Id.*

52 Madoff Report [Doc. # 190, Ex. 6], at 7.

53 Seale Dep. [Doc. # 188, Ex. 2], at 62:16-25; Guice Dep. [Doc. # 188, Ex. 1], at 67:17-19 ("Most diabetics with experience can tell you when their sugar is too low.").

54 Madoff Report [Doc. # 190, Ex. 6], at 3.

is described as "quite simple" and reportedly takes no more than two minutes to complete by an experienced person.[55]

Medical standards of "optimal" treatment recommend that a type 2 diabetic taking insulin should have his or her blood glucose monitored at least three times a day.[56] The blood glucose levels of diabetic inmates at the Jail are monitored on a regular basis "both by venipuncture laboratory testing and by fingerstick point of care testing," but fingersticks are not administered three times a day unless this level of frequency is ordered by a medical provider.[57] In that regard, the Chronic Care Clinic conducts quarterly testing of each diabetic detainee's hemoglobin A1c, which measures a patient's average blood glucose level over a period of seven to twelve weeks before the test.[58] Fingerstick monitoring is done at a frequency dictated by a physician at the discretion of the treatment provider in his or her medical judgment

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55 *Id.*

56 *See* Madoff Report [Doc. # 190, Ex. 6], at 3-4; *see also* Lambi Dep. [Doc. # 188, Ex. 3], at 73:20-76:1 (referencing standards articulated by the American Diabetes Association, the Institute for Clinical Systems Improvement, and the Federal Bureau of Prisons); Seale Dep. [Doc. # 188, Ex. 2], at 66:11-76:4 (same).

57 Seale Aff. [Doc. # 179-3], at ¶ 12.

58 *See id.*; *see also* Howard Aff. [Doc. # 179-6], ¶ 6 (summarizing the care Baughman received at the Chronic Care Clinic, including his quarterly A1c test results); Seale Dep. [Doc. # 190, Ex. 1], at 76:9-77:3, 83:4-14; Lambi Dep. [Doc. # 190, Ex. 2], at 86:3-88:21.

based on the detainee's history and observations of his condition.[59] Diabetics with fluctuating blood glucose levels are subject to closer monitoring by the "fingerstick blood sugar/blood pressure clinic," which is operated as an adjunct to the Chronic Care Clinic.[60] Thus, fingerstick monitoring is not automatically done every day before administering each dose of insulin unless a medical provider deems it necessary.[61]

At the time of his arrest, Baughman's treating physician reportedly had prescribed fingersticks at least four times per day.[62] Baughman advised Jail personnel of this treatment regimen in a grievance that he submitted on April 19, 2014, complaining that he was being denied adequate fingersticks to monitor his blood glucose levels.[63] In this lawsuit, Baughman complains that Jail medical personnel frequently administer his twice-daily injections of insulin without any knowledge of his existing blood sugar level, creating a risk of hypoglycemia followed by severe

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59 Seale Aff. [Doc. # 179-3], at p. 4.

60 Seale Dep. [Doc. # 188, Ex. 2], at 33:8-36:11.

61 *See* Lambi Dep. [Doc. # 188, Ex. 3], at 75:20-76:1; Guice Dep. [Doc. # 188, Ex. 1], at 66:20-25; Seale Dep. [Doc. # 188, Ex. 2], at 74:20-75:19 (explaining that an individual practitioner is free to order more fingersticks if he or she felt it was clinically indicated).

62 Baughman Decl. [Doc. # 190, Ex. 8], at 1.

63 *Id.* at 1-2; Inmate Complaint Form [Doc. # 190, Ex 5], at 1 (Bates No. HC/Baughman 8268).

injury or even death.[64] Citing the numerous grievances that he has filed over the past three years, Baughman contends that "all defendants" are aware that this practice poses "unnecessary and severe health risks," yet they do not automatically require checks of blood glucose levels with a fingerstick before administering each dose of insulin.[65]

Seeking relief under 42 U.S.C. § 1983, Baughman contends that Harris County's "policy" or practice of denying fingersticks before each dose of insulin, as developed, implemented, and enacted by supervisory officials at the Jail (Sheriffs Garcia and Hickman, Drs. Seale and Guice, Davis, Lambi, and Howard) is deliberately indifferent to his serious medical needs as an insulin-dependent diabetic and violates his constitutional right to adequate medical care.[66] Baughman adds that Sheriff Garcia, Sheriff Hickman, Dr. Seale, and Dr. Guice have failed to adequately train and supervise medical personnel administering insulin at the Jail.[67] By failing to provide medical care for diabetes in accordance with "good and accepted medical and professional practice," Baughman contends further that Harris County is liable for

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64 Plaintiff's Response to the Individual Capacity Defendants' Motions [Doc. # 190], at 13.

65 *Id.* at 14.

66 Fourth Amended Complaint [Doc. # 134], at ¶¶ 40, 46, 67-68.

67 *Id.* at ¶¶ 78-79.

negligence.[68]

D. Allegations of Inadequate Dental Care

Baughman also contends that he has been denied adequate dental care at the Jail for severe tooth decay, which has caused him to lose several teeth. When Baughman was booked into the Jail on April 3, 2014, he reportedly had a "severe toothache" because one or more of his teeth were "broken off at the gum line" and he also had at least two painful cavities.[69] Baughman, who had already lost numerous teeth before arriving at the Jail, was referred to the Dental Clinic for treatment pursuant to the Jail's written policy. That policy is summarized briefly below followed by a chronology of the dental care that Baughman has received during his confinement at the Jail, which has included the extraction of multiple decayed teeth.

Jail policy states that upon intake each inmate will be given a toothbrush and toothpaste along with a copy of the Inmate Handbook, which includes instructions on

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[68] Fourth Amended Complaint [Doc. # 134], at ¶¶ 73-74. Previously, the Court dismissed with prejudice state law negligence claims lodged by Baughman against former Sheriff Adrian Garcia, former Sheriff Ron Hickman, Dr. Michael Seale, Bobby Davis, Dr. Marcus Guice, Sharon Lambi, Dr. Edwin Chin, Dr. Alan Harper, Beverly Howard, Cathy Rossi, and Renee Hinojosa as precluded by an election-of-remedies provision found in § 101.106(c) of the Texas Civil Practice and Remedies Code. *See* Memorandum and Order dated October 21, 2016 [Doc. # 160], at 6-7. As a result, the only remaining negligence claims in this case concern Harris County.

[69] Inmate Complaint Form [Doc. # 190, Ex. 9], at 1 (Bates No. HC/Baughman 8106).

proper brushing and flossing of teeth.[70] Shortly thereafter, a registered nurse performs dental screening that includes "a visual inspection of the teeth and gums, noting any obvious or gross abnormalities requiring immediate referral to a dentist."[71] Inmates are given access to "the preventative benefits of fluorides in a form determined by the dentist" at an oral examination within 12 months of admission.[72] The oral examination includes: "(a) taking and reviewing the patient's oral history; (b) extraoral, head, and neck examination; (c) charting of teeth; (d) examination of the hard and soft tissue of the oral cavity with a mouth mirror, explorer, and adequate illumination; and (e) the initiation of a treatment plan including appropriate follow up."[73] The policy states that "[r]outine oral treatment, *not limited to extractions*, is provided according to a treatment plan based upon a system of established priorities for care."[74] According to the policy, "[c]onsultation through referral to oral health care specialists is available as needed."[75] The policy also provides that "detainees

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70 HCSO Manual of Policies and Procedures for Health Services, No. J-E-06 [Doc. # 190, Ex. 28], at Bates No. HC/Baughman 5728.

71 *Id.*

72 *Id.*

73 *Id.* at Bates No. HC/Baughman 5728-5729.

74 *Id.* at Bates No. HC/Baughman 5729 (emphasis added).

75 *Id.*

considered to benefit from provision of dentures as determined by Harris County Sheriff's Office Dentists *will be provided* with a denture to replace the missing teeth."[76]

On May 29, 2014, Baughman was seen in the Dental Clinic by Dr. Chin, who diagnosed "residual root tips" in two teeth (#17 and #19), which were extracted with Baughman's consent.[77] An x-ray disclosed cavities in two other teeth (#18 and #20).[78] Although Dr. Chin told Baughman that the teeth could be saved with "extensive [restorative] treatment" such as a root canal,[79] the only treatment Dr. Chin offered was "extraction."[80]

On October 14, 2014, Baughman filed a grievance asking for the cavities in tooth #18 and tooth #20 to be treated with fillings, arguing that these teeth could be saved if restorative dental work were provided.[81] Baughman also requested "partial

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76 HCSO Manual of Policies and Procedures for Dental Services, No. 16 [Doc. # 190, Ex. 27], at Bates No. HC/Baughman 5726 (emphasis added).

77 Plaintiff's Response to the Individual Capacity Defendants' Motions [Doc. # 190], at 14; Dental Progress Note [Doc. # 190, Ex. 12], at 1-2 (Bates No. HC/Baughman 9420) (filed under seal).

78 Chin Dep. [Doc. # 188, Ex. 6], at 151:1-152:11, 157:13-25.

79 *Id.* at 152:12-17, 154:12-20, 158:5-23.

80 *Id.* at 152:21-153:4, 158:16-18.

81 Grievance #15000 [Doc. # 190, Ex. 13], at Bates No. HC/Baughman 8336 & 8337.

dentures" to help him chew.[82] Baughman's requests were denied by the HCSO Inmate Grievance Board, which advised Baughman that this type of care was not provided at County expense, but that he had the option of having his own "freeworld dentist" provide the requested care at the Jail.[83]

On October 23, 2014, Baughman returned to the Jail Dental Clinic and repeated his request for fillings to treat his decaying teeth (#18 and #20).[84] Again Baughman was offered treatment in the form of extraction, which he again declined.[85]

On April 6, 2015, Baughman returned to the Dental Clinic for an annual dental exam.[86] Records of that exam reflect that Baughman was missing 13 out of 32 teeth (#1, #2, #3, #4, #12, #13, #15, #16, #17, #19, #29, #30, and #32) and had "moderate" periodontal disease.[87] During this exam, Dr. Harper recommended extracting three more teeth (#6, #18, and #31) and further recommended a root canal with a crown or,

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82 *Id.*

83 Grievance Resolution Form - Inmate Grievance Board [Doc. # 190, Ex. 31], at Bates No. HC/Baughman 8335.

84 Chin Dep. [Doc. # 188, Ex. 6], at 155:12-156:10.

85 *Id.*

86 HCSO Health Services Bureau Dental: Annual and Juvenile Exam Form [Doc. # 190, Ex. 14], at 1-2 (Bates No. HC/Baughman 5917) (filed under seal).

