Appendix A

Decision of the U.S. Court of Appeals

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 19-1319/1322

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 14, 2019
DEBORAH S. HUNT, Clerk

ADE BROWN,

Plaintiff-Appellant,

v.

WILLIE SMITH, Warden, et al.,

Defendants

and

REID DESROCHERS, Sergeant, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

ORDER

Before: MOORE, SUTTON, and NALBANDIAN, Circuit Judges.

In this consolidated appeal, Ade Brown, a pro se Michigan prisoner, appeals the district court's orders granting summary judgment in favor of the defendants in this action filed pursuant to 42 U.S.C. § 1983. He also requests the appointment of counsel. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Brown commenced this action in 2017 against thirty-eight defendants, most of whom are or were employed at the Ionia Correctional Facility, where Brown was formerly incarcerated. The district court screened Brown's complaint, as amended, and (1) dismissed all claims against two defendants for failure to state a claim, and (2) dismissed twenty-eight defendants on the grounds that they were improperly joined. The following defendants remained: Desiree Thomas, Shane

Tumbleson, Keith Sikkema, Reid Desrochers, Ronald Stambaugh, Michael Enderle, Micah Fracker, and Glenda Carlisle. All defendants except Thomas are referred to as the "MDOC [Michigan Department of Corrections] Defendants."[1]

The events giving rise to this action occurred on June 1, 2016. According to Brown, on that day, Desrochers allowed Stambaugh to place Brown in "[f]etal chains." Brown alleges that Desrochers, Stambaugh, Tumbleson, Sikkema, Enderle, and Fracker refused to remove him from the fetal chains; he claims that he remained in the chains for fourteen hours. He further alleges that he complained about his pain from the fetal chains to Thomas and Carlisle, but that neither defendant took his complaints seriously. Based on these allegations, Brown claims that the defendants used excessive force, were deliberately indifferent to his serious medical needs, and imposed cruel and unusual punishment upon him, in violation of the Eighth Amendment.

But whether the defendants violated Brown's Eighth Amendment rights is not at issue in this appeal. Rather, the parties dispute whether Brown complied with MDOC's grievance procedures, and therefore whether he exhausted his administrative remedies. According to Brown, he filed a grievance on June 2, and he never received a response or a grievance identifier number. He submitted a grievance form, which he purports to be the June 2 grievance that he filed. Brown further claims that, because his June 2 grievance was never responded to, he rewrote the June 2 grievance on June 21 out of an abundance of caution. Nevertheless, Brown avers that the June 21 grievance "is not the grievance [he is] using to defend [his] claim[s]"; rather, he claims to be using the June 2 grievance to show that he "properly exhausted all [of his] available administrative remedies."

The MDOC Defendants, however, maintain that Brown filed only one grievance—on June 21—with respect to the June 1 issue. They attached to their brief what they purport to be this June 21 grievance. The defendants assert that this grievance was (1) rejected at Step I because Brown was on modified access but failed to follow the applicable policy for filing grievances when

[1] Thomas is a registered nurse who worked at the Ionia Correctional Facility through her employment with Care One, Inc.

a prisoner is on modified access,[2] and (2) rejected at Step III as untimely and for failure to file proper documents. Brown does not dispute that the grievance that he filed on June 21 was not supported by the proper documents and was untimely. Rather, as alluded to above, he maintains that he exhausted the issues raised in the June 21 grievance when his June 2 grievance was not responded to, therefore making the grievance process "unavailable" and relieving him of any further requirement to exhaust with respect to the June 2 grievance.

Shortly after they were served, the MDOC Defendants moved for summary judgment, and a magistrate judge recommended that the motion be granted on the ground that Brown failed to exhaust his administrative remedies. The magistrate judge explained that Brown's June 21 grievance, attached to the MDOC Defendants' brief, (1) did not indicate that it was the refiling of an earlier grievance that was not properly processed (i.e., Brown's purported June 2 grievance) and (2) was rejected at Step III because it was untimely. The magistrate judge concluded that, because a grievance that is rejected at Step III for failing to follow MDOC's grievance procedure is not considered exhausted, the MDOC Defendants were entitled to summary judgment.

In his objections, Brown reiterated his argument that the June 21 grievance was merely a refiling of his June 2 grievance. He attached what he purports to be the June 21 grievance, in which Brown claims to have written: "Failure 2 resolve This is my 2nd time grieving this issue." However, this June 21 grievance, as set forth below, differs from the June 21 grievance that the MDOC Defendants attached.

The district court, in overruling Brown's objections, compared the two purported June 21 grievances and determined that the grievance that Brown attached was not authentic and that the grievance that the MDOC Defendants attached was the true copy of the June 21 grievance. In particular, the district court noted that: (1) the true copy of the June 21 grievance, filed by the MDOC Defendants, shows the first words as "failure to," whereas Brown's copy used the numeral "2" instead of "to"; (2) the true copy identifies Brown as "Ade Brown," whereas his copy identifies

[2] Under MDOC Policy Directive ("PD") 03.02.130(KK), if an inmate is placed on modified access, he can obtain a grievance form from only the Step I grievance coordinator, who will provide one if the issue is grievable and otherwise meets the criteria under the grievance policy.

him as "A. Brown"; and (3) Brown's copy contains a marking that the true copy does not. The district court also noted that the June 21 grievance attached to Brown's objections was "irrelevant" because it was not attached to his opposition to the summary judgment motion. Thus it was "never properly before the magistrate judge." The district court therefore adopted the magistrate judge's report and recommendation and entered summary judgment in favor of the MDOC Defendants.

A discovery dispute then arose between Brown and Thomas, the only remaining defendant. In short, Brown sought to conduct additional discovery with respect to the exhaustion issue and to extend the discovery deadline. The district court denied Brown's discovery motions, reasoning that they did not comply with the local rules and, moreover, because he failed to establish good cause to extend the discovery deadline so that he could conduct additional discovery.

Meanwhile, Thomas had filed a motion for summary judgment, and the magistrate judge recommended that it be granted for the same reasons that the MDOC Defendants were entitled to summary judgment, which are set forth above. The district court agreed, adopted the magistrate judge's report and recommendation, and entered summary judgment in favor of Thomas.

On appeal, Brown argues that: (1) the district court erred in granting summary judgment in favor of the defendants on the grounds that he failed to exhaust his administrative remedies; and (2) he was not given enough time to conduct sufficient discovery with respect to Thomas. More specifically, with respect to Brown's exhaustion argument, he claims that the grievance forms that he provided were authentic and, therefore, were sufficient to create a genuine dispute of fact relating to exhaustion.

Standard of Review

We review the district court's grant of summary judgment de novo, *Sagan v. United States*, 342 F.3d 493, 497 (6th Cir. 2003), and may affirm a district court's decision "on any grounds supported by the record even if different from the reasons of the district court," *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 629 (6th Cir. 2002). Summary judgment is proper "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).

Exhaustion of Administrative Remedies

This case centers on administrative exhaustion. Under the Prison Litigation Reform Act, prisoners are generally required to exhaust all available administrative remedies prior to filing civil rights suits in federal court. 42 U.S.C. § 1997e(a); *Jones v. Bock*, 549 U.S. 199, 211 (2007). "To exhaust his administrative remedies, a prisoner must adhere to the institutional grievance policy, including any time limitations." *Risher v. Lappin*, 639 F.3d 236, 240 (6th Cir. 2011) (citing *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006)). A prisoner's "[f]ailure to exhaust administrative remedies is an affirmative defense" that the defendants have "the burden to plead and prove by a preponderance of the evidence." *Lee v. Willey*, 789 F.3d 673, 677 (6th Cir. 2015).

Summary Judgment–Non-Exhaustion

The parties dispute at length (1) whose copy of the June 21 grievance is "authentic" and (2) whether either copy shows that Brown filed a grievance on June 2. But this appeal can be resolved by answering a much simpler question: namely, whether Brown properly exhausted his administrative remedies through all three steps of the grievance process with respect to the grievance that he filed on June 21.