87 *Id.*

alternatively, extraction for another tooth (#14).[88] An x-ray disclosed decay in another tooth (#21).[89] At that time, both tooth #20 and tooth #21 were reportedly salvageable, but Dr. Harper did not offer or recommend any treatment for those teeth.[90]

On February 19, 2016, Baughman was seen at the Dental Clinic by Dr. Harper for pain in one of his molars (#31).[91] Dr. Harper diagnosed decay and extracted the tooth after determining that it could not be saved.[92]

On March 8, 2016, Baughman returned to the Dental Clinic for pain in tooth #18, which is one of the teeth that he originally sought treatment for following his arrest in April 2014.[93] By this time, decay and "chewing pressure" had caused the "head" of tooth #18 to crumble or break off.[94] Dr. Harper extracted the remains of tooth #18.[95] X-rays taken during this visit further showed that the level of decay in

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88 *Id.*

89 Chin Dep. [Doc. # 188, Ex. 6], at 159:16-160:24.

90 *Id.* at 161:15-16, 162:17-23.

91 Expert Report of Dr. Jay D. Shulman ("Shulman Report") [Doc. # 190, Ex. 26], at 28 (summarizing treatment provided to Baughman on February 19, 2016) (filed under seal).

92 *Id.* (referencing Bates No. HC/Baughman 5922).

93 Dental Provider Note [Doc. # 190, Ex. 15], at 3 (Bates No. HC/Baughman 5926) (filed under seal).

94 Chin Dep. [Doc. # 188, Ex. 6], at 168:20-169:2.

95 *Id.* at 167:11-168:12; 170:2.

two other teeth (#20 and #21) had progressed such that there was no treatment that could save them.[96] It is unclear from the record whether these teeth (#20 and #21) were extracted or whether they remain in Baughman's mouth.

On April 20, 2016, Baughman was seen again in the Dental Clinic for pain in tooth #15.[97] Dr. Harper diagnosed decay and extracted the tooth after determining that it was unsalvageable.[98]

Dr. Chin admitted at his deposition that dentists at the Jail do not provide treatment for cavities, other than extraction, at County expense.[99] If a tooth looks like it can be saved with restorative treatment such as a filling or root canal, the only available option an inmate has is to hire a private dentist to treat that tooth at the Jail Dental Clinic.[100] Baughman notes that he is indigent and maintains that this option, which requires a private dentist to bring his own staff and equipment, is "cost-prohibitive and impossible for most inmates[.]"[101] As a result, Baughman argues that

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96 Chin Dep. [Doc. # 188, Ex. 6], at 174:12-22.

97 Shulman Report [Doc. # 190, Ex. 26], at 29 (summarizing treatment provided to Baughman on April 20, 2016) (filed under seal).

98 *Id.*

99 Chin Dep. [Doc. #188, Ex. 6], at 41:18-42:4.

100 *Id.* at 41:21-42:1.

101 Plaintiff's Response to the Individual Capacity Defendants' Motions [Doc. # 190], at (continued...)

the Jail effectively employs a *de facto* "extraction-only" policy "under which the only option presented to inmates is to have their teeth forcibly removed."[102]

As the result of numerous extractions both in and out of the Jail, Baughman no longer has any molar teeth, meaning that he can only chew food with his front teeth.[103] Because a person normally chews with his back teeth, Dr. Chin acknowledged at his deposition that the lack of molars places tremendous pressure on Baughman's few remaining front teeth and makes eating painful.[104] Acknowledging further that Baughman is missing a substantial number of teeth, Dr. Chin noted that Baughman is an "extremely high candidate" for getting "complete dentures."[105] To date, Baughman's request for partial dentures has been refused because, according to Dr. Chin, dentists at the Jail will attempt to repair an inmate's broken dentures, but will not provide new ones.[106]

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[101](...continued)
16-17.

[102] *Id.* at 16. *See also* Shulman Report [Doc. # 190, Ex. 26], at 20-21 (filed under seal) (characterizing the Jail's practice of refusing to fill cavities as a "*de facto* extraction only policy").

[103] Chin Dep. [Doc. # 188, Ex. 6], at 174:1-7.

[104] *Id.* at 137:6-18, 144:1-17.

[105] *Id.* at 142:16-143:10.

[106] *Id.* at 120:8-122:10.

The defendants do not dispute that Baughman was not provided with "full-scale periodontal treatment," fillings, root canals, or crowns for tooth decay and that he was not offered dentures.[107] Baughman contends that he was denied the care he requested at County expense pursuant to an official custom or policy that was developed, enacted, and implemented by Sheriffs Garcia and Hickman, and Drs. Seale, Guice, Chin, and Harper with deliberate indifference to his serious dental needs in violation of his constitutional right to adequate dental care.[108] Baughman adds that Garcia, Hickman, Dr. Seale, Dr. Guice, and Dr. Chin also failed to supervise care given at the Dental Clinic or train dentists to provide adequate care.[109] By failing to provide dental care in accordance with "good and accepted dental and professional practice," Baughman contends further that Harris County is liable for negligence.[110]

E. Allegations of Retaliation

Baughman alleges that he was punished after he sent a letter to the TCJS in March 2015, objecting to the inadequate medical and dental care he had received at

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107 Seale Aff. [Doc. # 179-3], at ¶ 21; Guice Aff. [Doc. # 179-4], at ¶ 30.

108 Fourth Amended Complaint [Doc. # 134], at ¶¶ 54, 57, 59, 70-71.

109 *Id.* at ¶¶ 78-79.

110 *Id.* at ¶¶ 76-77.

the Jail.[111] In that same letter, Baughman argued that Defendant Dr. Seale's "dual role" as head medical administrator for the Jail and a member of the TCJS was a "conflict of interest."[112] TCJS reportedly received that letter on April 6, 2015.[113] Shortly thereafter on April 13, 2015, Baughman alleges that Davis, at the direction of Dr. Seale, ordered Rossi to impose restrictions on Baughman's commissary privileges that limited the types of food items he could purchase.[114] Baughman contends, therefore, that Dr. Seale, Davis, and Rossi retaliated against him for exercising his constitutional right to seek redress of grievances.[115]

F. Defendants' Motions

Defendants Dr. Seale, Dr. Guice, Davis, Lambi, and Howard have filed a joint motion for summary judgment, arguing that they are entitled to qualified immunity from the claims lodged against them in their individual capacity as supervisory officials.[116] In doing so, Dr. Seale, Dr. Guice, Davis, Lambi, and Howard argue that

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111 *Id.* at ¶ 62.

112 *Id.*

113 *Id.* at ¶ 63.

114 *Id.* at ¶ 63.

115 *Id.* at ¶¶ 81-82.

116 Motion for Summary Judgment for Individual Defendants Michael Seale, M.D., Bobby Davis, R.N., Marcus Guice, M.D., Sharon Lambi, MSPAS, PA-C, [and] Beverly (continued...)

Baughman does not have admissible evidence to prove that they personally engaged in wrongful conduct which caused a violation of Baughman's rights with the requisite subjective deliberate indifference.[117]

Defendants Dr. Chin, Dr. Harper, and Rossi have filed a separate joint motion for summary judgment, arguing that Baughman cannot show that they violated his constitutional rights and that they are also entitled to qualified immunity as a result.[118]

Harris County moves for summary judgment, arguing that Baughman fails to establish municipal liability by showing that an official custom, policy, or procedure was deliberately indifferent to his serious medical or dental needs.[119] Harris County contends further that Baughman cannot demonstrate municipal liability based on a claim of failure to train and supervise.[120] Finally, Harris County argues that Baughman cannot prevail on a negligence claim because his allegations do not fit

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[116](...continued)
Howard, Ph.D., R.N., FNP-BC [Doc. # 179], at 28-49.

[117] *Id.*

[118] Defendants Dr. Edwin Chin, Dr. Alan Harper, and Catherine Rossi's Motion for Summary Judgment [Doc. # 183], at 11-17.

[119] Defendant Harris County's Motion for Summary Judgment [Doc. # 181], at 24-33.

[120] *Id.* at 33-35.

within the waiver of sovereign immunity found in the Texas Tort Claims Act.[121]

II. STANDARD OF REVIEW

The defendants move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Under this rule, a reviewing court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Id.*

If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the non-movant to provide "specific facts showing the existence of a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A reviewing court "must view the evidence introduced and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment[.]" *Smith v. Regional Trans. Auth.*, 827 F.3d 412, 417 (5th Cir. 2016). The Supreme Court has particularly emphasized the importance of drawing

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121 *Id.* at 36-39.

inferences in favor of the nonmovant in cases such as this one, where individual defendants have asserted the defense of qualified immunity. *See Tolan v. Cotton*, — U.S. —, 134 S. Ct. 1861, 1866 (2014).

III. ANALYSIS OF LIABILITY OF THE INDIVIDUAL DEFENDANTS

Baughman seeks monetary damages from the individual defendants in their individual or personal capacity under 42 U.S.C. § 1983, which establishes "a private right of action to vindicate violations of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (quoting § 1983). "Under the terms of this statute, '[e]very person' who acts under the color of state law to deprive another of a constitutional right is answerable to that person in a suit for damages" *Id.* (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)). Arguing that Baughman cannot show that they violated a constitutional right, Dr. Seale, Dr. Guice, Davis, Lambi, Howard, Dr. Chin, Dr. Harper, and Rossi have moved for summary judgment on the grounds that they are entitled to qualified immunity from the claims lodged against them. Thus, Baughman's claims against these individual defendants are discussed below under the standard that governs the defense of qualified immunity.

A. Qualified Immunity

Public officials acting within the scope of their authority generally are shielded

from a suit for monetary damages by the doctrine of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A plaintiff seeking to overcome qualified immunity must satisfy a two-prong inquiry by showing: "(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." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citation omitted). This is an "exacting standard" that protects "all but the plainly incompetent or those who knowingly violate the law." *City and County of San Francisco v. Sheehan*, — U.S. —, 135 S. Ct. 1765, 1774 (2015) (citation omitted).

As this standard reflects, "[a] good-faith assertion of qualified immunity alters the usual summary judgment burden of proof, shifting it to the plaintiff to show that the defense is not available." *King v. Handorf*, 821 F.3d 650, 653-54 (5th Cir. 2016) (internal quotation marks and citations omitted). "The plaintiff must rebut the defense by establishing that the official's allegedly wrongful conduct violated clearly established law and that genuine issues of material fact exist regarding the reasonableness of the official's conduct." *Id.* at 654 (quoting *Gates v. Texas Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 419 (5th Cir. 2008)). "To negate a defense of qualified immunity and avoid summary judgment, the plaintiff need not present 'absolute proof,' but must offer more than 'mere allegations.'" *Id.* (quoting *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009)).

B. Deliberate Indifference Standard

As an initial matter, Baughman's claims that he was denied adequate medical and dental care while in Jail implicate both the Fourteenth Amendment and the Eighth Amendment to the United States Constitution. In that respect, pretrial detainees ordinarily are protected by the Due Process Clause of the Fourteenth Amendment, which dictates that "a pretrial detainee may not be punished." *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Inmates who have been convicted and sentenced to imprisonment, by contrast, are protected by the Eighth Amendment, which prohibits punishment that is "cruel and unusual." *Id.* The Fifth Circuit has recognized that there is no significant distinction between pretrial detainees and convicted inmates concerning basic human needs such as medical care. *See Gibbs v. Grimmette*, 254 F.3d 545, 548 (5th Cir. 2001) (citing *Hare v. City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc)). In other words, the same legal standard governs constitutional claims concerning medical care by pretrial detainees and convicted inmates. *See id.* Thus, precedent decided under the Eighth Amendment, which prohibits deliberate indifference to an inmate's serious medical needs, governs Baughman's claims that he was denied adequate medical and dental care.[122]

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[122] Although he is technically a detainee awaiting trial, Baughman acknowledges that he is a previously convicted felon who was on parole at the time of his arrest. *See* Fourth (continued...)

A prison official's "deliberate indifference to serious medical needs of prisoners" can constitute "unnecessary and wanton infliction of pain" of the type proscribed by the Eighth Amendment and actionable under 42 U.S.C. § 1983. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) ("Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.'"). A serious medical need is one for which treatment has been recommended or for which the need is so apparent that even laymen would recognize that care is required. *Gobert v. Caldwell*, 463 F.3d 339, 345 n.12 (5th Cir. 2006) (citation omitted). In this context, it is "obduracy and wantonness, not inadvertence or error in good faith," that characterizes the conduct

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[122](...continued)
Amended Complaint [Doc. # 134], at ¶ 16. In his response to the summary judgment motions, Baughman does not seek relief under the legal standard that applies to pretrial detainees under the Fourteenth Amendment. *See* Plaintiff's Response to Harris County's Motion for Summary Judgment [Doc. # 188], at 18, n.4 (citing *Presley v. Sanders*, Civ. A. No. 1:14cv130, 2016 WL 6651375, at *2 (S.D. Miss. Nov. 10, 2016)). He therefore has abandoned this theory of recovery, and the Court does not address whether Baughman's claims concern "episodic acts or omissions" or "conditions of confinement," which is a distinction developed by the Fifth Circuit in *Hare v. City of Corinth, Mississippi*, 74 F.3d 633, 644-45 (5th Cir. 1996) (en banc), for purposes of determining whether a due process violation occurred. *See Estate of Henson v. Wichita Cty., Tex.*, 795 F.3d 456, 462 (5th Cir. 2015) (noting that, "post-*Hare*, constitutional challenges by pretrial detainees may be brought under two alternative theories: as an attack on a 'condition of confinement' or as an 'episodic act or omission'") (quoting *Shepherd v. Dallas Cty.*, 591 F.3d 445, 452 (5th Cir. 2009) (citation omitted)).

prohibited by the Eighth Amendment, "whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998) (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). "Thus, the prison official's state of mind must be examined to determine whether the undue hardship endured by the prisoner was a result of the prison official's deliberate indifference." *Bradley*, 157 F.3d at 125 (citing *Wilson v. Seiter*, 501 U.S. 294 (1991)).

The deliberate indifference standard has both an objective and subjective component. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To establish deliberate indifference under this standard, the prisoner must show that the defendants were both (1) aware of facts from which an inference of an excessive risk to the prisoner's health or safety could be drawn, and (2) that they actually drew an inference that such potential for harm existed. *See Farmer*, 511 U.S. at 837; *Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999). Under the subjective prong of this analysis, a prison official acts with deliberate indifference "only if [(A)] he knows that inmates face a substantial risk of serious bodily harm and [(B)] he disregards that risk by failing to take reasonable measures to abate it." *Gobert*, 463 F.3d at 346 (quoting *Farmer*, 511 U.S. at 847).

The deliberate indifference standard is an "extremely high" one to meet.

Domino v. Texas Dep't of Criminal Justice, 239 F.3d 752, 756 (5th Cir. 2001). It is well established that "[u]nsuccessful medical treatment, acts of negligence, or medical malpractice do not constitute deliberate indifference, nor does a prisoner's disagreement with his medical treatment, absent exceptional circumstances." *Gobert*, 463 F.3d at 346 (citing *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995); *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991); *Hall v. Thomas*, 190 F.3d 693, 697 (5th Cir. 1999); *Stewart v. Murphy*, 174 F.3d 530, 537 (5th Cir. 1999)). "Furthermore, the decision whether to provide additional treatment 'is a classic example of a matter for medical judgment.'" *Gobert*, 463 F.3d at 346 (citing *Domino*, 239 F.3d at 756 (quoting *Estelle*, 429 U.S. at 107)). "A showing of deliberate indifference requires the prisoner to submit evidence that prison officials 'refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.'" *Gobert*, 463 F.3d at 346 (quoting *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985)).

C. Claims of Inadequate Blood Glucose Monitoring for Diabetes

Baughman notes that the Jail has no written policy that governs the frequency of blood glucose monitoring or that requires fingerstick testing before each dose of insulin, which Baughman believes is necessary to avert potentially serious

consequences (*i.e.*, hypoglycemia) for a diabetic whose blood sugar happens to be dangerously low when the dose is administered. Baughman contends, therefore, that Dr. Seale, Dr. Guice, Davis, Lambi, and Howard have failed to adopt polices and procedures necessary to protect inmates with diabetes and that they have also failed to adequately supervise and train "directors, administrators and staff" on how frequently to conduct fingerstick testing despite the fact that damage to Baughman was a "highly predictable consequence" of their failure to do so.[123]

Arguing that Baughman has not established that he was denied adequate care for diabetes with the requisite deliberate indifference, Dr. Seale, Dr. Guice, Davis, Lambi, and Howard argue collectively that they are entitled to summary judgment on the defense of qualified immunity because Baughman cannot demonstrate that they are liable under 42 U.S.C. § 1983 as supervisory officials. A supervisory official is not liable under § 1983 for the actions of subordinates "on any theory of vicarious liability." *Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir. 1987) (citations omitted). "Rather, a plaintiff must show either the supervisor personally was involved in the constitutional violation or that there is a 'sufficient causal connection' between the supervisor's conduct and the constitutional violation." *Evett v. Deep East Tex.*

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[123] Fourth Amended Complaint [Doc. # 134], at ¶¶ 66-68, 79; *see also* Plaintiff's Response to the Individual Capacity Defendants' Motions for Summary Judgment [Doc. # 190], at 33.

Narcotics Trafficking Task Force, 330 F.3d 681, 689 (5th Cir. 2003) (quoting *Thompkins*, 828 F.2d at 304); *see also Southard v. Texas Bd. of Crim. Justice*, 114 F.3d 539, 550 (5th Cir. 1997) ("[T]he misconduct of the subordinate must be affirmatively linked to the action or inaction of the supervisor."). Thus, "[a] supervisory official may be held liable . . . only if (1) he affirmatively participates in the acts that cause the constitutional deprivation, or (2) he implements unconstitutional policies that causally result in the constitutional injury." *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011) (internal quotation marks and citation omitted).

Baughman does not allege that Dr. Seale, Dr. Guice, Davis, Lambi, or Howard personally participated in a constitutional deprivation.[124] Instead, he claims that they are liable for failing to implement an adequate policy that requires fingersticks three

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[124] The record reflects that Lambi treated Baughman in the Chronic Care Clinic on a total of three occasions: June 26, 2014; July 29, 2014; and June 29, 2016. *See* Lambi Aff. [Doc. # 179-5], at ¶¶ 7-9. Howard personally treated Baughman in the Chronic Care Clinic on ten occasions, including: April 22, 2014; September 22, 2014; October 22, 2014; January 22, 2015; April 28, 2015; July 28, 2015; October 30, 2015; November 16, 2015; February 15, 2016; and October 11, 2016. *See* Howard Aff. [Doc. # 179-6], at ¶ 6. Baughman does not specifically allege or point to any admissible evidence showing that Lambi or Howard personally denied him a fingerstick or any other type of treatment on these occasions. Baughman does not otherwise demonstrate that he was denied care with deliberate indifference in connection with any treatment that Lambi and Howard personally provided. Likewise, Baughman does not allege or show that Dr. Seale, Dr. Guice, or Davis personally provided him with medical care or that they were otherwise directly involved in any blood glucose monitoring that was conducted by medical providers under their supervision.

times per day for diabetic detainees and that the practice currently in place at the Jail is constitutionally deficient. To be liable based on a policy or practice, the supervisory employee must "implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation"; or he must know that the system was so deficient as to be unconstitutional and "failed to properly attempt to correct [it]" and his inaction must cause the plaintiff's injuries. *Thompkins*, 828 F.2d at 304. Moreover, to establish liability in this context, a plaintiff must show that the supervisory official acted or failed to act with deliberate indifference to constitutional violations committed by their subordinates. *See Porter*, 659 F.3d at 446 (citation omitted). "A failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights." *Id.* (internal quotation marks and citation omitted).

Also, where, as here, a plaintiff asserts liability based on a failure to train or supervise, he must show that "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to supervise or train and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Id.* (quoting *Goodman v. Harris Cty.*, 571 F.3d 388, 395 (5th Cir. 2009)); *see also Estate of Davis v. City of North Richland Hills*, 406

F.3d 375, 381 (5th Cir. 2005) (citations omitted).

Baughman falls short of the showing required to impose supervisory liability where his medical care for diabetes is concerned. In support of his claim, Baughman simply notes that medical standards of care recommended by the American Diabetes Association ("ADA") and the Federal Bureau of Prisons call for testing blood glucose levels *up to* three times daily.[125] The defendants do not dispute that Jail policy does not require fingersticks up to three times a day on a daily basis as recommended by medical standards, but instead contend that the medical standards and Jail policy leave decisions about the frequency of blood glucose monitoring up to the individual treatment provider in his or her clinical judgment.[126] As outlined above, diabetic detainees are treated and monitored regularly by the Chronic Care Clinic. Nurses working under the direction of a treating physician go to the housing units to administer insulin to diabetic detainees "on a twice daily basis" in the morning and evening.[127] A nurse may decide based on an inmate's appearance or symptoms that it is not in the inmate's best interest to receive a dose of insulin and may contact a

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[125] *See* Madoff Report [Doc. # 190, Ex. 6], at 3; Seale Dep. [Doc. # 188, Ex. 2], at 66:13-75:3 (discussing standards).