For grievable matters, a Michigan prisoner must timely proceed through MDOC's three-step process. *See Surles v. Andison*, 678 F.3d 452, 455 (6th Cir. 2012); MDOC PD 03.02.130 (eff. 7/9/2007). At Step I, a prisoner must "attempt to resolve the issue with the staff member involved within two business days," and if unsuccessful, file a grievance within five business days. MDOC PD 03.02.130(P). At Step II, a prisoner may appeal the denial of the Step I grievance to the warden or other appropriate official within ten business days after receiving the denial. MDOC PD 03.02.130(BB), (DD). At Step III, a prisoner may appeal the Step II denial to MDOC's Grievance and Appeals Section within ten business days after receiving the denial. MDOC PD 03.02.130(FF).

We need not decide whose copy of the June 21 grievance is "authentic" to answer the question of whether Brown completed these three steps because the parties agree that Brown in fact filed a grievance on June 21 with respect to the alleged June 1 incident. In other words, there

is no dispute that Brown filed a grievance on June 21; whether Brown's copy or the MDOC Defendants' copy is the actual grievance is immaterial. And there is no dispute that Brown did not complete MDOC's three-step grievance process with respect to the June 21 grievance. The defendants asserted that this grievance (1) was rejected at Step I because Brown failed to follow the proper procedures for filing a grievance while on modified access, and (2) was rejected at Step III as untimely and for failure to file proper documents. They submitted MDOC records that confirm these assertions. Brown does not challenge these assertions or this documentary evidence. The defendants therefore met their burden of establishing the absence of a genuine dispute of material fact as to Brown's exhaustion of administrative remedies with respect to the June 21 grievance.

Undeterred, Brown maintains that he was excused from exhausting his administrative remedies because the grievance that he submitted on June 2 was neither responded to nor processed. For the reasons set forth below, this argument lacks merit and is insufficient to establish a triable issue of fact regarding Brown's non-exhaustion.

For purposes of this appeal, we can assume that Brown filed a grievance on June 2. As indicated above, Brown argues that the administrative process was "unavailable" to him because his June 2 grievance was neither responded to nor processed. "[W]hen prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation . . . , such interference with an inmate's pursuit of relief renders the administrative process unavailable." *Ross v. Blake*, 136 S. Ct. 1850, 1860 (2016) (citation omitted). And if the administrative process is unavailable, then exhaustion is not a prerequisite for initiation of a civil rights action. *Id.* at 1858-60; *Walker v. Mich. Dep't of Corr.*, 128 F. App'x 441, 446-47 (6th Cir. 2005). But here, Brown cannot show that the administrative process was unavailable because the applicable MDOC Policy Directive explicitly makes further administrative proceedings available even in the absence of a Step I response. In particular, MDOC Policy Directive 03.02.130(T) provides that, if there is no timely response at Step I or II, then the prisoner "may forward the grievance to the next step of the grievance process within ten

business days after the response deadline expired." Forwarding the grievance in the absence of a response is mandatory insofar as "[p]roper exhaustion" requires "compliance with an agency's . . . critical procedural rules[.]" *Woodford*, 548 U.S. at 90; *see, e.g.*, *Carr v. Booker*, No. 14-1258, 2014 U.S. App. LEXIS 25042, at *5-6 (6th Cir. Dec. 4, 2014) (finding that the prisoner failed to exhaust his claim where he did not receive a response to his grievance at Step I and failed to proceed to Steps II and III). Thus, the MDOC grievance process was not "unavailable" to Brown, notwithstanding prison officials' purported failure to respond to or process his June 2 grievance at Step I.

In accordance with the foregoing, Brown was required to proceed to Step II within ten business days after the response deadline expired. MDOC PD 03.02.130(T). Brown admittedly failed to do so. And although "inmates are not required to specially plead or demonstrate exhaustion in their complaints," *Jones*, 549 U.S. at 216, here, because Brown expressly concedes that he did not forward his June 2 grievance to Step II, we find that his failure to comply with MDOC's three-step process mandates that the district court enter summary judgment against him.

In short, Brown failed to exhaust his administrative remedies with respect to the incident alleged to have occurred on June 1, 2016. Accordingly, the district court properly granted summary judgment in favor of the defendants.

Denials of Discovery Motions

Brown also challenges the district court's denials of his multiple motions to conduct additional discovery, beyond the deadline, with respect to the exhaustion issue. We review these denials for an abuse of discretion. *Anwar v. Dow Chem. Co.*, 876 F.3d 841, 854 (6th Cir. 2017).

According to Brown, he needed more time to conduct discovery because he did not receive Thomas's motion for summary judgment, which was filed on March 27, 2018, until May 2 or 3, 2018, fourteen days before the discovery deadline. He claims that he should have been given the full forty-five-days to conduct discovery on Thomas's argument that he failed to exhaust his administrative remedies (the case management order provided for a forty-five-day discovery period on the exhaustion issue).

The district court found that it was "difficult, if not impossible to reconcile" Brown's claim that he did not receive Thomas's motion until May with the arguments that he made in his discovery motion filed on April 2, 2018. In that motion, Brown requested to conduct discovery "to obtain relevant evidence necessary to respond to the defense's summary [judgment] motion." Because the only summary judgment motion pending on April 2 was the one filed by Thomas, Brown's claim that he did not receive Thomas's motion until May is suspect.

Even if Brown did not receive Thomas's motion until May, he cannot show that he suffered prejudice. He was on notice that exhaustion was an issue in the case as early as August 21, 2017, when the MDOC Defendants filed their motion for summary judgment based on lack of exhaustion. None of the discovery requests that Brown purports he would have made beyond the deadline would have altered the conclusion that Brown failed to exhaust his administrative remedies, as that issue had already been decided on March 1, 2018, when the district court granted the MDOC Defendants' summary judgment motion. Under these circumstances, we find that the district court did not abuse its discretion when it denied Brown's discovery motions.

Accordingly, we **AFFIRM** the district court's judgment and **DENY** the request for the appointment of counsel as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix B

Decision of the U.S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ADE BROWN,
Plaintiff,

v.

REID DESROCHERS, ET AL.,
Defendants.

No. 1:17-CV-282

HONORABLE PAUL L. MALONEY

ORDER

This is a civil rights action brought by a *pro se* state prisoner under 42 U.S.C. § 1983. The suit arises out of the conditions of Plaintiff's confinement at the Ionia Correctional Facility. He alleges that on June 1, 2016, the Defendants used excessive force against him, violating the Eighth Amendment.

All Defendants except Unknown Thompson have moved for summary judgment, based on the affirmative defense of failure to exhaust administrative remedies, as required by 42 U.S.C. § 1997e. The matter was referred to the magistrate judge for an R & R, which issued on February 7, 2018.

The magistrate recommended granting the motion for summary judgment over Plaintiff's argument that he had exhausted a grievance written on June 3, 2016 because prison authorities never issued a grievance number to it or responded to it. Plaintiff supported his claim with a second grievance filed June 21, 2016, which he said was a re-filing of the original grievance. The magistrate rejected the argument, finding that nothing on the face of the June

21 grievance indicated that it was a refiling of an earlier grievance, nor was there any mention of the earlier grievance in Plaintiff's Step II and III appeals of the June 21 grievance.

The matter is now before the Court on Plaintiff's objections. He objects to the magistrate's conclusion that he failed to exhaust on the basis of the June 3, 2016 grievance and says that the top section of the June 21, 2016 grievance references the prior grievance.

However, the section Plaintiff references is illegible. The only words that can be made out definitively are the first two—"Failure to . . . ." (ECF No. 22-3 at PageID.206.)