[126] Guice Dep. [Doc. # 188, Ex. 1], at 122:16-124:5; Seale Dep. [Doc. # 188, Ex. 2], at 76:9-77:3.

[127] Seale Dep. [Doc. # 188, Ex. 2], at 83:4-14; *see also* Lambi Dep. [Doc. # 188, Ex. 3], at 86:3-88:21.

physician if an adjustment to the detainee's treatment plan is indicated.[128] A diabetic inmate may request a fingerstick at any time if he suspects that his blood sugar is low.[129] It is undisputed that Baughman was given a fingerstick at his request on all but one occasion.[130]

There are more than 2,000 pages of medical records in this case, confirming that Baughman has received extensive care and monitoring throughout his current incarceration both at the Jail and by specialists outside the Jail.[131] "Medical records of sick calls, examinations, diagnoses, and medications may rebut an inmate's allegations of deliberate indifference." *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995) (citing *Mendoza v. Lynaugh*, 989 F.2d 191, 193-95 (5th Cir. 1993)). These records show that, of the fingerstick testing that was done on 267 occasions between April 3, 2014, and September 30, 2016, Baughman's blood glucose levels were consistently within what is considered a normal range or higher.[132] Baughman does

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128 Seale Dep. [Doc. # 188, Ex. 2], at 84:9-85:1.

129 *Id.* at 89:23-90:3.

130 Affidavit of Susan Morrey Morris, M.D. [Doc. # 181-8], at ¶ 8.

131 *See* Medical Records [Doc. # 182] (under seal); Seale Aff. [Doc. # 181-3], ¶ 4 (summarizing care between April 3, 2014, through September 4, 2015); Howard Aff. [Doc. # 179, Ex. 5], at 6-11 (summarizing treatment provided in the Chronic Care Clinic and by outside providers between 2014 and 2016, including results of Baughman's A1c tests).

132 Blood Glucose for Steven Baughman [Doc. # 190, Ex. 23] at Bates No. (continued...)

not point to any evidence showing that he has suffered complications as the result of receiving a dose of insulin while his blood sugar was too low or that he suffered any harm as a result of the alleged failure to adopt a specific fingerstick policy. The Court's own review of the voluminous medical records does not disclose evidence showing that Baughman suffered any adverse effect as the result of not receiving a fingerstick.

Viewing all of the evidence in the light most favorable to Baughman as the non-movant, he does not establish that the practice of providing fingersticks at the discretion of Jail medical providers has resulted in a denial of care with wanton disregard for a serious medical need. Even assuming that the existing policy or practice falls below the standard of care that is considered optimal, it is well established that neither allegations of malpractice nor disagreement with the level of care provided rise to the level of deliberate indifference that is actionable under 42 U.S.C. § 1983. *See Gobert*, 463 F.3d at 346; *Hall*, 190 F.3d at 697; *Stewart*, 174 F.3d at 537; *Banuelos*, 41 F.3d at 235; *Varnado*, 920 F.2d at 321. Baughman does not otherwise demonstrate that he has suffered any harm as a result of the level of care he has been provided for his diabetes or that reasonable officials in the defendants'

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[132](...continued)
HC/Baughman 7936-7942 (filed under seal).

positions would have realized that their conduct as supervisory officials was objectively unreasonable in light of clearly established law that prohibits deliberate indifference to a detainee's serious medical needs where blood-glucose monitoring is concerned.

Likewise, for the foregoing reasons, Baughman does not demonstrate that his constitutional rights were violated due to any failure to train or supervise the nurses who administer insulin at the Jail. Absent a genuine issue of material fact, Dr. Seale, Dr. Guice, Davis, Lambi, and Howard are entitled to qualified immunity on the claims against them regarding the adequacy of care for his diabetes. Accordingly, the motion for summary judgment filed by these individual defendants will be granted with respect to this claim.

D. Denial of Adequate Dental Care

As outlined above, Baughman requested fillings for tooth decay and partial dentures, but alleges that his requests were refused and he was told that he had to hire a private dentist to provide care at the Jail if he wanted this type of treatment. Arguing that he is indigent and unable to afford the services of a private dentist, Baughman contends that this "policy" of refusing to provide restorative treatment at County expense for tooth decay has caused him to lose several teeth that could have been saved and that, without dentures, he has been put at risk of losing more teeth and

subjected to "preventable pain."[133] Baughman claims, therefore, that Drs. Seale, Guice, Chin, and Harper have violated his constitutional right to adequate dental care.

Drs. Seale, Guice, Chin, and Harper do not dispute that Baughman was not offered restorative treatment or dentures. These defendants maintain, nevertheless, that the treatment options offered to him (extraction of his decaying teeth or care provided by a private dentist at his expense) were not unreasonable in light of clearly established law. For this reason, Drs. Seale, Guice, Chin, and Harper maintain that they are entitled to qualified immunity.

For purposes of qualified immunity, "[a] clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, — U.S. —, 136 S. Ct. 305, 308 (2015) (per curiam) (citation and internal quotation marks omitted). While there need not be a case "directly on point" for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Thus, a clearly established right may not be defined "at a high level of generality." *Mullenix*, 136 S. Ct. at 308 (citing *al-Kidd*, 563 U.S. at 742). Rather, a clearly established right must be "'particularized'

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[133] Plaintiff's Response to the Individual Defendants' Motions for Summary Judgment [Doc. # 190], at 35.

to the facts of the case." *White v. Pauly*, — U.S. —, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see also Wyatt v. Fletcher*, 718 F.3d 496, 503 (5th Cir. 2013) (explaining that a clearly established right "must derive from 'controlling authority – or a robust consensus of persuasive authority – that defines the contours of the right in question with a high degree of particularity' at the time of [the] challenged conduct").

This case concerns an indigent inmate who requested dental care, specifically, fillings for his decayed teeth and partial dentures to replace missing teeth, but was denied such care at County expense. The Court considers separately whether Baughman had a clearly established right to restorative treatment for tooth decay and for dentures and, if so, whether he was denied that right by dental providers (Drs. Chin and Dr. Harper) and by the supervisory officials (Drs. Seale and Guice).

1. A Detainee's Right to Dental Care for Tooth Decay

Courts have recognized that "[p]risoners generally have more extensive dental problems that the average citizen." *Ramos v. Lamm*, 639 F.2d 559, 576 (10th Cir. 1980); *Mounce v. Doe*, Civ. No. 12-669, 2014 WL 2587698, at *12 (E.D. La. 2014) (summarizing testimony from a dentist, who observed that inmates frequently come into a county jail with "terrible, terrible, terrible teeth" because they do not otherwise get regular dental care). It is undisputed that tooth decay, if left untreated, is

progressive and can result in extreme pain, loss of tooth structure, and ultimately loss of the affected tooth.[134] Thus, courts have recognized that access to dental care in prison is an "important medical need" for conditions that cause pain, discomfort, or otherwise pose a threat to an inmate's health. *Ramos*, 639 F.2d at 576; *see also, e.g., Hartsfield v. Colburn*, 491 F.3d 394, 397 (8th Cir. 2007) ("Toothaches can be excruciatingly painful, and dental care is an important part of proper health care [in the prison environment]."); *Jones v. Coughlin*, 623 F. Supp. 392, 404 (S.D.N.Y. 1985) (concluding that where pain and discomfort are alleged "restorative services" such as filling cavities, doing root canal work, and crowning broken teeth are "serious medical needs as the law defines that term").

It is beyond dispute that the government has an "obligation to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). A prison official's failure to provide medical care with deliberate indifference to a prisoner's serious medical needs can constitute "unnecessary and wanton infliction of pain," which is prohibited by the Eighth Amendment. *Id.* at 104 (citation omitted). Although a non-indigent prisoner may be expected to pay for some

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[134] *See* Shulman Report [Doc. # 190, Ex. 26], at 10 (filed under seal) (explaining that tooth decay, "especially once the enamel is penetrated, generally progresses consistently, and the more time that passes before the tooth is treated (*i.e.*, filled), the greater the likelihood that decay will progress, destroying tooth structure, possibly causing an abscess, and generally requiring the tooth to be extracted").

or all of his medical expenses,[135] if he has the means to do so, it is clearly established that "[p]rison officials may not, with deliberate indifference to the serious medical needs of the inmate, opt for 'an easier and less efficacious treatment' of the inmate's condition' . . . [, n]or may they condition provision of needed medical services on the inmate's ability or willingness to pay." *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (citation and internal quotation omitted); *see also Weeks v. Hodges*, 871 F. Supp. 2d 811, 821-22 (N.D. Ind. 2012) (observing in a case about dental care that prison officials may not condition medical treatment on a prisoner's ability to pay) (citing *Martin v. Debruyn*, 880 F. Supp. 610, 615 (N.D. Ind. 1995) ("A prison official who withholds necessary medical care, for want of payment, from an inmate who could not pay would violate the inmate's constitutional rights if the inmate's medical needs were serious . . . ."); *Cannon v. Mason*, 340 F. App'x 495, 499 n.3 (10th Cir. 2009) ("[A]n Eighth Amendment violation concerning medical charges only occurs if prison officials deny an inmate medical treatment due to a lack of funds or condition the provision of needed medical services upon an inmate's ability to pay . . . .") (citations omitted)). Simply put, "[i]f the prisoner

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[135] *See Morris v. Livingston*, 739 F.3d 740, 746-47 (5th Cir. 2014) (upholding TDCJ's authority to assess a $100 annual health care fee); *see also Myers v. Klevenhagen*, 97 F.3d 91 (5th Cir. 1996) (upholding the Harris County Sheriff's policy of charging non-indigent prisoners for medical services).

cannot pay, he must be maintained at state expense; it cannot deny minimal medical care to poor inmates." *Bihms v. Klevenhagen*, 928 F. Supp. 717, 718 (S.D. Tex. 1996) (citing *Estelle*).

The defendants do not address this authority. Instead, they emphasize that access to dental care in the Jail setting differs from what is available in the community because "[j]ail settings are typically short term environments."[136] As such, routine preventive care and cleanings are not provided because dentists at the Jail "are there for more acute dental needs."[137] In that regard, the dentists primarily provide "emergent dental care," which typically involves treating a tooth that is causing pain.[138] According to Dr. Chin, most of the inmates who request care at the Jail Dental Clinic need to have a painful tooth removed.[139] Dr. Chin acknowledges that extraction is the only option provided for cavities if an inmate cannot pay for care by a private dentist.[140] Baughman characterizes this as an "extraction-only policy" and argues that

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136 Seale Dep. [Doc. # 188, Ex. 2], at 124:10-20.