In his objections, Plaintiff purports to file another copy of the same grievance where the first section clearly states "failure 2 [sic] resolve this is my 2nd time grieving this issue." The Court does not believe this to be an authentic document for several reasons. First, the true copy on the record clearly shows the first words as "failure to" while Plaintiff's new copy uses the numeral "2" in its place. (*Compare* ECF No. 22-3 at PageID.206 *with* ECF No. 43-1 at PageID.324.) Plaintiff's name in the copy on the record is listed as "Ade Brown" but appears as "A. Brown" on his attached copy. The last word of the first section—"issue"—also appears on Plaintiff's copy on a second line to the left and below "failure" in very dark markings that appear to have been traced over multiple times. No such marking appears on the copy in the record. (ECF No. 22-3 at PageID.206.)

Additionally, Plaintiff's copy was not attached to his response to the motion for summary judgment and was not considered by the magistrate or the Defendants—it only was produced as an attachment to Plaintiff's objections. (ECF No. 43-1 at PageID.324.) The Court does not find the form to be authentic, and at any rate, it is irrelevant because it was

never properly before the magistrate judge. *Murr v. United States*, 200 F.3d 895, 902 n. 1 (6th Cir. 2000).

Defendants have met their burden by showing that Plaintiff did not exhaust any grievances relating to the legal issues at stake. Plaintiff argues that the Defendants were required to prove that they did not interfere with the June 2 grievance, but that is not the case. Once the Defendants have met their burden of showing that no exhausted grievances existed, the burden shifts to the Plaintiff to create a genuine dispute of fact relating to exhaustion through evidence. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see, e.g., Rumsey v. Michigan Dept' of Corr.*, No. 1:10-cv-880, 2013 WL 5517888, at *6 (W.D. Mich. 2013). Plaintiff has not produced any other evidence that his June 2 grievance was disregarded by prison authorities, so he has not met his burden. Accordingly, the Court agrees with the magistrate's conclusion that Plaintiff did not exhaust his claims.

THEREFORE,

IT IS ORDERED that the February 7, 2018 R & R (ECF No. 39) is **APPROVED** and **ADOPTED** as the Opinion of the Court.

IT IS FURTHER ORDERED that Plaintiff's Objections to the R&R (ECF No. 143) are **OVERRULED.**

IT IS FURTHER ORDERED that Defendants Desrochers, Stambaugh, Enderle, Fracker, Carlisle, Tumbleson, and Sikkemer's motion for summary judgment is **GRANTED** and Plaintiff's claims against them be **DISMISSED WITHOUT PREJUDICE.**

Date: March 1, 2018

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

Appendix C

2nd Decision of the U.S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ADE BROWN,
Plaintiff,

v.

DESIREE THOMAS,
Defendant.

No. 1:17-CV-282

HONORABLE PAUL L. MALONEY

ORDER ADOPTING REPORT AND RECOMMENDATION

This is a civil rights action brought by a *pro se* state prisoner under 42 U.S.C. § 1983. The suit arises out of the conditions of Plaintiff's confinement at the Ionia Correctional Facility. He claims that Defendant Desiree Thomas was deliberately indifferent to his serious medical needs in violation of his Eighth Amendment rights. The matter is now before the Court on Plaintiff's objections to the Report and Recommendation, which recommended granting Thomas' motion for summary judgment and denying Plaintiff's motion for a default judgment.

With respect to a dispositive motion, a magistrate judge issues a report and recommendation, rather than an order. After being served with a report and recommendation issued by a magistrate judge, a party has fourteen days to file written objections to the proposed findings and recommendations. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). A district court judge reviews de novo the portions of the R & R to which objections have been filed. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Only those objections that are specific are entitled to a de novo review under the statute. *Mira v.*

Marshall, 806 F.2d 636, 637 (6th Cir. 1986) (per curiam) (holding the district court need not provide de novo review where the objections are frivolous, conclusive or too general because the burden is on the parties to "pinpoint those portions of the magistrate's report that the district court must specifically consider"). Failure to file an objection results in a waiver of the issue and the issue cannot be appealed. *United States v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005); *see also Thomas v. Arn*, 474 U.S. 140, 155 (upholding the Sixth Circuit's practice). The district court judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

Plaintiff's objections are not numbered and span more than ten pages. However, Plaintiff generally has three objections—two procedural and one substantive.

First, Plaintiff's procedural objections are easily dispatched. He asserts that the magistrate judge erred by concluding that his sur-reply brief to Thomas's motion for summary judgment was "unauthorized." Under the Court's Local Rules, parties must seek leave of Court prior to filing a sur-reply. *See* W.D. Mich. LCivR 7.2(c). Based on application of the Local Rules, the magistrate judge accurately concluded that Plaintiff's sur-reply was improper. However, the magistrate also explicitly stated that he would consider the brief, despite Plaintiff's violation of the Local Rules—in part because Defendant had also violated other portions of the Local Rules—to best effectuate judicial efficiency. (ECF No. 95 at PageID.631 n.2.) Thus, there is no harm for the Court to remedy, and even if the magistrate judge had *not* considered the sur-reply, it would not have been error.

Second, Plaintiff objects to the magistrate's recommendation that his motion for a default judgment be denied. The magistrate judge concluded that because default had never entered as to Defendant Thomas, Plaintiff's motion for a default judgment must be denied. As a matter of black letter law, the magistrate judge correctly concluded that "default is a prerequisite [] to entry of a default judgment." *Briggs v. Burke*, 2015 WL 5714520, at *15 (W.D. Mich. Sept. 29, 2015) (citations omitted). Plaintiff's objection is overruled.

Finally, Plaintiff devotes the remainder of his objections to what amounts to a second motion for reconsideration of the Court's March 1, 2018 Order. The Court has already once rejected such a motion. Plaintiff reprises his argument that summary judgment on the basis of administrative exhaustion is inappropriate because he filed a grievance that was never acted on June 2, 2016. However, as the magistrate judge noted, the Court has already held that the purported June 2 grievance was not sufficient to create a genuine dispute of fact relating to exhaustion. (ECF No. 46 at PageID.337.) Plaintiff's objections provide no new insight into this issue.

Accordingly, the Court **ADOPTS** the Report and Recommendation as the Opinion of the Court (ECF No. 95), **OVERRULES** Plaintiff's objections (ECF Nos. 96-97), **GRANTS** Defendant's motion for summary judgment, and **DENIES** Plaintiff's motion for a default judgment.

Date: March 5, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ADE BROWN,
Plaintiff,

v.

DESIREE THOMAS,
Defendant.

No. 1:17-CV-282

HONORABLE PAUL L. MALONEY

JUDGMENT

In accordance with the Court's Order entered on this date, and pursuant to Fed. R. Civ. P. 58, **JUDGMENT** hereby enters.

IT IS SO ORDERED.

Date: March 5, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

Certified as a True Copy
By _____
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date 3/5/19

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ADE BROWN,
Plaintiff,

v.

DESIREE THOMAS,
Defendant.

No. 1:17-CV-282

HONORABLE PAUL L. MALONEY

ORDER

This is a prison conditions case brought by a pro se prisoner, Ade Brown. The matter is now before the Court on Plaintiff's objections (ECF No. 82, 83) to non-dispositive orders of the magistrate judge (ECF No. 67, 68).

Orders of magistrate judges on non-dispositive matters can be appealed under 28 U.S.C. § 636(b)(1)(A). *See also* W.D. Mich. LCivR 72.3(a). Such orders are reviewed under a "clearly erroneous" standard. *United States v. Curtis*, 237 F.3d 598, 603 (6th Cir. 2001). Legal conclusions are set aside if they are contrary to law. *Id.*

First, the magistrate judge issued an order clarifying the procedural posture of the case, which was "muddled" after the parties began litigating the case as if Plaintiff had amended his complaint to name Desiree Thomas, despite him never having done so. (ECF No. 67.) The magistrate judge noted that, by virtue of the original case management order, Thomas was under no obligation to file a response to the complaint under 42 U.S.C. § 1997e(g)(1). (*See* ECF No. 24 at PageID.222.) Thus, when the Clerk of Court entered a default against "Unknown Thompson," (ECF No. 27), that action was erroneous. The magistrate judge thus ordered the default against Unknown Thompson to be side aside. The magistrate judge further ordered that

Desiree Thomas was deemed substituted in place of Unknown Thompson, dismissed Plaintiff's motion for a default judgment, and ordered her to file an answer to Plaintiff's complaint.

Plaintiff filed a one-page objection (ECF No. 82) arguing that his motion for a default judgment should not have been dismissed. However, Plaintiff did not address the magistrate judge's conclusion that the entry of default was improperly entered in view of the case management order. Accordingly, the Court finds that the magistrate judge's order was not clearly erroneous or contrary to law. Thus, the Order (ECF No. 67) is **AFFIRMED** and Plaintiff's Appeal to the District Judge is **DENIED** (ECF No 82).

Second, the magistrate judge issued an order pertaining to discovery. Specifically, the magistrate judge's order addressed Plaintiff's motion to compel production of documents by non-parties and former parties (ECF No. 45), his motion for leave to conduct merits-based discovery (ECF No. 51), and his corrected motion for an extension of time to complete discovery (ECF No. 59). The magistrate judge denied all three motions, finding that the motion to compel documents was not supported by Rule 34(a), and the operative case management order authorized Plaintiff discovery limited to the issue of exhaustion only, so the latter motions pertaining to merits-based discovery were premature. Finally, the magistrate judge concluded that Plaintiff had not shown good cause to extend discovery (as requested in ECF No. 59) on the issue of exhaustion because exhaustion had largely been covered by the briefing of other Defendants' motions, and Plaintiff had not supplied any proposed discovery regarding exhaustion.

Plaintiff filed for reconsideration of his motions, which the Court will liberally construe as an appeal to the district judge. Plaintiff continues to argue that he was not aware of

Defendant's motion for summary judgment on the basis of exhaustion until May 1, 2018, despite his motion on April 2, 2018 that he be authorized to conduct discovery "to obtain evidence necessary to respond to the defense's summary motion." (ECF No. 51 at PageID.372.) The only motion pending at that time was Thomas' motion for summary judgment on the basis of exhaustion, which was filed six days before Plaintiff's motion.

The Court does not find that the magistrate judge's denial of Plaintiff's discovery motions (ECF Nos. 45, 51, 59) was clearly erroneous or contrary to law. Accordingly, the order of the magistrate judge (ECF No. 68) is **AFFIRMED** and the Plaintiff's Appeal to the District Judge (ECF No. 83) is **DENIED**.

IT IS SO ORDERED.

Date: March 4, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

Appendix D

Order of the U.S. Court of Appeals
untimely petition for rehearing

Case No. 19-1319/19-1322

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

ADE BROWN

Plaintiff - Appellant

v.

REID DESROCHERS, Sergeant; RONALD STAMBAUGH, Corrections Officer; MICHAEL ENDERLE, Corrections Officer; MICAH FRACKER, Corrections Officer; GLENDA CARLISLE, Corrections Officer; SHANE TUMBLESON, Corrections Officer; KEITH SIKKEMA, R.N.

Defendants - Appellees

Upon consideration of the appellant's motion for leave to file a petition for rehearing out of time in the above-styled cases,

It is **ORDERED** that the motion is hereby **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: December 12, 2019

Appendix E

Report & Recommendation
of the U.S. District Court

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ADE BROWN, # 884273,	)	
	)	
Plaintiff,	)	Case No. 1:17-cv-282
	)	
v.	)	Honorable Paul L. Maloney
	)	
REID DESROCHERS , et al.,	)	
	)	
Defendants.	)	
	)	

REPORT AND RECOMMENDATION

This is a civil rights action brought by a state prisoner under 42 U.S.C. § 1983. Plaintiff complaint arises out of conditions of his confinement at the Ionia Correctional Facility. The Michigan Department of Corrections defendants are Sergeant Reid Desrochers, Corrections Officers Ronald Stambaugh, Michael Enderle, Micah Fracker, Glenda Carlisle, and Shane Tumbleson, and Registered Nurse Keith Sikkema. Plaintiff alleges that, on June 1, 2016, all these defendants used excessive force against him in violation of his Eighth Amendment rights. In addition, plaintiff alleges that on the same date, Nurse Unknown Thompson was deliberately indifferent to his serious medical needs in violation of his Eighth Amendment rights.[1]

The matter is before the Court on a motion for summary judgment by all defendants other than defendant Thompson, based on the affirmative defense of failure to exhaust administrative remedies, as required by 42 U.S.C. § 1997e(a).

[1] All other claims have been dismissed. (ECF No. 9, 10).

(ECF No. 21). Plaintiff opposes the motion. (ECF No. 31, 35). For the reasons set forth herein, I recommend that defendants' motion for summary judgment be granted and that all plaintiff's claims against defendants Desrochers, Stambaugh, Enderle, Fracker, Sikkema, Carlisle, and Tumbleson be dismissed without prejudice.

Summary Judgment Standard

Summary judgment is appropriate when the record reveals that there are no genuine issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *McKay v. Federspiel*, 823 F.3d 862, 866 (6th Cir. 2016). The standard for determining whether summary judgment is appropriate is "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Rocheleau v. Elder Living Const., LLC*, 814 F.3d 398, 400 (6th Cir. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The Court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *France v. Lucas*, 836 F.3d 612, 624 (6th Cir. 2016).

When the party without the burden of proof seeks summary judgment, that party bears the initial burden of pointing out to the district court an absence of evidence to support the nonmoving party's case, but need not support its motion with affidavits or other materials "negating" the opponent's claim. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 787 (6th Cir. 2000); *see also Minadeo v. ICI Paints,*

398 F.3d 751, 761 (6th Cir. 2005). Once the movant shows that "there is an absence of evidence to support the nonmoving party's case," the nonmoving party has the burden of coming forward with evidence raising a triable issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To sustain this burden, the nonmoving party may not rest on the mere allegations of his pleadings. *See Ellington v. City of E. Cleveland*, 689 F.3d 549, 552 (6th Cir. 2012); *see also Scadden v. Warner*, 677 F. App'x 996, 1001, 2017 WL 384874, at *4 (6th Cir. Jan. 27, 2017). The motion for summary judgment forces the nonmoving party to present evidence sufficient to create a genuine issue of fact for trial. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1990); *see Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 533 (6th Cir. 2012). "A mere scintilla of evidence is insufficient; 'there must be evidence on which a jury could reasonably find for the [non-movant].' " *Dominguez v. Correctional Med. Servs.*, 555 F.3d 543, 549 (6th Cir. 2009) (quoting *Anderson*, 477 U.S. at 252); *see Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 565 (6th Cir. 2016).

A moving party with the burden of proof faces a "substantially higher hurdle." *Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir. 2002); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1056 (6th Cir. 2001). The moving party without the burden of proof needs only show that the opponent cannot sustain his burden at trial. "But where the moving party has the burden – the plaintiff on a claim for relief or the defendant on an affirmative defense – his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (citation and quotation omitted). The

Court of Appeals has repeatedly emphasized that the party with the burden of proof faces "a substantially higher hurdle" and " 'must show that the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it.' " *Arnett*, 281 F.3d at 561 (quoting 11 JAMES WILLIAM MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 56.13[1], at 56-138 (3d ed. 2000)); *see Surles v. Andison*, 678 F.3d 452, 455-56 (6th Cir. 2012); *Cockrel*, 270 F.2d at 1056. Accordingly, summary judgment in favor of the party with the burden of persuasion "is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999).