137 *Id.*

138 Chin Dep. [Doc. # 188, Ex. 6], at 17:1-14.

139 *Id.* at 18:15-17.

140 *Id.* at 74:18-75-5, 76:1-77:5.

it is unconstitutional.[141]

There is authority for the proposition that a policy of denying treatment for painful dental conditions "unless the inmate is willing to submit to extraction of a tooth at county expense, or has the resources to employ a local dentist for an emergency filling[,] . . . violates the requirement that reasonably adequate medical care be supplied to persons in custody." *Heitman v. Gabriel*, 524 F. Supp. 622, 627 (W.D. Mo. 1981); *see also Stack v. McCotter*, 79 F. App'x 383 (10th Cir. 2003) (holding that summary judgment was inappropriate where an inmate was denied care under a prison policy which explicitly stated, "[*d*]*o not* ask to go to the dentist unless you are willing to have your tooth pulled") (emphasis in original); *Beamon v. Parkland Hosp.*, Civ. No. 3:08-0693, 2008 WL 4061417, at *3 (N.D. Tex. Aug. 20, 2008) (concluding without reaching the merits that an inmate who alleged that he was refused treatment other than extraction stated a claim under the Eighth Amendment standard); *Mitchell v. Liberty*, Civ. No. 8-341-B-W, 2009 WL 33435, *4 (D. Me. Jan. 5, 2009) (concluding that a detainee articulated a possible constitutional violation in connection with a county-wide policy of denying dental care other than emergency extractions). In that respect, offering extraction only as treatment for tooth decay may be unconstitutional depending on the facts of the case. *See Chance v. Armstrong*, 143

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[141] *See* Shulman Report [Doc. # 190, Ex. 26], at 20-21 (filed under seal).

F.3d 698, 703-04 (2d Cir. 1998) (recognizing that a dentist's decision to recommend extraction rather than fillings could be the product of sound medical judgment, but it could be deliberate indifference if the dentist had a monetary incentive or other ulterior motive); *see also Harrison v. Barkley*, 219 F.3d 132, 137-39 (2d Cir. 2000) (overturning summary judgment on qualified immunity for a prison dentist who left a cavity unfilled for one year because the inmate would not consent to extraction of an adjacent tooth); *Pipes v. North Dakota*, Civ. No. 1:07-00067, 2007 WL 4661655, *8-9 (D.N.D. Dec. 10, 2007) (suggesting that an extraction-only policy may give rise to an Eighth Amendment violation in certain circumstances unless evidence makes clear that extraction is a "medically preferred treatment"). Thus, it appears clearly established that offering extraction only instead of a filling for tooth decay can violate the Eighth Amendment if extraction is not medically necessary at that time. *See Chance*, 143 F.3d at 703-04.

Baughman has presented evidence showing that he arrived at the Jail with a broken, decaying, and missing teeth, and that he was denied restorative dental care in the form of fillings by Drs. Chin and Harper,[142] which subjected Baughman to "pain

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[142] Chin Dep. [Doc. # 188, Ex. 6], at 152:12-17, 153:9-10; HCSO Health Services Bureau Dental: Annual and Juvenile Exam Form [Doc. # 190, Ex. 14], at 1-2 (Bates No. HC/Baughman 5917) (filed under seal).

and loss of tooth structure,"[143] because he could not pay for the care that he needed. In that respect, Baughman has raised a genuine fact issue regarding whether he was denied necessary dental care because of the Jail dentists' practice of limiting treatment for cavities to extractions unless the inmate could afford to hire a private dentist.[144] Assuming Baughman can establish that he was indigent,[145] there is a genuine issue of material fact whether Drs. Chin and Harper denied him dental care, because of an inability to pay, by refusing him fillings for advanced tooth decay, which was a serious medical need.

The Court's ruling here is narrow. The Court addresses only whether Baughman was denied dental care in the form of standard fillings to repair one or more of his decayed teeth. It is undisputed that Baughman arrived at the Jail with multiple teeth in various states of decay and he had already had more than ten teeth

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143 Shulman Report [Doc. # 190, Ex. 26], at 31, 35.

144 *See* Seale Dep. [Doc. # 188, Ex. 2], at 134:16-135:17, 150:18-23 (attributing to the dentists the practice of providing extractions only for indigent inmates with cavities); *see also* Chin Dep. [Doc. # 188, Ex. 6], at 35:5-8 (describing how he learned of the practice).

145 There is evidence in the record that may call into question whether Baughman was indigent. The medical records reflect that Baughman threatened to sue, claiming that the dental care being offered was "unconstitutional" and that he had received a $27,000.00 settlement from prison officials in Oklahoma for this same issue. *See* Seale Aff. [Doc. # 179-3], at ¶ 33. If an inmate is not indigent, prison officials can require him to pay for some or all of his medical and dental treatment. *See Morris*, 739 F.3d at 747 (citations omitted); *see also Poole v. Isaacs*, 703 F.3d 1024, 1026 (7th Cir. 2012) (observing that "the Eighth Amendment does not compel prison administrators to provide cost-free medical services to inmates who are able to contribute to the cost of their care").

extracted before he was arrested in 2014. There is conflicting evidence about whether standard fillings would have resolved Baughman's pain and prevented further decay where only two of his teeth are concerned (teeth #18 and #20).[146] Although Baughman has presented enough evidence to survive summary judgment on this limited issue, it is not clear that he can prevail.[147] *See Greywind v. Podrebarac*, Civ. No. 1:10-006, 2011 WL 4750962, *8 n.6 (D.N.D. Sept. 12, 2011) ("[G]iven the weight of existing authority, any prisoner claim for better dental care than what can be afforded by the poor and working poor in this country would face an uphill battle."); *see also Rumierz v. Sheriff*, Civ. No. 02-6146, 2006 WL 3068577 (D.N.J. Oct. 27, 2006) (noting that an extraction-only policy "has been deemed constitutionally offensive," but that "if defendants can establish that extraction was the appropriate medical decision given the condition of [plaintiff's] teeth at the time

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[146] *See* Chin Dep. [Doc. # 188, Ex. 6], at 152:4-153:10 (noting that tooth #18 was not "a fillable tooth"); *see also* Shulman Report [Doc. # 190, Ex. 26], at 24, n.44 (noting that tooth #18, which was indicated for extraction by Dr. Chin on May 29, 2014, had "deep decay" and may have been unsalvageable) and 31 (noting that tooth #20 could have been treated with a "conservative filling" on May 29, 2014, but decay was allowed to spread).

[147] Although Baughman argues that extractions are not "treatment," [Doc # 190], at p. 37, in reality it is course of treatment resorted to by many who are unable to afford more expensive alternatives. *See* Mary Jordan and Kevin Sullivan, *The Painful Truth About Teeth*, WASH. POST, May 13, 2017 (noting that millions of working poor Americans rely on charity clinics and hospital emergency rooms to treat painful and neglected teeth, many opting simply to have them pulled because they are unable to afford expensive root canals and crowns).

of treatment, the legal implications of an extraction-only policy become less clear").

To the extent that Baughman contends that Drs. Chin and Harper failed to diagnose decay before it advanced beyond the point of salvageability with a standard filling, his claim sounds only in common law negligence or dental malpractice, and does not constitute deliberate indifference or state a claim under the Eighth Amendment. *See Estelle*, 429 U.S. at 105 ("[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."); *see also Stewart* ("[A]lthough inadequate medical care may, at a certain point, rise to the level of a constitutional violation, malpractice or negligent care does not.").

Likewise, to the extent that Drs. Chin and Harper recommended other more extensive treatment such as a root canal with a crown, the exercise of medical judgment in making that recommendation is not actionable under the Eighth Amendment. *See Estelle*, 429 U.S. at 107 (explaining that the decision whether to provide a particular type of treatment "is a classic example of a matter for medical judgment"). In that respect, it is well established that disagreement with or differences of opinion about treatment options provided do not rise to the level of deliberate indifference and do not demonstrate a constitutional violation. *See Gobert*, 463 F.3d at 346 (citations omitted); *see also Norton v. Dimazana*, 122 F.3d 286, 292 (5th Cir.

1997).

It is also well established that an inmate has no constitutional right to have the treatment he prefers or the best medical treatment available. *See Estelle*, 429 U.S. at 105-06; *see also Ruiz v. Estelle*, 679 F.2d 1115, 1149 (5th Cir. 1982) ("The Constitution does not command that inmates be given the kind of medical attention that judges would wish to have for themselves, nor the therapy that Medicare and Medicaid provide for the aged or the needy."). Prison officials are not required to provide treatment that is "the best that money could buy[.]" *Mayweather v. Foti*, 958 F.2d 91, 91 (5th Cir. 1992); *McMahon v. Beard*, 583 F.2d 172, 174 (5th Cir. 1978). As Baughman's dental expert concedes, root canals are "generally not performed in a correctional environment."[148] Thus, offering extraction in lieu of a root canal or other more expensive treatment for tooth decay does not violate the Eighth Amendment if extraction is medically appropriate and will resolve the issue. *See McQueen v. Karr*, 54 F. App'x 406, 2002 WL 31688891 (5th Cir. 2002) (per curiam) (rejecting an Eighth Amendment challenge by an inmate who declined extraction because he wanted "more expensive restorative treatment"); *see also James v. Penn. Dep't of Corr.*, 230 F. App'x 195, 196-98, 2007 WL 131730, at *1-2 (3d Cir. 2007) (per curiam) (concluding that there was no Eighth Amendment claim stemming from

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148 Shulman Report [Doc # 190, Ex. 26], at 14.

an extraction where prison policy did not permit root canals); *Mathews v. Raemisch*, 513 F. App'x 605, 607-08 (7th Cir. 2003) (offering extraction, rather than a root canal, does not demonstrate deliberate indifference); *Willis v. Washington*, 172 F.3d 54, 1999 WL 14307, at *2 (7th Cir. 1999) (unpublished) (rejecting an Eighth Amendment claim from an inmate who was told "he either could live with the pain or have his teeth pulled," and who alleged that he "should have been offered alternatives to extraction"); *Greywind v. Podrebarac*, Civ. No. 1:10-006, 2011 WL 4750962, *8 (D.N.D. Sept. 12, 2011) (concluding that "there is no 'clearly established' right on the part of prisoners to dental treatment in the form of crowns and implants in lieu of extraction, particularly when the latter appropriately resolves the underlying problem and does not compromise the prisoner's health"); *Bain v. Hsu*, Civ. No. 1:06-189, 2010 WL 3927589, *4-5 (D. Vt. 2010) (noting that other courts have found that extraction is a constitutionally valid treatment absent evidence that it is an unnecessary course of treatment for a broken and decayed tooth) (citations omitted); *Brathwaite v. Corr. Med. Servs.*, 630 F. Supp. 2d 413, 417 (D. Del. 2009) (concluding that there was no Eighth Amendment violation where a prisoner was offered extraction only and denied the root canal that he requested); *Campbell v. St. Clair Cty. Jail*, Civ. No. 2:08-10224, 2008 WL 186376 (E.D. Mich. Jan. 22, 2008) (concluding that a decision by jail officials to extract an inmate's tooth, rather than perform a root

remaining teeth and gums.[152] Baughman does not present evidence showing that partial dentures are a suitable option for him. Nor has he established that he sought and was denied a full set of dentures. Under these circumstances, Baughman has failed to show that he was denied dentures with deliberate indifference in violation of a clearly established right. Accordingly, Drs. Chin and Harper are entitled to qualified immunity from Baughman's claim that he was wrongfully denied partial dentures. The defendants' motion for summary judgment on this issue will be granted.