Standards Applicable to the Affirmative Defense of Failure to Exhaust Remedies

Defendants have asserted the affirmative defense of plaintiff's failure to exhaust administrative remedies. A prisoner bringing an action with respect to prison conditions under 42 U.S.C. § 1983 "or any other Federal law" must exhaust available administrative remedies. 42 U.S.C. § 1997e(a); *see Jones v. Bock*, 549 U.S. 199, 220 (2007); *Porter v. Nussle*, 534 U.S. 516, 532 (2002); *Booth v. Churner*, 532 U.S. 731 (2001). A prisoner must exhaust available administrative remedies, even if the prisoner may not be able to obtain the specific type of relief he seeks in the state administrative process. *See Porter*, 534 U.S. at 520; *Booth*, 532 U.S. at 734. "This requirement is a strong one. To further the purposes behind the PLRA, exhaustion is required even if the prisoner subjectively believes the remedy is not available, even when the state cannot grant the particular relief requested, and even where the

prisoner[ ] believes the procedure to be ineffectual or futile." *Napier v. Laurel County, Ky.*, 636 F.3d 218, 222 (6th Cir. 2011) (internal quotations and citations omitted).

In *Jones v. Bock*, the Supreme Court held that "exhaustion is an affirmative defense, and prisoners are not required to specifically plead or demonstrate exhaustion in their complaints." 549 U.S. at 216. The burden is on defendants to show that plaintiff failed to properly exhaust his administrative remedies. The Supreme Court reiterated that "no unexhausted claim may be considered." 549 U.S. at 220. The Court held that when a prisoner complaint contains both exhausted and unexhausted claims, the lower courts should not dismiss the entire "mixed" complaint, but are required to dismiss the unexhausted claims and proceed to address only the exhausted claims. 549 U.S. at 219-24.

In order to exhaust administrative remedies, prisoners must complete the administrative review process in accordance with the deadlines and other applicable procedural rules established by state law. *Jones v. Bock*, 549 U.S. at 218-19. In *Woodford v. Ngo*, 548 U.S. 81 (2006), the Supreme Court held that the PLRA exhaustion requirement "requires proper exhaustion." 548 U.S. at 93. "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules." *Id.* at 90; *see Scott v. Ambani*, 577 F.3d 642, 647 (6th Cir. 2009). Thus, when a prisoner's grievance is rejected by the prison as untimely because it was not filed within the prescribed period, the prisoner's claim is not "properly exhausted" for purposes of filing a section 1983 action in federal court. 548 U.S. at 90-93; *Siggers v. Campbell*, 652 F.3d 681, 692 (6th Cir. 2011); *see* 42 U.S.C. § 1997e(a).

MDOC Policy Directive 03.02.130 (effective July 9, 2007) sets forth the applicable grievance procedures.[2] In *Sullivan v. Kasajaru*, 316 F. App'x 469, 470 (6th Cir. 2009), the Sixth Circuit held that this policy directive "explicitly required [the prisoner] to name each person against whom he grieved," and it affirmed the district court's dismissal of a prisoner's claim for failure to properly exhaust his available administrative remedies. *Id.* at 470.

The Sixth Circuit has "clearly held that an inmate does not exhaust available administrative remedies when the inmate fails entirely to invoke the grievance procedure." *Napier*, 636 F.3d at 224. An argument that it would have been futile to file a grievance does not suffice. Assertions of futility do not excuse plaintiff from the exhaustion requirement. *See Napier*, 636 F.3d at 224; *Hartsfield v. Vidor*, 199 F.3d 305, 309 (6th Cir. 1999) ("[A]n inmate cannot simply fail to file a grievance or abandon the process before completion and claim that he has exhausted his remedies or that it is futile for him to do so because his grievance is now time-barred under the regulations."); *see also Booth v. Churner*, 532 U.S. at 741 n.6 ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise.").

Preliminary Matters

Plaintiff's amended complaint is not properly verified, as he has interjected the limitations that the allegations are made 'to the best of [his] knowledge, belief and

[2]A copy of the policy directive is found in the record. *See* ECF No. 22-2, PageID.178-84.

understanding."[3] (*See* ECF No. 8 at PageID.65, 66). Plaintiff's brief incorporates the same limitations. (ECF No. 31, PageID.244). His sur-reply brief adds the limitations that the "foregoing is true to the best of [his] knowledge, wisdom and understanding." (ECF No. 35, PageID.262).

"[S]tatements made on belief or on information and belief, cannot be utilized on a summary-judgment motion." *Ondo v. City of Cleveland*, 795 F.3d 597, 605 (6th Cir. 2015). Accordingly, plaintiff's amended complaint will not be considered as his affidavit in opposition to defendant's motion. *See, e.g., Brown v. City of Grand Rapids*, No. 1:13-cv-964, 2016 WL 4920144, at *3 n.3 (W.D. Mich. June 13, 2016); *Naumovski v. Federal Nat'l Mort. Ass'n*, No. 15-11466, 2016 WL 949220, at *2 (E.D. Mich. Mar. 14, 2016).

"Verified" arguments and legal conclusions are not evidence. Legal conclusions, whether asserted in an affidavit or verified complaint, do not suffice to create a genuine issue of material fact for trial. *See Medison Am. Inc. v. Preferred Med. Sys.*, LLC, 357 F. App'x 656, 662 (6th Cir. 2009); *Simmons v. Rogers*, No. 1:14-cv-1242, 2017 WL 1179376, at *1 (W.D. Mich. Mar. 30, 2017). "Arguments in parties' briefs are not evidence." *Duha v. Agrium, Inc.*, 448 F.3d 867, 879 (6th Cir. 2006).

[3] Plaintiff has demonstrated that he knows how to make an unambiguous and unrestricted declaration under penalty of perjury as required by 28 U.S.C. § 1746, by stating: "I declare under penalty of perjury that the foregoing is true and correct." (ECF No. 26 at PageID.229).

Proposed Findings of Fact

The following facts are beyond genuine issue. Plaintiff was an inmate held in the custody of the Michigan Department of Corrections at the Ionia Correctional Facility (ICF) during the period at issue. The defendants were MDOC employees at ICF during this period.

Plaintiff filed a number of grievances and pursued some of them through a Step III decision before he filed this lawsuit. (ECF No. 22-3, PageID.186-215) One grievance is related to plaintiff's claims and therefore warrants further discussion.

On June 23, 2016, ICF's grievance coordinator received a grievance from plaintiff and assigned it Grievance No. ICF 2016-06-803-28e. (ECF No. 22-3, PageID.206). Plaintiff wrote this grievance on June 21, 2016, and he identified the date of the incident as June 1, 2016. (*Id.*). Plaintiff complained that, on the morning of June 1, 2016, he had been taken from his cell and placed in restraints by Sergeant Desrochers, and Corrections Officers Stambaugh, and Tumbleson. Plaintiff complained that he was kept in restraints for fourteen hours. Corrections Officers Enderle, Fracker, and Carlisle did not remove the restraints when plaintiff asked them to do so. Nurses did not help when plaintiff asked for assistance. (*Id.*).

Nothing on the face of plaintiff's grievance asserted it was the re-filing of an earlier grievance that had not been processed by ICF's grievance coordinator. (ECF No. 22-3, PageID.206). Plaintiff's Step II and III appeals (*Id.* at PageID.208-09) are also devoid of any claim that Grievance No. ICF 2016-06-803-28e was the re-filing of an earlier grievance.

Plaintiff's grievance was rejected at Step I. (*Id.* at PageID.207). He pursued unsuccessful Step II and III appeals. His Step III appeal was rejected because it was untimely. (*Id.* at PageID.205).

On March 29, 2017, plaintiff filed this lawsuit.

Discussion

I. Motion for Summary Judgment

All defendants other than defendant Unknown Thompson have raised the affirmative defense that plaintiff did not properly exhaust his administrative remedies against them as required by 42 U.S.C. § 1997e(a).

Plaintiff seeks to avoid summary judgment in favor of the moving defendants by arguing that he wrote a grievance on June 3, 2016, that was never assigned a grievance number and he never received a response. (Plf. Brief at 2-7, ECF No. 31, PageID.239-44; Sur-reply Brief at 2-3, ECF No. 35, PageID.261-62). Plaintiff's argument is untenable on this record. Grievance No. ICF 2016-06-803-28e did not indicate that it was the re-riling of an earlier grievance. (ECF No. 22-3, PageID.206). Plaintiff's Step II and III appeals (*Id.* at PageID.208-09) are also devoid of any claim that it was the re-filing of an earlier grievance.

Exhaustion analysis is patterned after habeas corpus procedural default analysis. The pivotal question is whether the Step III decision, the last decision, was based on the enforcement of a procedural bar. *See Reed-Bey v. Pramstaller*, 603 F.3d 322, 326 (6th Cir. 2010); *see also Reynolds-Bey v. Harris*, 428 F. App'x 493, 502 (6th Cir. 2011) (The Step III decision is "the equivalent of the last state court [decision] in

[a] habeas [case.]"). Here, Grievance No. ICF 2016-06-803-28e was rejected at Step III because it was untimely. The Court honors procedural rules that prison officials enforce. *See Reed-Bey v. Pramstaller*, 603 F.3d at 326; *see also Doss v. Mackie*, No. 2:16-cv-135, 2017 WL 6047754, at *4 (W.D. Mich. Nov. 7, 2016) ("[W]here a Step III response rejects a grievance for failing to follow MDOC grievance procedure, the grievance cannot be considered properly exhausted under the policy.").

Exhaustion is mandatory. *Woodford*, 548 U.S. at 85. "[N]o unexhausted claim may be considered." *Jones v. Bock*, 549 U.S. at 220. Plaintiff did not properly exhaust his claims against defendants before he filed this lawsuit. Accordingly, I find that defendants Desrochers, Stambaugh, Enderle, Fracker, Sikkema, Carlisle, and Tumbleson have carried their burden on the affirmative defense and are entitled to dismissal of all of plaintiff's claims.

Recommended Disposition

For the reasons set forth herein, I recommend that defendants' motion for summary judgment (ECF No. 21) be granted and that all plaintiff's claims against defendants Desrochers, Stambaugh, Enderle, Fracker, Sikkema, Carlisle, and Tumbleson be dismissed without prejudice.

Dated: February 7, 2018

/s/ Phillip J. Green
PHILLIP J. GREEN
United States Magistrate Judge

NOTICE TO PARTIES

ANY OBJECTIONS to this Report and Recommendation must be filed and served within fourteen days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. MICH. LCIVR 72.3(b). Failure to file timely and specific objections may constitute a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012); *United States v. Branch*, 537 F.3d 582, 587 (6th Cir. 2008). General objections do not suffice. *See McClanahan v. Comm'r of Social Security*, 474 F.3d 830, 837 (6th Cir. 2006); *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006).

Appendix F

2nd Report & Recommendation
of the U.S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ADE BROWN, #884273, Plaintiff, v. DESIREE THOMAS, R.N., Defendant.	Case No. 1:17-cv-282 Honorable Paul L. Maloney

REPORT AND RECOMMENDATION

This is a civil rights action brought by a state prisoner pursuant to 42 U.S.C. § 1983. This lawsuit arises out of conditions of plaintiff's confinement at the Ionia Correctional Facility. Plaintiff alleges that on June 1, 2016, Desiree Thomas, R.N., was deliberately indifferent his serious medical needs in violation of his Eighth Amendment rights.[1]

The matter is before the Court on plaintiff's third motion for entry of a default judgment (ECF No. 70), and defendant's motion for summary judgment based on the affirmative defense of failure to exhaust administrative remedies, as required by 42 U.S.C. § 1997e(a) (ECF No. 50).[2] For the reasons set forth herein, I recommend that

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[1] All other claims have been dismissed. (ECF No. 9, 10, 46).

[2] The parties' failure to comply with the requirements of the Local Civil Rules is an ongoing problem. Defendant's motion does not indicate what effort she made to ascertain whether plaintiff would oppose her motion before she filed it. *See* W.D. MICH. LCIVR 7.1(d). Plaintiff filed an unauthorized sur-reply brief (ECF No. 93) in opposition to defendant's motion. *See* W.D. MICH. LCIVR 7.2(c). Although dismissing

the Court deny plaintiff's motion, grant defendant's motion, and enter a judgment dismissing plaintiff's claim against defendant without prejudice.

Summary Judgment Standard

Summary judgment is appropriate when the record reveals that there are no genuine issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *McKay v. Federspiel*, 823 F.3d 862, 866 (6th Cir. 2016). The standard for determining whether summary judgment is appropriate is "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Rocheleau v. Elder Living Const., LLC*, 814 F.3d 398, 400 (6th Cir. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The Court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *France v. Lucas*, 836 F.3d 612, 624 (6th Cir. 2016).

When the party without the burden of proof seeks summary judgment, that party bears the initial burden of pointing out to the district court an absence of evidence to support the nonmoving party's case, but need not support its motion with

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defendant's motion without prejudice, disregarding plaintiff's unauthorized sur-reply brief, and requiring the parties to start over with a new motion and briefing is an available option, here it would result in a needless waste of judicial resources and unnecessary delay in resolving a case that has been pending for almost two years. Defendant's motion and plaintiff's sur-reply brief are considered herein.

affidavits or other materials "negating" the opponent's claim. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 787 (6th Cir. 2000); *see also Minadeo v. ICI Paints*, 398 F.3d 751, 761 (6th Cir. 2005). Once the movant shows that "there is an absence of evidence to support the nonmoving party's case," the nonmoving party has the burden of coming forward with evidence raising a triable issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To sustain this burden, the nonmoving party may not rest on the mere allegations of his pleadings. *See Ellington v. City of E. Cleveland*, 689 F.3d 549, 552 (6th Cir. 2012). The motion for summary judgment forces the nonmoving party to present evidence sufficient to create a genuine issue of fact for trial. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1990); *see Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 533 (6th Cir. 2012). "A mere scintilla of evidence is insufficient; 'there must be evidence on which a jury could reasonably find for the [non-movant].' " *Dominguez v. Correctional Med. Servs.*, 555 F.3d 543, 549 (6th Cir. 2009) (quoting *Anderson*, 477 U.S. at 252); *see Lossia v. Flagstar Bancorp, Inc.*, 895 F.3d 423, 428 (6th Cir. 2018).

A moving party with the burden of proof faces a "substantially higher hurdle." *Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir. 2002); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1056 (6th Cir. 2001). "[W] here the moving party has the burden – the plaintiff on a claim for relief or the defendant on an affirmative defense – his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (citation and quotation omitted). In other words, the movant with the

burden of proof " 'must show that the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it.' " *Arnett*, 281 F.3d at 561 (quoting 11 JAMES WILLIAM MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 56.13[1], at 56-138 (3d ed. 2000)); *see Surles v. Andison*, 678 F.3d 452, 455-56 (6th Cir. 2012); *Cockrel*, 270 F.2d at 1056. Accordingly, summary judgment in favor of the party with the burden of proof "is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999).