3. Supervisory Liability

Baughman alleges that Drs. Seale and Guice are liable in their supervisory capacity as the Jail's Executive Medical Director and Interim Executive Medical Director, respectively, because they were responsible for overseeing the Dental Clinic and ensuring that the dentists provided adequate dental care. Specifically, Baughman claims that the extraction-only policy enforced by the dentists violated his constitutional rights and that this violation was caused by Drs. Seale and Guice's failure to adequately staff the Dental Clinic or train and supervise the dentists. Baughman adds that Dr. Chin is also liable as a supervisor for failing to train Dr. Harper to provide adequate dental care.

Drs. Seale and Guice argue that, as supervisory officials without direct personal

[152] *Id.* at 144:9-146:3.

involvement in the dental care provided, they properly relied on the dentists, who were trained and licensed by the State of Texas, to provide adequate dental care consistent with the Jail's written policies, which were independently reviewed and approved by TCJS and NCCHC. Drs. Seale and Guice argue further that Baughman cannot demonstrate liability on their part because he cannot establish that they acted with the requisite deliberate indifference.

As noted earlier, a supervisory official can be liable under 42 U.S.C. § 1983 where the failure to train or supervise amounts to deliberate indifference. *See Porter*, 659 F.3d at 446; *Goodman*, 571 F.3d at 395. Both the Supreme Court and the Fifth Circuit have emphasized that "'[d]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Davis*, 406 F.3d at 381 (quoting *Board of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 410 (1997)). Where supervisory liability is concerned, "[p]roof of deliberate indifference normally requires a plaintiff to show a pattern of violations and that the inadequate training or supervision is 'obvious and obviously likely to result in a constitutional violation.'" *Brown v. Callahan*, 623 F.3d 249, 255 (5th Cir. 2010) (quoting *Davis*, 406 F.3d at 381 (citations omitted)). This requires a plaintiff to "demonstrate a pattern of similar violations." *Davis*, 406 F.3d at 383.

It is undisputed that neither Dr. Seale nor Dr. Guice is a dentist and neither personally participated in the care that was provided to Baughman. There is no evidence that contradicts Drs. Seale and Guice's testimony that decisions about the level of dental care provided at the Jail were delegated to the dentists to make in the exercise of their professional judgment.[153] As far as Dr. Seale and Dr. Guice knew, the Jail's written policy on providing dental care specifies that detainees will be provided with "oral treatment" that is "not limited to extractions[.]"[154] Dentists at the Jail were allowed full authority to implement this policy as they saw fit.[155] In doing so, the dentists developed their own policy or practice of offering extractions only for complaints of pain associated with tooth decay, with no access to fillings, root canals, crowns, or other restorative treatment unless the detainee could arrange for a private dentist come into the Jail and provide this type of care at the detainee's expense.

Dr. Guice, who has only served as Interim Director since September of 2015, testified at his deposition that he was unaware that extractions were the only treatment

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153 Guice Dep. [Doc. # 188, Ex. 1], at 146:2-13, 150:14-22; Seale Dep. [Doc. # 188, Ex. 2], at 134:16-20.

154 HCSO Manual of Policies ans Procedures for Health Services, No. J-E-06 [Doc. # 190, Ex. 28], at Bates No. HC/Baughman 5729.

155 Guice Dep. [Doc. # 188, Ex. 1], at 146:2-13; Seale Dep. [Doc. # 188, Ex. 2], at 134:16-135:17.

provided for tooth decay by Jail dentists.[156] Dr. Guice did not directly oversee the work performed by the dentists,[157] and he had no role in developing the Jail's current policy on dental care, which he admittedly read for the first time at his deposition.[158] Otherwise, he had little personal interaction with the dentists and his supervisory efforts involving them appear to have been limited to listening to any concerns raised during quarterly staff meetings.[159] The record contains no evidence showing that any concern was brought to Dr. Guice's attention during one of these meetings, or at any other time, regarding deficient practices at the Dental Clinic. According to Dr. Guice, the dentists never reported any problem to him regarding the level of care they were able to provide.[160]

Dr. Seale also testified at his deposition that he did not know that extraction was the only treatment offered for indigent inmates with tooth decay.[161] He acknowledged that while he was the Executive Director he received regular reports from the Dental Clinic, showing that hundreds of extractions were being done by the dentists each

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156 Guice Dep. [Doc. # 188, Ex. 1], at 157:18-21.

157 *Id.* at 146:2-24.

158 *Id.* at 145:4-10.

159 *Id.* at 144:4-20, 147:24-148:11.

160 *Id.* at 163:6-164:3.

161 Seale Dep. [Doc. # 188, Ex. 2], at 141:2-5, 143:2-144:3.

month, but that "zero" fillings were provided.[162] Relying on the dentists to provide adequate care,[163] Dr. Seale assumed that the extractions were being done because they were indicated by "clinical judgment."[164]

Drs. Seale and Guice concede that there is no particular training program for dentists at the Jail and they also appear to concede that no real effort was made to ensure that the level of care provided in the Dental Clinic complied with the Jail's written policies or generally accepted standards such as those demanded by the TCJS or the NCCHC. Baughman points to the report reviewed by Dr. Seale about the number of extractions being done by Jail dentists on a monthly basis, showing that no fillings were provided in 2016, and suggests that this should have placed him on notice that an extraction-only policy was being enforced in a manner that was contrary to the Jail's written policy of providing treatment "not limited to extractions."[165] Again, however, there is no evidence that Drs. Seale or Guice knew that extractions were being done where not medically necessary, which is the central premise behind Baughman's claim that he was denied adequate dental care because extraction was the

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162 *Id.* at 144:8-146:9.

163 *Id.* at 134:16-135:17.

164 *Id.* at 146:15-147:5.

165 Dental Services Clinic Monthly Report 2016 [Doc. # 190, Ex. 29], at Bates No. HC/Baughman 9357.

only treatment offered for his decayed teeth when a filling would have solved the problem. There is ample authority, as set forth above, holding that offering to extract a painful, decaying tooth, does not demonstrate deliberate indifference and does not violate the Eighth Amendment if the tooth is not viable. *See McQueen*, 54 F. App'x 406, 2002 WL 31688891, at *1; *see also Greywind*, Civil No. 1:10-006, 2011 WL 4750962, at *7-8 (collecting cases).

A showing of deliberate indifference requires a plaintiff to "show that the failure to train reflects a 'deliberate' or 'conscious' choice to endanger constitutional rights." *Davis*, 406 F.3d at 383 (quoting *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003)). There is insufficient evidence that Drs. Seale or Guice, who are not dentists, actually knew, or had reason to suspect, that the Jail dentists had developed a practice of only offering extractions for tooth decay if a detainee could not afford to hire his own dentist under circumstances in which extraction was not medically necessary. "[N]otice of a pattern of *similar* violations is required" in order to impose liability on a supervisory official. *Davis*, 406 F.3d at 383 (emphasis in original). Other than pointing to the deficient care that he received, Baughman does not demonstrate a pattern of similar violations that would have placed Drs. Seale or Guice on notice of a problem. This is insufficient to impose supervisory liability under § 1983. *See Davis*, 406 F3d at 382-83; *see also Connick v. Thompson*, — U.S. —, 131 S. Ct. 1350,

1360-61 (2011) (explaining that "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train") (quoting *Board of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 409 (1997)). In that respect, the Supreme Court has recognized that where the allegedly untrained employees are licensed professionals, "recurring constitutional violations" are not the "obvious consequence" of failing to provide in-house training on how to do their jobs. *Connick*, 131 S. Ct. at 1363. Thus, Baughman fails to show that Dr. Seale, Dr. Guice, or any other supervisory official at the Jail, "ignored a known or obvious risk" that unconstitutionally deficient care would result without a particular training program in place. *See Brown*, 623 F.3d at 255; *see also Thompson v. Upshur Cty., Tex.*, 245 F.3d 447, 459 (5th Cir. 2001). Based on this record, Dr. Seale and Dr. Guice are entitled to qualified immunity from Baughman's claims against them, as supervisors of the Jail's medical facilities, regarding his dental care.

To the extent that Baughman blames Dr. Chin for failing to train Dr. Harper, his claim fares no better. There is evidence that, as the more senior dentist, Dr. Chin and the dental assistants were responsible for getting Dr. Harper "up to speed" on the

Jail's policies and practices of providing care when Dr. Harper was hired in 2012.[166] However, there is no evidence in the record showing that Dr. Harper was subordinate to Dr. Chin or that it was Dr. Chin's responsibility to supervise or train Dr. Harper to provide adequate dental care.[167] Likewise, there is no evidence that Dr. Harper, as a licensed professional, required instruction in the practice of dentistry when he commenced his employment at the Jail. Baughman does not establish that Dr. Chin is liable as a supervisor and, therefore, Dr. Chin is also entitled to qualified immunity from this claim.

E. Retaliation Claims

Baughman contends that Dr. Seale, Davis, and Rossi improperly retaliated against him by imposing restrictions on his commissary privileges in April 2015, after he sent a letter to TCJS, complaining about his medical and dental care at the Jail.[168] "To prevail on a claim of retaliation, a prisoner must establish (1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation," *i.e.*, that

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166 Chin Dep. [Doc. # 188, Ex. 6], at 34:14-37:17; Harper Aff. [Doc. # 183-2], at ¶ 2.