Standards Applicable to the Affirmative Defense of Failure to Exhaust Remedies

Defendant has asserted the affirmative defense of plaintiff's failure to exhaust administrative remedies. A prisoner bringing an action with respect to prison conditions under 42 U.S.C. § 1983 "or any other Federal law" must exhaust available administrative remedies. 42 U.S.C. § 1997e(a); *see Jones v. Bock*, 549 U.S. 199, 220 (2007); *Porter v. Nussle*, 534 U.S. 516, 532 (2002); *Booth v. Churner*, 532 U.S. 731 (2001). A prisoner must exhaust available administrative remedies, even if the prisoner may not be able to obtain the specific type of relief he seeks in the state administrative process. *See Porter*, 534 U.S. at 520; *Booth*, 532 U.S. at 734. "This requirement is a strong one. To further the purposes behind the PLRA, exhaustion is required even if the prisoner subjectively believes the remedy is not available, even when the state cannot grant the particular relief requested, and even where the prisoner[ ] believes the procedure to be ineffectual or futile." *Napier v. Laurel County, Ky.*, 636 F.3d 218, 222 (6th Cir. 2011) (internal quotations and citations omitted).

In *Jones v. Bock*, the Supreme Court held that "exhaustion is an affirmative defense, and prisoners are not required to specifically plead or demonstrate exhaustion in their complaints." 549 U.S. at 216. The burden is on defendants to show that plaintiff failed to properly exhaust his administrative remedies. The Supreme Court reiterated that "no unexhausted claim may be considered." 549 U.S. at 220. The Court held that when a prisoner complaint contains both exhausted and unexhausted claims, the lower courts should not dismiss the entire "mixed" complaint, but are required to dismiss the unexhausted claims and proceed to address only the exhausted claims. 549 U.S. at 219-24.

In order to exhaust administrative remedies, prisoners must complete the administrative review process in accordance with the deadlines and other applicable procedural rules established by state law. *Jones v. Bock*, 549 U.S. at 218-19. In *Woodford v. Ngo*, 548 U.S. 81 (2006), the Supreme Court held that the PLRA exhaustion requirement "requires proper exhaustion." 548 U.S. at 93. "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules." *Id.* at 90; *see Scott v. Ambani*, 577 F.3d 642, 647 (6th Cir. 2009). Thus, when a prisoner's grievance is rejected by the prison as untimely because it was not filed within the prescribed period, the prisoner's claim is not "properly exhausted" for purposes of filing a section 1983 action in federal court. 548 U.S. at 90-93; *Siggers v. Campbell*, 652 F.3d 681, 692 (6th Cir. 2011); *see* 42 U.S.C. § 1997e(a).

MDOC Policy Directive 03.02.130 (effective July 9, 2007) sets forth the applicable grievance procedures.[3] In *Sullivan v. Kasajaru*, 316 F. App'x 469, 470 (6th Cir. 2009), the Sixth Circuit held that this policy directive "explicitly required [the prisoner] to name each person against whom he grieved," and it affirmed the district court's dismissal of a prisoner's claim for failure to properly exhaust his available administrative remedies. *Id.* at 470.

The Sixth Circuit has "clearly held that an inmate does not exhaust available administrative remedies when the inmate fails entirely to invoke the grievance procedure." *Napier*, 636 F.3d at 224. An argument that it would have been futile to file a grievance does not suffice. Assertions of futility do not excuse plaintiff from the exhaustion requirement. *See Napier*, 636 F.3d at 224; *Hartsfield v. Vidor*, 199 F.3d 305, 309 (6th Cir. 1999) ("[A]n inmate cannot simply fail to file a grievance or abandon the process before completion and claim that he has exhausted his remedies or that it is futile for him to do so because his grievance is now time-barred under the regulations."); *see also Booth v. Churner*, 532 U.S. at 741 n.6 ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise.").

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[3]A copy of the policy directive is found in the record. (*See* ECF No. 22-2, PageID.178-84).

Proposed Findings of Fact

The following facts are beyond genuine issue. Plaintiff was an inmate held in the custody of the Michigan Department of Corrections at the Ionia Correctional Facility (ICF) during the period at issue. Desiree Thomas, R.N., was an employee of Care One, Inc., and she provided ICF prisoners with medical care during this period. (Thomas Aff. ¶¶ 2-3, ECF No. 50-2, PageID.370).

Plaintiff filed a number of grievances and pursued some of them through a Step III decision before he filed this lawsuit. (ECF No. 22-3, PageID.186-215). One grievance is related to plaintiff's claims; accordingly, it warrants further discussion.

On June 23, 2016, ICF's grievance coordinator received a grievance from plaintiff and assigned it Grievance No. ICF 2016-06-803-28e. (ECF No. 22-3, PageID.206). Plaintiff wrote this grievance on June 21, 2016, and he identified the date of the incident as June 1, 2016. (*Id.*). Plaintiff complained that, on the morning of June 1, 2016, he had been taken from his cell and placed in restraints by Sergeant Desrochers, and Corrections Officers Stambaugh, and Tumbleson. Plaintiff complained that he was kept in restraints for fourteen hours. Corrections Officers Enderle, Fracker, and Carlisle did not remove the restraints when plaintiff asked them to do so. Nurses did not help when plaintiff asked for assistance. (*Id.*).

Nothing on the face of plaintiff's grievance asserted that it was the re-filing of an earlier grievance that had not been processed by ICF's grievance coordinator. (*Id.*). Plaintiff's Step II and III appeals (*Id.* at PageID.208-09) are also devoid of any

claim that Grievance No. ICF 2016-06-803-28e was the re-filing of an earlier grievance.

Plaintiff's grievance was rejected at Step I. (*Id.* at PageID.207). He pursued unsuccessful Step II and III appeals. His Step III appeal was rejected because it was untimely. (*Id.* at PageID.205).

On March 29, 2017, plaintiff filed this lawsuit.

Discussion

I. Motion for Entry of a Default Judgment

On May 23, 2018, plaintiff filed his third motion for entry of a default judgment. (ECF No. 70). "Default is a prerequisite [ ] to entry of a default judgment under FED. R. CIV. P. 55(b)." *Briggs v. Burke*, No. 1:13-cv-1160, 2015 WL 5714520, at *15 (W.D. Mich. Sept. 29, 2015) (citation and quotation omitted). Defendant is not in default. (ECF No. 67, 74). Accordingly, I recommend that the Court deny plaintiff's third motion for entry of a default judgment.

II. Motion for Summary Judgment

Defendant has raised the affirmative defense that plaintiff did not properly exhaust his administrative remedies against them as required by 42 U.S.C. § 1997e(a). Exhaustion analysis is patterned after habeas corpus procedural default analysis. The pivotal question is whether the Step III decision, the last decision, was based on the enforcement of a procedural bar. *See Reed-Bey v. Pramstaller*, 603 F.3d 322, 326 (6th Cir. 2010); *see also Reynolds-Bey v. Harris*, 428 F. App'x 493, 502 (6th Cir. 2011) (The Step III decision is "the equivalent of the last state court [decision] in

[a] habeas [case.]"). Here, Grievance No. ICF 2016-06-803-28e was rejected at Step III because it was untimely. The Court honors procedural rules that prison officials enforce. *See Reed-Bey v. Pramstaller*, 603 F.3d at 326; *see also Doss v. Mackie*, No. 2:16-cv-135, 2017 WL 6047754, at *4 (W.D. Mich. Nov. 7, 2016) ("[W]here a Step III response rejects a grievance for failing to follow MDOC grievance procedure, the grievance cannot be considered properly exhausted under the policy.").

On March 1, 2018, the Court entered its order overruling plaintiff's objections, adopting a report and recommendation, and dismissing plaintiff's claims against other defendants for failure to exhaust administrative remedies, as required by 42 U.S.C. § 1997e(a). The Court rejected plaintiff's argument that he exhausted his claims through a June 2, 2016, grievance because prison authorities never issued a grievance number or responded to it. (Order, 1, ECF No. 46, PageID.336). Plaintiff attempted to support his argument "with a second grievance filed on June 21, 2016, which he said was a re-filing of the original grievance." (*Id.*). The Court found that the true copy of the June 21, 2016, grievance did not contain any legible reference to an earlier grievance. (*Id.* at 2, PageID.337). Further, the purported copy of the same grievance containing a reference to an earlier grievance (ECF No. 43-1, PageID.324) was not authentic.[4] (Order at 2, PageID.337). Plaintiff's purported June 2, 2016,

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[4] The Court listed three reasons why it found that the proffered evidence was not authentic:

> First, the true copy on the record clearly shows the first words as "failure to" while Plaintiff's new copy uses the numeral "2" in its place. (*Compare* ECF No. 22-3 at PageID.206 *with* ECF No. 43-1 at PageID.324.) Plaintiff's name in the copy on the record is listed as "Ade Brown" but

grievance (ECF No. 43-1, PageID.320) was not sufficient to "create a genuine dispute of fact relating to exhaustion[.]" (Order, 3, PageID.338).