167 Chin Dep. [Doc. # 188, Ex. 6], at 31:13-32:7 (indicating that Dr. Chin and Dr. Harper were "on the same level" and that the extent of Dr. Chin's supervisory function, if any, was limited to managing "patient flow").

168 Fourth Amended Complaint [Doc. # 134], at ¶¶ 62-63.

regularly purchased foods high in unhealthy carbohydrates.[173] Baughman complained to a different staff member on February 13, 2015, asking to be placed on the "Adkin's diet" and threatening to sue if his dietary demands were not met.[174] After reviewing the medical records of Baughman's condition and the commissary records of his repeated purchases of food items that were hazardous to his medical condition, Davis told "jail commissary staff" to restrict Baughman's commissary purchases so that he could not harm himself by purchasing food that was dangerous to his health.[175] Acting on a verbal request from Davis, Rossi imposed restrictions on Baughman's commissary privileges on April 13, 2015, because he was "consistently purchasing items that are inappropriate for his multiple medical conditions."[176]

Dr. Seale notes that restrictions on commissary privileges are "common for patients who present complications in the delivery of health care because of their lack of compliance with dietary recommendations" and denies that he had any involvement

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173 Davis Aff. [Doc. # 179-7], at ¶ 11. Baughman's commissary purchases reflect that he made repeated purchases of high calorie and high sodium sweets, starches, and snack foods that are entirely inconsistent with either a heart-healthy diabetic diet or the Atkins diet. *See* Morris Letter [Doc. # 190, Ex. 7], at 2.

174 Davis Aff. [Doc. # 179-7] at ¶ 13.

175 *Id.* at ¶ 14.

176 Nutrition Note [Doc. # 190, Ex. 17], at Bates No. HC/Baughman 9318.

with the decision to impose commissary restrictions against Baughman.[177] Davis and Rossi also maintain that they had no knowledge that Baughman had sent a letter to TCJS complaining about the medical care at the Jail at the time the commissary restrictions were imposed.[178]

Baughman presents nothing to refute the defendants' evidence and he does not otherwise demonstrate that Dr. Seale, Davis, or Rossi had any intent to retaliate against him. Because the defendants have filed a properly supported motion for summary judgment, Baughman's conclusory allegations of retaliation are not sufficient to raise a genuine issue of material fact. *See Woods*, 60 F.3d at 1166. Baughman makes no evidentiary showing that the defendants intended to retaliate against him or that, but for any retaliatory intent, the commissary restrictions would not have been imposed. Baughman accordingly does not raise a genuine fact issue of a constitutional violation. Accordingly, Dr. Seale, Davis, and Rossi are entitled to qualified immunity and summary judgment on Baughman's retaliation claim.

IV. ANALYSIS OF CLAIMS AGAINST HARRIS COUNTY

Baughman contends that Harris County is liable as a municipal entity for the failure of Jail medical and dental personnel to provide him with adequate care for his

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177 Seale Aff. [Doc. # 179-3], at ¶ 32.

178 Davis Aff. [Doc. # 179-7] at ¶ 16; Rossi Aff. [Doc. # 183-3] at 2.

serious medical and dental needs.[179] Invoking 42 U.S.C. § 1983, Baughman argues that Harris County is liable for the following deficient policies: (1) the widespread practice of not requiring fingersticks three times a day for insulin-dependent diabetics; (2) the refusal to provide dentures or restorative dental care for inmates with advanced tooth decay who are unable to pay for a private dentist to provide such care; and (3) the failure to train and supervise personnel who provide medical and dental care with respect to these issues.[180] In addition, Baughman asserts that Harris County is liable under state law for the negligent failure to provide him with adequate medical and dental care.[181] Harris County moves for summary judgment, arguing that Baughman does not establish that a constitutional violation occurred and that it is not liable as a municipal entity under any theory.[182] The parties' contentions are examined below under the legal standard that governs municipal liability, starting with Baughman's claims under 42 U.S.C. § 1983.

A. Municipal Liability under 42 U.S.C. § 1983

Municipalities are deemed to be "persons" susceptible to suit under § 1983. *See*

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179 Fourth Amend. Compl. [Doc. # 134] at 16-18.

180 Plaintiff's Response to Harris County's Motion for Summary Judgment [Doc. # 188], at 13-29.

181 *Id.* at 30-31.

182 Defendant Harris County's Motion for Summary Judgment [Doc. # 181], at ¶ 2.

Monell v. Dep't of Social Servs., 436 U.S. 658, 690 (1978). Municipal liability, however, cannot be sustained under a theory of *respondeat superior* or vicarious liability for wrongdoing by a municipal employee. *See id.* at 691; *James v. Harris County*, 577 F.3d 612, 617 (5th Cir. 2009). A municipality is only liable under § 1983 for acts that are "directly attributable to it 'through some official action or imprimatur.'" *James*, 577 F.3d at 617 (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)). To proceed beyond the summary judgment stage, "a plaintiff making a direct claim of municipal liability must demonstrate a dispute of fact as to three elements: that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional rights." *Davidson v. City of Stafford, Tex.*, 848 F.3d 384, 395 (5th Cir. 2017) (citing *Culbertson v. Lykos*, 790 F.3d 608, 628 (5th Cir. 2015)).

Harris County maintains that Baughman cannot establish any of the necessary prerequisites for municipal liability because (1) he does not demonstrate that his constitutional rights were violated, and (2) even if his constitutional rights were violated, no official policy was to blame.[183] For reasons outlined in more detail above, Baughman has not demonstrated that he has been denied adequate medical care for diabetes in the form of thrice-daily fingersticks in violation of the Eighth Amendment.

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[183] Defendant Harris County's Motion for Summary Judgment [Doc. # 181], at ¶ 22.

Baughman also has failed to establish that he was denied adequate dental care in the form of partial dentures. Absent a showing of a genuine fact issue of a constitutional violation, Harris County is entitled to summary judgment on these claims and on Baughman's claim that Harris County failed to train or supervise employees with respect to these matters.

There are unresolved fact issues, however, about whether Baughman was denied adequate dental care for tooth decay in violation of the Eighth Amendment pursuant to a widespread practice or custom of offering extractions as the only available treatment option for inmates with cavities, but with no funds to pay for care by a private dentist. Arguing further that an extraction-only practice evolved because the Dental Clinic is understaffed,[184] Baughman contends that this practice rises to the level of an official policy that was the cause of his suffering and is attributable to Harris County for purposes of liability. *See Ramos*, 639 F.2d at 576 (finding that a dental clinic open only 40 hours a week was constitutionally inadequate to serve the dental needs of 1,400 inmates).

Harris County argues that, even assuming that a deficient practice was the moving force behind a violation of Baughman's right to adequate dental care, there

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[184] *See* Shulman Report [Doc. # 190,. Ex. 26] at 31-32; Chin Dep. [Doc. # 190, Ex. 6], at 40:7- 41:6 (noting that dentists at the Jail can identify periodontal disease, but cannot treat it because of "the amount of patients" and the small number of staff).

is no evidence that care was denied as the result of an official policy adopted by an official policymaker who had notice of a problem, but was deliberately indifferent to the likelihood that a constitutional violation would occur.

Official policy, which establishes municipal culpability, "can arise in various forms." *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847 (5th Cir. 2009). Official policy usually exists in the form of "written policy statements, ordinances, or regulations, but may also arise in the form of a widespread practice that is 'so common and well-settled as to constitute a custom that fairly represents municipal policy.'" *James*, 577 F.3d at 617 (citations and quotations omitted)). "A policy is official only 'when it results from the decision or acquiescence of the municipal officer or body with "final policymaking authority" over the subject matter of the offending policy.'" *Id.* (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)).

Assuming that an extraction-only policy exists, Harris County maintains that it is not an *official* policy because the Harris County Sheriff is the final policymaker for all matters involving the Jail and there is no evidence showing that the Sheriff had actual or constructive knowledge of the practice about which Baughman complains.[185] Baughman contends that there is a fact issue about whether the Sheriff actually exercises control over healthcare matters at the Jail, noting that Dr. Seale and Dr.

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[185] Defendant Harris County's Motion for Summary Judgment [Doc. # 181], at ¶ 24.

Guice were the officials vested with authority to make policy in that area.[186] Where municipal liability is concerned, however, "the identity of the final policymaker is a question of law — specifically a question of state law — and not a question of fact." *Groden v. City of Dallas, Tex.*, 826 F.3d 280, 284 (5th Cir. 2016) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) ("We begin by reiterating that the identification of policymaking officials is a question of state law."). "[I]t has long been recognized that, in Texas, the county Sheriff is the county's final policymaker in the area of law enforcement, not by virtue of the delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected." *Turner v. Upton County, Tex.*, 915 F.2d 133, 136 (5th Cir. 1990) (citing

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[186] Plaintiff's Response to Harris County's Motion for Summary Judgment [Doc. # 188], at 14-16. In making this argument, Baughman references two recent cases from Louisiana which call into question whether a parish sheriff is the final policy maker where Jail medical care is at issue. *See Nagle v. Gusman*, Civ. No. 12-1910, 2016 WL 768588, at *8 (E.D. La. Feb. 26, 2016) (interpreting La. Stat. § 13.5539(c), which is nearly identical to the Texas statute making the sheriff "keeper" of the jail, and concluding that the medical director of a jail may qualify as a policymaker for purposes of municipal liability); *Thompson v. Ackal*, Civ. No. 15-02288, 2016 WL 1394352, at *5 (W.D. La. March 9, 2016), report and recommendation adopted, 2016 WL 1391047 (W.D. La. April 6, 2016) (rejecting defendants' argument that the sheriff is the only final policymaker regarding medical care for inmates where doctors designed and implemented policies, procedures, and protocol for delivering health care to inmates). Neither case is binding authority and each is distinguishable. The *Nagle* case involved claims of individual liability on the part of the medical director as policymaker, and not municipal liability. *See Nagle*, 2016 WL 768588, at *8. Likewise, the *Thompson* case involved policies implemented by a private contractor which had policymaking authority pursuant to the express terms of its written contract with the municipality that it served. *See Thompson*, 2016 WL 1394352, at *5-6.

Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980)); *Colle v. Brazos County*, 981 F.2d 237, 244 (5th Cir. 1993) (same). Where the care of inmates is concerned, state law specifically provides that "[t]he sheriff of each county is the keeper of the county jail." TEX. LOC. GOV'T CODE § 351.041(a). As such, a county sheriff is required to "safely keep all prisoners committed to the jail by a lawful authority, subject to an order of the proper court." *Id.* "The sheriff may appoint a jailer to operate the jail and meet the needs of the prisoners, but the sheriff shall continue to exercise supervision and control over the jail." *Id.* at § 351.041(b).

The evidence reflects that the Sheriff has appointed his Chief Deputy to serve as administrator of the Jail, and that Dr. Seale and Dr. Guice reported to him through a chain of command.[187] If additional dentists or other staff were needed, Dr. Seale and Dr. Guice could make a recommendation through the chain of command, which would be presented to the Sheriff and the Harris County Commissioner's Court.[188] According to Dr. Seale, the Sheriff was ultimately responsible for staffing and funding for Jail operations.[189] This indicates that the Harris County Sheriff is the final

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[187] Guice Dep. [Doc. # 188, Ex. 1], at 28:7-17; Seale Dep. [Doc. # 188, Ex. 2], at 25:23-27:2.

[188] Guice Dep. [Doc. # 188, Ex. 1], at 160:20-163:16; Seale Dep. [Doc. # 188, Ex. 2], at 48:7-21, 153:14-20, 184:6-15.

[189] Seale Dep. [Doc. # 188, Ex. 2], at 152:15-153:20.

policymaker not only in the area of law enforcement, but also for operation of the Jail and the medical services provided at County expense.

There is no evidence showing that the practice or policy with which Baughman takes issue was ever adopted or endorsed by the Sheriff, thereby making it official for purposes of municipal liability. Even assuming that Dr. Seale and Dr. Guice could be considered final policymakers, it is undisputed that the policy of offering extractions as the only remedy for tooth decay was developed and implemented by dentists at the Jail. The County has had at all times relevant to Baughman's claims a written policy to the contrary, which called for oral treatment that was not limited to extractions. Harris County presents evidence that the Jail Health Services Division and its written policies were routinely approved and accredited following regular inspections by the TCJS and NCCHC, without any indication that these agencies or the Sheriff was aware that the Dental Clinic was operating without adequate staff or that the dental care being provided was constitutionally inadequate.[190] Although Dr. Chin has admitted that extraction was the only treatment being provided for cavities, neither Dr.

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[190] Seale Aff. [Doc. # 179-3], at ¶¶ 27-29; Guice Aff. [Doc. # 179-4], at ¶¶ 5-8, 37-38. Of course, accreditation status, standing alone, is not dispositive of the constitutionality of medical care provided at a correctional facility. *See Ruiz v. Johnson*, 37 F. Supp. 2d 855, 902 (S.D. Tex. 1999), *rev'd on other grounds, Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001). Harris County argues, nevertheless, that it should be able to rely on the accreditation process and its regimen of inspections, both planned and unannounced, as one manner of providing notice of systemic problems that may need to be rectified by official means.

Seale nor Dr. Guice were aware of an extraction-only practice at the Dental Clinic where extraction was not medically warranted.[191] As noted previously, Dr. Seale and Dr. Guice relied on licensed dentists to implement Jail policies in a manner consistent with governing standards of care by using their professional judgment and expertise. Dr. Seale testified further at his deposition that he believed that two dentists were adequate to meet the acute needs typically presented by detainees in the Jail setting and Baughman presents no evidence showing that Dr. Seale had a reason to question whether the Dental Clinic could not meet these needs due to a lack of staff.[192] Based on this record, there is no evidence that the Harris County Sheriff, or any other official with policymaking authority at the Jail, had actual or constructive knowledge of the problem of which Baughman complains, but that these officials consciously chose to enforce an extraction-only policy with deliberate indifference to the fact that a constitutional violation was the likely result. This is fatal to Baughman's claim for municipal liability. *See, e.g., Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003) ("Knowledge on the part of a policymaker that a constitutional violation will most likely result from a given official custom or policy is a *sine qua non* of

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[191] Guice Dep. [Doc. # 188, Ex. 1], at 157:18-21; Seale Dep. [Doc. # 188, Ex. 2], at 141:2-5, 143:2-144:3.

[192] Seale Dep. [Doc. # 188, Ex. 1], at 126:12-127:19, 153:4-13. Dr. Chin likewise disputed at his deposition that two dentists were inadequate to meet the needs of the Jail's fluctuating population. *See* Chin Dep. [Doc. # 188, Ex. 6], at 191:1-193:13.

municipal liability under section 1983."); *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984) (en banc) ("Actual or constructive knowledge of [a] custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policymaking authority.").

Baughman's contention that Harris County is liable for failing to train or supervise dentists at the Jail fails for similar reasons. In that respect, "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick*, 131 S. Ct. at 1359 (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 822-23 (1985)). For liability to attach under § 1983, "a municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Id.* (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). The Supreme Court has emphasized that deliberate indifference "is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* at 1360 (quoting *Board of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 410 (1997)). For this reason, a pattern of similar constitutional violations is required to trigger municipal liability. *Id.* "Without notice that a course of training is deficient in any respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of

constitutional rights." *Id.*

As noted previously in connection with the claims against Dr. Seale and Dr. Guice, Baughman does not present evidence of a pattern of violations similar to those alleged by him that were the product of any lack of training or supervision on the part of a municipal actor. Accordingly, Baughman does not satisfy the high standard of proof for purposes of imputing liability to a municipal entity under § 1983. *See Connick*, 131 S. Ct. at 1359-60. Absent a genuine issue of material fact on this question, Harris County is entitled to summary judgment on Baughman's claims under 42 U.S.C. § 1983.

B. State Law Negligence Claims

Baughman alleges that Harris County has failed to ensure that diabetes and his dental needs were treated in a manner that comports with the "good and accepted" standard of care for medical and dental practices.[193] Thus, Baughman contends that Harris County is liable for what amounts to negligence or malpractice by health care providers at the Jail. *See Blan v. Ali*, 7 S.W.3d 741, 744 (Tex. App. — Houston [14th Dist.] 1999, no pet.) (listing the elements of a *prima facie* claim for medical malpractice, which requires a showing that a provider breached the applicable standard of care).

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[193] Fourth Amended Complaint [Doc. # 134] at ¶¶ 72-77.

Harris County invokes sovereign immunity, which protects government entities from vicarious liability for the tortious acts of agents or employees acting in the scope of their employment.[194] *See Davis v. City of Palestine*, 988 S.W.2d 854, 857 (Tex. App. — Tyler 1999, no writ). Under this principle, the State of Texas and other governmental entities are immune unless liability is waived by a constitutional or legislative provision. *See Univ. of Tex. Med. Branch of Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994).

Baughman argues that immunity is waived pursuant to the Texas Tort Claims Act ("TTCA"), which provides that "[a] governmental unit in the state is liable for . . . personal injury . . . caused by a condition or use of tangible personal . . . property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE § 101.021.

Pointing to § 101.021 of the TTCA, Baughman argues that his claims are not barred by sovereign immunity because they involve Harris County's use of tangible property in the form of insulin injections and dental tools to effect extractions.[195]

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[194] As noted previously, the Court dismissed with prejudice similar state law negligence claims lodged by Baughman against the individual defendants as precluded by an election-of-remedies provision found in § 101.106(c) of the Texas Civil Practice and Remedies Code. *See* Memorandum and Order dated October 21, 2016 [Doc. # 160], at 6-7.

[195] Plaintiff's Response to Harris County's Motion for Summary Judgment [Doc. # 188], at 7, 30-31.

Baughman's underlying claims, however, concern the allegedly deficient care involved in the exercise, or lack of exercise, of professional medical judgment. As such, Baughman's claims do not fit within the statutory waiver of sovereign immunity available under the TTCA. *See Texas Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 587-89 (Tex. 2001) (concluding that a negligent failure to diagnose or treat meningitis stemming from an error of medical judgment was not within the statutory waiver). Accordingly, Harris County is entitled to summary judgment on Baughman's negligence claims.

V. REMAINING CLAIMS AND DEFENDANTS

Remaining for trial is Baughman's claim that Drs. Chin and Harper violated his constitutional rights by denying him adequate dental care in the form of standard fillings to treat advanced tooth decay in one or more of his teeth that were ultimately extracted.

It is not apparent that Baughman has a claim against former Sheriff Adrian Garcia or former Sheriff Ron Hickman in their personal capacity where his dental care is concerned, although neither of these defendants has moved for summary judgment. Likewise, it is unclear what claims Baughman intends to continue litigating against Renee Hinojosa, who also did not move for summary judgment. In that respect, Baughman has asserted that Hinojosa violated his constitutional rights by prescribing

a heart-healthy diet, which he claims was inappropriate for his diabetes, although even Baughman's own medical expert agrees that this diet is appropriate for diabetic patients.[196] The parties' counsel should address in the joint pretrial order whether Garcia, Hickman, and Hinojosa should remain as defendants in this lawsuit.

VI. CONCLUSION AND ORDER

Based on the foregoing, the Court **ORDERS** as follows:

1. The motion for summary judgment by Defendants Dr. Michael Seale, Dr. Marcus Guice, Bobby Davis, Sharon Lambi, and Beverly Howard [Doc. #179] is **GRANTED**.

2. The motion for summary judgment by Harris County [Doc. # 181] is **GRANTED**.

3. The motion for summary judgment by Defendants Dr. Edwin Chin, Dr. Allen Harper, and Catherine Rossi [Doc. # 183] is **GRANTED**, in part, with respect to the retaliation claims against Catherine Rossi, the claim that Drs. Chin and Harper denied Baughman adequate dental care in the form of dentures, and the claim of supervisory liability against Dr. Chin. The motion is **DENIED** with respect to the claim that Drs. Chin and

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196 *See* Madoff Report [Doc. # 190, Ex. 6], at 9 (noting that the heart-healthy diet with consistent carbohydrate content at each meal is appropriate for patients who suffer from diabetes); *see also* Morris Letter [Doc. # 190, Ex. 7], at 2 (same).

Harper denied Baughman adequate dental care in the form of standard fillings to treat tooth decay in violation of the Eighth Amendment.

The Clerk will provide a copy of this order to the parties.

SIGNED at Houston, Texas on May 26, 2017.

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

Appendix C

Decision of Court of Appeals On Motion For Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20435

STEVEN KURT BAUGHMAN,

Plaintiff - Appellant

v.

DOCTOR MICHAEL SEALE; M. GUICE; DOCTOR LAMBI; DOCTOR HOWARD; DETENTION OFFICER J. RAMIREZ; DETENTION OFFICER M. Z. SACKS; DRAKE NARENDORF; NURSE SCOTT; KATHY ROSSI; EL FRANCO LEE; HARRIS COUNTY; BOBBY DAVIS,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 2/25/19, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, ELROD, and HO, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

Additional material from this filing is available in the Clerk's Office.