Plaintiff relies on essentially the same evidence and argument here.[5] (ECF No. 80. PageID.510-13; ECF No. 80-1, PageID.515-21; ECF No. 93, PageID.620-24; ECF No. 93-1, PageID.626-27). For the reasons stated in the March 1, 2018, Order, plaintiff's argument should be rejected. Plaintiff did not properly exhaust his claim against defendant before he filed this lawsuit. Accordingly, I find that defendant Thomas has carried her burden on the affirmative defense and is entitled to dismissal of all of plaintiff's claims.

Recommended Disposition

For the reasons set forth herein, I recommend that the Court deny plaintiff's third motion for entry of a default judgment (ECF No. 70), grant defendant's motion for summary judgment (ECF No. 50), and enter a judgment dismissing plaintiff's claim against defendant without prejudice.

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appears as "A. Brown" on his attached copy. The last word of the first section—"issue"—also appears on Plaintiff's copy on a second line to the left and below "failure" in very dark markings that appear to have been traced over multiple times. No such marking appears on the copy in the record. (ECF No. 22-3 at PageID.206.).

[5] Plaintiff argues that he presented "new documents" (ECF No. 93, PageID.622), but I find that none of the documents he filed in response to defendant's motion for summary judgment undermine the Court's determination that purported copies of the June 21, 2016, grievance containing clear references to a prior grievance are not authentic.

Dated: January 7, 2019

/s/ Phillip J. Green
PHILLIP J. GREEN
United States Magistrate Judge

NOTICE TO PARTIES

ANY OBJECTIONS to this Report and Recommendation must be filed and served within fourteen days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. MICH. LCIVR 72.3(b). Failure to file timely and specific objections may constitute a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012); *United States v. Branch*, 537 F.3d 582, 587 (6th Cir. 2008). General objections do not suffice. *See McClanahan v. Comm'r of Social Security*, 474 F.3d 830, 837 (6th Cir. 2006); *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006).

Appendix G

Order of the U.S. District Court denying a timely Motion for reconsideration

Y

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ADE BROWN,
Plaintiff,

v.

REID DESROCHERS, ET AL.,
Defendants.

No. 1:17-CV-282

HONORABLE PAUL L. MALONEY

ORDER DENYING RECONSIDERATION

This is a civil rights action brought by a *pro se* state prisoner under 42 U.S.C. § 1983. The suit arises out of the conditions of Plaintiff's confinement at the Ionia Correctional Facility. He alleges that on June 1, 2016, the Defendants used excessive force against him, violating the Eighth Amendment. The Court previously granted summary judgment on administrative exhaustion grounds to several Defendants finding that there was no genuine dispute of fact that Plaintiff had failed to exhaust his administrative remedies. The Court also rejected Plaintiff's argument that he had filed a previous grievance regarding the incident on June 1, 2016, but that the MDOC had never acted on the grievance.

Plaintiff now moves for reconsideration, arguing that the Court erred in rejecting a copy of a grievance he filed as an exhibit because it differed materially from the official copy maintained by the MDOC. The Court concluded that there was no genuine dispute of fact that Plaintiff had not exhausted his administrative remedies because no evidence showed that Plaintiff had actually filed a previous grievance. It noted that the document supplied by Plaintiff had no evidentiary value for several reasons:.

> First, the true copy on the record clearly shows the first words as "failure to" while Plaintiff's new copy uses the numeral "2" in its place. (*Compare* ECF No. 22-3 at PageID.206 *with* ECF No. 43-1 at PageID.324.) Plaintiff's name in the copy on the record is listed as "Ade Brown" but appears as "A. Brown" on his attached copy. The last word of the first section–"issue"–also appears on Plaintiff's copy on a second line to the left and below "failure" in very dark markings that appear to have been traced over multiple times. No such marking appears on the copy in the record. (ECF No. 22-3 at PageID.206.)

Based on these irregularities, the Court disregarded Plaintiff's exhibit which he offered to prove that he had actually filed a previous grievance.

I.

Under the Local Rule of Civil Procedure for the Western District of Michigan, a court may grant a motion for reconsideration when the moving party demonstrates both a palpable defect by which the Court and parties have been misled and a showing that a different disposition of the case must result from the correction of the mistake. W.D. Mich. LCivR 7.4(a). The decision to grant or deny a motion for reconsideration under this Local Rule falls within the district court's discretion. *See Evanston Ins. Co. v. Cogswell Props.*, LLC, 683 F.3d 684, 691 (6th Cir. 2012) (citation omitted). The palpable defect standard does not expand the authority of the district court to reconsider an earlier order; it is merely consistent with a district court's inherent authority. *See Tiedel v. Northwestern Michigan Coll.*, 865 F.2d 88, 91 (6th Cir. 1988).

The Sixth Circuit has held that "district courts have inherent power to reconsider interlocutory orders and reopen any part of a case before entry of final judgment." *In re Saffady*, 524 F.3d 799, 803 (6th Cir. 2008) (quoting *Mallory v. Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991). A party seeking reconsideration of an interlocutory order must show (1) an

intervening change in the controlling law, (2) new evidence previously not available, or (3) a need to correct error to prevent manifest injustice. *Louisville/Jefferson Cty. Metro Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 389 (6th Cir. 2009) (citing *Rodriguez v. Tennessee Laborers Health & Welfare Fund*, 89 F. App'x 949, 959 (6th Cir. 2004).

II.

Plaintiff now moves for reconsideration, claiming that the Court erred by disregarding the exhibit he proffered. He explains that the exhibit entered with his objections was his copy of the June 21 grievance (No. ICF 2016-06-803-28e) that he had retained, and that he had traced over portions of his copy that had not been clearly marked when the carbon copy was created.

However, Plaintiff does not contest that he did not file his copy of the grievance with the magistrate judge. It was Plaintiff's burden to come forward with specific facts to show a genuine dispute for trial after Defendants carried their initial burden by establishing that Plaintiff had not exhausted any grievance pertaining to his constitutional claim. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In fact, while Plaintiff did attach two other grievance forms in response to the Defendants' motion for summary judgment, he did not attach his version of the June 21 grievance.

It is well established that "a district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation." *United States v. Howell*, 231 F.3d 615, 621 (9th Cir.2000). *See also Muhammad v. Close*, No. 08-1944, 2009 WL 8755520, at *2 (6th Cir. Apr.20, 2009) (finding *Howell* and *Freeman v. Bexar*, 142 F.3d 848 (5th Cir.1998), "persuasive" and

concluding that remand was required because the district court failed to recognize and properly exercise its discretion to consider new evidence not presented to the magistrate judge); *Cf. Irving v. Metrish*, 2007 WL 80940 (W.D. Mich. Jan. 8, 2007) (concluding that even if supplemental objection had been timely, it would have been rejected for raising new arguments and new evidence not previously considered).

Here, the Court finds no palpable defect in its prior opinion adopting the report and recommendation of the magistrate judge. The Court properly used its discretion in declining to consider evidence not presented to the magistrate judge and for which it had significant doubts as to its authenticity and admissibility. Accordingly, Plaintiff's motion for reconsideration is **DENIED.**

Date: March 4, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge