FILED: February 8, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7119
(5:17-ct-03136-BO)

ABDU-SALIM GOULD

Plaintiff - Appellant

v.

LESLIE BESS, Shift Sergeant; TRINITRA LEE-BOONE; CORPORAL AMBROSE; TYRONE PUGH, Dorm Officer

Defendants - Appellees

and

TOWNSHIP OF WINDSOR; BERTIE-MARTIN COUNTY REGIONAL JAIL BOARD OF COMMISSIONERS

Defendants

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7119

ABDU-SALIM GOULD,

Plaintiff - Appellant,

v.

LESLIE BESS, Shift Sergeant; TRINITRA LEE-BOONE; CORPORAL AMBROSE; TYRONE PUGH, Dorm Officer;

Defendants - Appellees,

and

TOWNSHIP OF WINDSOR; BERTIE-MARTIN COUNTY REGIONAL JAIL BOARD OF COMMISSIONERS,

Defendants.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (5:17-ct-03136-BO)

Submitted: December 22, 2020 Decided: December 29, 2020

Before NIEMEYER, FLOYD, and RICHARDSON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Abdu-Salim Gould, Appellant Pro Se. Rudolf Alexander Garcia-Gallont, James R. Morgan, Jr., WOMBLE BOND DICKINSON (US) LLP, Winston-Salem, North Carolina,

PER CURIAM:

Abdu-Salim Gould appeals from the district court's order denying his motions for change of venue, for recusal of the district court judge, and for entry of judgment in his favor, and dismissing his 42 U.S.C. § 1983 complaint without prejudice for failure to exhaust his administrative remedies. He also appeals from the denial of his motion to alter or amend the judgment. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Gould v. Bess*, No. 5:17-ct-03136-BO (E.D.N.C. July 21, 2020 & Sept. 28, 2020). Additionally, we grant Gould's motion to seal an exhibit filed in this court, and we deny his remaining pending motions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:17-CT-3136-BO

ABDU-SALIM GOULD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
LESLIE BESS, et al,	)	
	)	
Defendants.	)	

Plaintiff Abdu-Salim Gould ("plaintiff"), a state inmate, filed this civil rights action *pro se* pursuant to 42 U.S.C. § 1983. On July 21, 2020, the court granted defendants summary judgment, and dismissed this action without prejudice for failure to exhaust administrative remedies.[1] The matter now is before the court on plaintiff's July 22, 2020, motion to strike pursuant to Federal Rule of Civil Procedure 60(b)(3) (DE 162), which the court construes as a motion to alter or amend its July 21, 2020, judgment pursuant to Federal Rule of Civil Procedure 59(e). See Dove v. CODESCO, 569 F.2d 807, 809 (4th Cir. 1978).

Rule 59(e) permits a court to alter or amend a judgment. See Fed. R. Civ. P. 59(e). The decision whether to amend or alter a judgment pursuant to Rule 59(e) is within the sound discretion of the district court. See Hughes v. Bedsole, 48 F.3d 1376, 1382 (4th Cir. 1995). Courts have recognized three reasons for granting a motion to amend or alter a judgment under Rule 59(e): (1) to accommodate an intervening change in controlling law; (2) to account for the availability of new

[1] The court alternatively granted defendants' motion for summary judgment on the merits.

evidence not previously available; or (3) to correct clear error of law or prevent manifest injustice. See, Zinkand v. Brown, 478 F.3d 634, 637 (4th Cir. 2007); Hutchison v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Therefore, to successfully persuade this court to amend or alter its judgment, plaintiff must demonstrate that a recent change in the law, newly discovered evidence, or a clear error by this court merits such a change.

In his motion, plaintiff requests that the court strike Terrence Whitehurst's ("Whitehurst") declarations, which defendants submitted in support of their motion for summary judgment. See (DE 77-1, 122-1, 124, 145-1). In particular, plaintiff requests that the court strike Whitehurst's October 9, 2019, declaration (DE 124) from the record because defendants did not serve him with the filing. Plaintiff admits that the court subsequently sent him the alleged missing filing, but asserts that it was defendants' duty to serve the pleading. Here, the record reflects defendants executed a certificate of service certifying that they sent plaintiff a copy of their supplemental motion for summary judgment, which included Whitehurst's declaration, in the United States First-Class mail. See ((DE 121), p. 2). There is no indication that defendants intentionally withheld the declaration (DE 124), and plaintiff ultimately received a copy of the document. Thus, plaintiff is not entitled to relief on this ground.

Plaintiff also requests that the court strike Whitehurst's declarations because Whitehurst did not become the Administrator at Bertie Martin Regional Jail ("BMRJ") until after plaintiff was released from the jail on August 10, 2017, and, thus, did not have knowledge of the information contained in plaintiff's medical records. In his declaration, Whitehurst stated that "as Jail Administrator for the BMR, [he is] a custodian of medical and mental health records of inmates" and that an inmate's medical records are available to him upon request. ((DE 124) ¶ 7). Whitehurst

further states that he reviewed plaintiff's entire medical records prior to executing his declaration. (Id.) Based upon the foregoing, plaintiff has not demonstrated fraud, or any clear error. Thus, plaintiff's motion (DE 162) is DENIED.

SO ORDERED, this the 23 day of September, 2020.

Terrence Boyle

TERRENCE W. BOYLE
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:17-CT-3136-BO

ABDU-SALIM GOULD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
LESLIE BESS, et al,	)	
	)	
Defendants.	)	

The matter comes before the court on defendants' supplemental motion for summary judgment (DE 121). Also before the court are plaintiff's pleading captioned "Motion for Judgment Independent of the Motion: Fed. R. Civ. P. Rule 56(f), Fed. R. Civ. P rule 56(H)" (DE 129) and motion for recusal (DE 143). The issues raised have been fully briefed and are ripe for adjudication.

STATEMENT OF THE CASE

For ease of reference, the statement of the case as set forth in the court's March 7, 2019, order is as follows:

> On May 24, 2017, plaintiff, a pretrial detainee incarcerated at Bertie Regional Jail ("the Jail"), filed this civil rights action *pro se* pursuant to 42 U.S.C. § 1983, and subsequently filed a motion to amend his complaint. On September 12, 2017, the court granted plaintiff's motion to amend, and directed plaintiff to file one amended complaint. The court instructed plaintiff that his amended complaint would be considered his complaint in its entirety, and that the court would not review any of plaintiff's other filings to glean any misplaced claims. Plaintiff complied.[1] On December 11, 2017, the court reviewed plaintiff's amended complaint and allowed him to

[1]Plaintiff was convicted and transferred to the custody of the North Carolina Department of Public Safety on October 11, 2017. See doc.state.nc.us.

> proceed with his allegations that defendants Leslie Bess ("Bess"), Trinitra Lee-Boone ("Lee-Boone"), Corporal Ambrose ("Ambrose"), and Tyrone Pugh ("Pugh") violated his rights pursuant to the Fourteenth Amendment to the United States Constitution when they used excessive force, subjected him to extremely cold cell temperatures, and denied him medical care following an alleged assault. In that same order, the court, additionally, dismissed without prejudice plaintiff's remaining claims against the remaining defendants. On March 19, 2018, defendants filed a motion to dismiss requesting that this court revoke plaintiff's *in forma pauperis* ["IFP"] status pursuant to 28 U.S.C. § 1915(g), which the court subsequently denied. North Carolina Prisoner Legal Services ("NCPLS") then conducted discovery on plaintiff's behalf. (See (DE 53)).
>
> On August 27, 2018, plaintiff filed a motion for recusal. On August 31, 2018, defendants filed a motion for summary judgment arguing that plaintiff is unable to establish a constitutional violation, and, alternatively, assert the affirmative defense of qualified immunity. The motion was fully briefed.

((DE 78), p. 1-2).

On March 7, 2019, the court granted defendants' motion for summary judgment as to plaintiff's claim regarding freezing cell temperatures, but denied it as to plaintiff's remaining claims. At this point in the proceedings, plaintiff's remaining claims are that defendants Bess, Lee-Boone, Ambrose, and Pugh violated his rights pursuant to the Fourteenth Amendment to the United States Constitution when they used excessive force against him and denied him medical care following an alleged excessive force incident at the Jail. United States Magistrate Judge Robert B. Jones, Jr. subsequently conducted a settlement conference, but the parties did not reach a settlement.

On September 18, 2019, the court directed the parties to file supplemental dispositive motions addressing plaintiff's remaining claims.[2] Defendants filed a supplemental motion for

[2] The court also directed defendants to attach to their dispositive motion any video tape evidence of the use of force incident. It is undisputed that no video-tape exists. ((DE 124), p. 2; (DE 152-1), p. 5).

summary judgment on October 9, 2019, which was fully briefed. On November 6, 2019, plaintiff filed a pleading captioned "Motion for Judgment Independent of the Motion: Fed. R. Civ. P. Rule 56(f), Fed. R. Civ. P rule 56(H)." Plaintiff then filed a motion for recusal and change of venue.

On May 19, 2020, the court entered an order noting that defendants raised failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a) as an affirmative defense, but that it was unclear whether defendants sought summary judgment on such grounds. Accordingly, the court provided defendants the opportunity to supplement their dispositive motion with evidentiary support in the event they intended to seek dismissal on exhaustion grounds. On May 28, 2020, defendants supplemented their dispositive motion, and clarified that they do seek summary judgment on exhaustion grounds. Defendants, additionally, provided a third affidavit from Terrence Whitehurst, who is employed as the Jail Administrator at the Bertie-Martin Regional Jail, as well as the Bertie-Martin Regional Jail's Grievance Policy and all grievances plaintiff filed at the jail from January 2017 through October 2018. (Third Whitehurst Decl. (DE 145-1) ¶¶ 2, 9-14). Plaintiff responded.[3]

STATEMENT OF FACTS

Except as where otherwise noted below, the undisputed facts are as follows. Plaintiff's cause of action arises out of a use of force incident which occurred while plaintiff was incarcerated at the jail from March 19, 2017 through August 10, 2017. ((DE 64-1), p. 39); (DE 124), ¶ 10). Upon his arrival at the Jail, medical staff completed a medical questionnaire for plaintiff. ((DE 64-3), p. 2). Medical staff noted that plaintiff had a history which included "schizophrenia, bipolar, compulsive

Jurisdiction Officer

[3] Plaintiff filed several responses to defendants' supplement (DE 145). See (DE 147-159). The filings are not a model of clarity. To the extent plaintiff states that he does not have the means to serve defendants with paper filings, the court relieved plaintiff of the obligation to serve defendants with paper copies of his filings in its July 20, 2018, order. See ((DE 147), p. 1); (DE 58), p. 2).

disorder." (Id.) Contrary to plaintiff's assertion in his complaint that he suffered from a snake bite when he arrived at the jail, medical staff noted that plaintiff did not appear to have any obvious pain or to require emergency services. (Id.) Medical staff, however, did note that plaintiff appeared to be "mentally confused." (Id.)

The next day, defendants Bess, Lee-Boone, and Ambrose made the decision to transfer plaintiff from the dormitory area to isolation cell number one. ((DE 64-1), p. 4). Jail staff decided that it would be preferable to assign plaintiff to an isolation cell, specifically isolation cell number one, because plaintiff was well known to Jail staff as disruptive, and had a history of aggression toward officers and other inmates. ((DE 27), p. 4; (DE 45), p. 4; (DE 64-2), p. 2). Plaintiff then was escorted to a visitation room, which did not contain a restroom, while isolation cell number one was being cleaned. ((DE 27), p. 4; (DE 45), p. 4).

The parties' accounts of events at this point differ. According to plaintiff, the incident at issue began when he informed defendant Ambrose that he had diarrhea, and needed to visit the restroom. (Am. Compl. (DE 11), p. 5). Plaintiff states that defendants Ambrose, Lee-Boone, and Pugh responded with hostility and "literally beat [plaintiff] and maced [plaintiff] leaving [him] soiled in defecation[.]" (Id.) Defendants dispute plaintiff's characterization of how the incident arose. According to defendants, the incident arose when defendant Ambrose peered into the visitation room, and observed plaintiff unclothed smearing feces on himself, a door, and a window. ((DE 27), p. 4; (DE 45), p. 4). Defendants then decided to remove plaintiff from the visitation room in order to decontaminate the area. (Id.)

Defendants likewise present different facts regarding the extraction of plaintiff from the visitation room. Specifically, defendants state that defendant Ambrose and Pugh entered the

visitation room, and that Ambrose ordered plaintiff to exit the room.[4] ((DE 64-1), p. 36). Plaintiff refused to comply. (Id.) Ambrose again ordered plaintiff to exit the visitation room, and warned plaintiff that Ambrose would spray him with OC spray if plaintiff did not comply. (Id.) In response, plaintiff stood up and attempted to hit defendant Ambrose. (Id.) Ambrose then stepped back and sprayed a one-second burst of OC spray at plaintiff. (Id.) According to defendants, plaintiff then became more combative and continued to proceed toward defendants Ambrose and Pugh. (Id. pp. 35-36). While plaintiff was still under the effects of the OC spray, defendants Ambrose and Pugh secured plaintiff's arms and legs using their hands, and worked together to bring plaintiff down to the ground. ((DE 64-2), p. 2). The officers then secured plaintiff in handcuffs behind his back. (Id.)

After plaintiff was restrained, he was placed in isolation cell number one. ((DE 27), p. 5; (DE 45), p. 5). Defendants state that plaintiff did not complain of any injuries, and did not request to be taken to medical. ((DE 64-1), p. 37). Plaintiff, however, states that he suffered shoulder and head injuries, as well as bruising to his back, but was denied medical treatment for a period of two weeks following the alleged assault. (Am. Compl. (DE 11), p. 7). Plaintiff states that his injuries had "basically" healed by the time he obtained medical care. (Id.)

Defendant Ambrose documented the incident in both a "Use of Chemical Irritant Report" and an "Incident Report." ((DE 64-1), pp. 6, 35-38). Defendant Ambrose's incident report provided as follows:

> Inmate Gould was removed from the dorm by myself, ofc Pugh and ofc Morris. Gould was placed in the visitation room until a permanent housing choice could be made. I looked into the room approximately two minutes later and observed Gould smearing feces

[4] Defendants state that Ambrose and Pugh entered the visitation room, but that defendants Bess and Lee-Boone remained in the booking area. ((DE 27), p. 5; (DE 45, p. 5).

> on the visitation room door, F-hall window, as well as his body. Gould then squatted by the door and began to draw figures on the floor using his feces. I put on gloves along with officers Pugh, Burke, and Morris. The door to the room was opened and I ordered Gould to exit the room. He refused. I ordered him to exit the room again and told him that he would be sprayed with OC spray if he did not comply. He then stood up and swung once at me. I moved back and sprayed a one second burst of Fox 5.3 OC spray. Gould then continued to come toward myself and officers Pugh, Burke, and Morris. Gould was brought to the floor.
>
> Officers Burke and Morris restrained Gould's feet and myself and ofc Pugh brought his arms behind his back so that he could be handcuffed. Gould was placed in I-1 insolation cell. At this time all officers involved went outside to get fresh air and decontaminate from OC exposure. Fifteen minutes later I returned to I-1 along with officers Pugh, Burke, and Morris. Gould was ordered to face the rear of the cell, so that the handcuffs could be removed. He complied. I removed the handcuffs from Gould without incident. He was given clean clothes and took a shower. Gould made no complaint of injury and was monitored by C-shift officers.

((DE 64-1), pp. 36-37). Defendant Lee, additionally, completed an "Incident Report," which is consistent with the report prepared by defendant Ambrose (Id. p. 35). The "Use of Chemical Irritant Report" further provided that pepper spray was used on plaintiff because he was "covered in feces and combative with officers" and that plaintiff was permitted to decontaminate following the incident. (Id. p. 38). All reports reflected that there were no injuries either to plaintiff or the officers involved in the incident. (Id. pp. 35-37). Jail staff did not obtain a written statement from plaintiff.

While plaintiff was incarcerated at the jail, he did not submit any sick call requests or voice any medical-related complaints regarding the March 20, 2017 use of force incident. ((DE 124), ¶ 10; ((DE 64-3), pp. 1-23). The record, however, does reflect that plaintiff submitted sick call requests shortly after the incident at issue on March 25, 2017, but that plaintiff complained of malnutrition, weigh loss, "loose bowels," and feeling ill following a snake bite. ((DE 64-3), p. 9, 10). On March

27, 2017, plaintiff was seen by medical staff and stated that his intestinal issue had resolved and that he no longer required medical attention. (Id. p. 8). Plaintiff, instead, stated that he needed "more nutrition." (Id.) The record further reflects that plaintiff was provided an extra blanket the day after the incident at issue, and that he denied having any difficulties with staff during a mental health assessment on March 24, 2016. (Id. pp. 13, 14).

DISCUSSION

A. Motion for Recusal and For Change of Venue

The court begins with plaintiff's motion requesting that the instant judge recuse himself pursuant to 28 U.S.C. § 455(a). This is plaintiff's second motion for recusal in this action. As stated in the court's March 7, 2019 order denying plaintiff's first motion for recusal, 28 U.S.C. § 455(a) requires that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Disqualification is required if a reasonable factual basis exists for doubting the judge's impartiality. Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978). Here, plaintiff's continued blanket claims of bias and prejudice, as well as his dissatisfaction with any previous rulings made by this court are insufficient to satisfy § 455(a). Plaintiff simply has presented no reasonable factual basis for doubting the undersigned's impartiality. Therefore, plaintiff's second motion for recusal is DENIED.

The court next addresses plaintiff's motion for change of venue. Title 28 U.S.C. § 1391 provides the framework for determining proper venue in civil cases. When jurisdiction is not premised solely on diversity of citizenship, as is the case in this action, a civil action may

> be brought in (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred,

> or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought . . . , any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b).

The allegations of plaintiff's complaint arose at the Bertie-Martin Regional Jail in Windsor, North Carolina, which is in Bertie County. Bertie County is located in this district. See 28 U.S.C. § 113(a). Thus, venue is proper here, and plaintiff's motion is DENIED. See 28 U.S.C. § 1391(b).[5]

B. Defendants' Motion for Summary Judgment

1 Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate that there exists a genuine issue of material fact requiring trial. Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson, 477 U.S. at 250.

2. Analysis

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[5] To the extent plaintiff also moves for a continuance of the court's ruling on the defendants' pending supplemental motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(d), the record reflects that plaintiff was appointed counsel to assist him with discovery. See (DE 53). The discovery deadline now has expired, and plaintiff has not demonstrated that he cannot "present facts essential to justify [his] opposition" to defendants' motion for summary judgment. See Fed. R. Civ. P. 56(d). Thus, plaintiff's motion is DENIED.

a. Exhaustion of Administrative Remedies

Title 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act ("PLRA") requires a prisoner to exhaust his administrative remedies before filing an action under 42 U.S.C. § 1983 concerning his confinement. Ross v. Blake, __ U.S. __, 136 S. Ct. 1850, 1856 (2016) ("[A] court may not excuse a failure to exhaust, even to take [special circumstances] into account."); Custis v. Davis, 851 F.3d 358, 361-362 (4th Cir. 2017); Woodford v. Ngo, 548 U.S. 81, 83-85 (2006); see Jones v. Bock, 549 U.S. 199, 217 (2007) ("failure to exhaust is an affirmative defense under [42 U.S.C. § 1997e]"). The PLRA states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); see Woodford, 548 U.S. at 84; Ross, 136 S. Ct. at 1855 ("A prisoner need not exhaust remedies if they are not available.") (internal quotation omitted). An administrative remedy process is unavailable when: (1) "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) it is "so opaque that it becomes, practically speaking, incapable of use"; or (3) "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." Ross, 136 S. Ct. at 1859-60 (internal quotation marks omitted)."[U]nexhausted claims cannot be brought in court." Jones, 549 U.S. at 211.

The Jail has an administrative remedy procedure which governs the filing of grievances. The jail's grievance policy specifically states that inmates may file formal grievances regarding "[a]ctions taken by staff . . . that have the effect of depriving the inmate of a guaranteed right, service, or privilege" and/or "[a]llegations of abuse, neglect, or mistreatment by staff . . . " or "[a]llegations of abuse, neglect or mistreatment by staff or other inmates." (DE 145-1) p. 6, 4(A)). An inmate

wishing to file a grievance must complete the grievance form and return it to a jail officer, or may place the form in a sealed envelope addressed to the chief jailer. (Id. 5(C)). An inmate will receive a written response to his grievance within five working days of receipt. (Id. 6(C)). If the inmate is dissatisfied with the grievance response, the inmate may file a written appeal to the director. (Id. 7(A)). The director rules on any grievance appeal. (Id. 7(A-F)).

Here, the record reflects that the only grievance plaintiff filed at the Bertie-Martin Regional Jail between the dates of March 20, 2017, when the alleged claims arose, and October 2018, was related to an alleged missing car. (Third Whitehurst Decl. (DE 145-1) ¶¶ 11-13 and Ex. B). Plaintiff asserts that this grievance, dated July 3, 2017, "point[s] to the fact" that he exhausted any and all available administrative remedies for all claims.[6] See ((DE 148), p. 2). Plaintiff is incorrect. The July 3, 2017 grievance is unrelated to the claims pending in this action and may not be used to establish exhaustion in this action. See Wilcox v. Brown, 877 F. 3d 161, 167 n. 4 (4th Cir. 2017); Moore v. Bennette, 517 F.3d 717, 729 (4th Cir. 2008) (finding that a grievance must provide prison officials a fair opportunity to address the problem at issue). Thus, the July 3, 2017 grievance is insufficient to establish exhaustion.

Plaintiff, additionally, presents several additional conflicting statements regarding whether he exhausted his administrative remedies. For instance, plaintiff states: "The Plaintiff in a § 1983 action generally is not required to exhaust available State Remedies before bring a cause of action unless the substantive federal right forming the basis of the cause of action requires exhaustion of

[6] On December 11, 2017, the court dismissed without prejudice plaintiff's claims regarding his alleged stolen property. See ((DE 12), pp. 3-5). Accordingly, any claims regarding plaintiff's alleged stolen property are not part of this action, and the court finds no reason to reconsider its December 11, 2017, decision. The court, additionally, denies as futile any attempt by plaintiff to amend his complaint at this stage in the proceedings to include an unrelated claim regarding his missing car. See Fed. R. Civ. P. 15; Foman v. Davis, 371 U.S. 178 (1962).

State Remedies," and that exhaustion is not required for excessive force or deliberate indifference to medical needs claims. ((DE 151), p. 26; (DE 151), p. 14). To the extent plaintiff asserts that he was not required to exhaust administrative remedies for the instant claims before filing this action, he is mistaken. See 42 U.S.C. § 1997e(a); Ross, 136 S. Ct. at 1856; (DE 145-1) p. 6, 4(a)).

Plaintiff also states that he pursued the issues presented in this case "with various courts and commissions [which] are means of exhaustion of remedies for the purposes of 42 U.S.C. § 1997e(a)." ((DE 152), pp. 2-3). The PLRA mandates proper exhaustion and exhaustion for the purposes of a North Carolina State tort action, or any other avenues outside of the procedure set forth in the jail's "Inmate Grievance System" do not comport with § 1997e(a). See Woodford, 548 U.S. at 90-91 ("Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules[.]"); Garcia-Calderon v. FCI Edgefiled Warden, No. 9:18-2947-TMC-BM, 2019 WL 7759051, at *4 (D.S.C. Oct. 11, 2019), adopting R&R, 2020 WL 437018 (Jan. 28, 2020); Owens v. Cavaleri, No. 5:09-CT-3100-BO, 2012 WL 3500031, at *2 (E.D.N.C. Aug. 15, 2012) (citation omitted).

Plaintiff also makes the conclusory assertion that the jail did not afford him an avenue to grieve. See (DE 151), p. 21). This allegation is belied by Whitehurst's third affidavit detailing the grievance process at the jail. See (DE 145-1). Additionally, while plaintiff cites to several unprocessed grievances that he allegedly gave to "staff," he provides no details surrounding whether the unidentified staff member accepted or rejected the purported grievances, or why they were unprocessed. See ((DE 149), p. 14) (citing (DE 68-1), pp. 34-40)). Simply put, plaintiff has not presented circumstances warranting excusal of exhaustion. Cf. Ross, 136 S. Ct. at 1859–60; Hill v. Haynes, 380 F. App'x 268, 270 (4th Cir. 2010) (per curiam). Based upon the foregoing, plaintiff has

failed to establish that the administrative remedy process was unavailable to him, particularly where he was able to fully exhaust an unrelated grievance within the same time period. See Hill v. Milam, No. 5:18-cv-00994, 2019 WL 4180155, at * 3-4 (S.D.W. Va. Sept. 3, 2019); Creel v. Hudson, No. 2:14-cv-10648, 2017 WL 4004579, at *5 (S.D. W. Va. Sept. 12, 2017) ("Unsubstantiated and conclusory assertions by an inmate that prison officials thwarted pursuit of the administrative process are insufficient to excuse failure to exhaust"); Ferguson v. Clarke, No. 7:14-cv-00108, 2016 WL 398852, at *6 (W.D. Va. Jan. 5, 2016) (finding inmate's general allegation that administrative process was unavailable was belied by evidence that inmate submitted other grievances within the same period), adopting R&R, 2016 WL 397895 (Jan. 29, 2016); McMillian v. N.C. Central Prison, No. 5:10-CT-3037-FL, 2013 WL 1146670, * 5 (E.D.N.C. March 19, 2013), aff'd, 534 F. App'x 221 (4th Cir. 2013).

To the extent plaintiff asserts that he was not required to exhaust the jail's administrative remedies because he was in imminent danger of physical injury, the exhaustion requirement is not excused even where an inmate asserts imminent danger of serious physical injury. See (DE 151), p. 18); Brown v. May, No. 0:18-3347-TMC-PJG, 2019 WL 3225621, at *3 (D.S.C. June 27, 2019) (citing McAlphin v. Toney, 375 F.3d 753, 755 (8th Cir. 2004)), adopting R&R, 2019 WL 3219378 (July 17, 2019); Enow v. Wolfe, No. PWG-17-341, 2018 WL 656434, at *6 (D. Md. Feb. 1, 2018). Based upon the foregoing, defendants have established that plaintiff failed to exhaust his administrative remedies for his pending claims prior to filing this action, and this action in DISMISSED without prejudice.

b. Fourteenth Amendment Claims

Defendants raise the affirmative defense of qualified immunity in this § 1983 action. Government officials are entitled to qualified immunity from civil damages so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In other words, a government official is entitled to qualified immunity when (1) the plaintiff has not demonstrated a violation of a constitutional right, or (2) the court concludes that the right at issue was not clearly established at the time of the official's alleged misconduct. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

1. Excessive Force

Conditions of confinement of pretrial detainees in state custody are evaluated under the Due Process Clause of the Fourteenth Amendment. See Bell v. Wolfish, 441 U.S. 520, 535 (1979). In Kingsley v. Hendrickson, 576 U.S. 389 (2016), the United States Supreme Court recently held that a pretrial detainee asserting an excessive force claim must demonstrate "only that the force purposely or knowingly used against him was objectively unreasonable." Id. at 389. In determining whether the force was objectively unreasonable, a court considers the evidence "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." Id. at 397 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)). Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. Kingsley, 576 U.S. at 397.

Applying the Kingsley factors to the instant action, there is no dispute that plaintiff was soiled with feces when defendants made the decision to remove him from the visitation cell. Accordingly, there was a need for defendants to remove plaintiff from his cell in order to sanitize the area. Plaintiff has produced no evidence to substantiate his version of events, with respect to the alleged assault or use of pepper spray/mace, and his vague, conclusory, and unsworn allegations in his amended complaint that defendants went behind him and "jumped on [him] and literally beat [him] and maced [him]" are insufficient to establish a constitutional violation. (Am. Compl. (DE 11), p. 5); see Riley v. Honeywell Technology Solutions, Inc., 323 F. App'x 276, 278, n. 2 (4th Cir. 2009) (finding plaintiff's "self-serving" allegations "were properly discounted by the district court as having no viable evidentiary support"); Larken v. Perkins, 22 F. App'x 114, 115 (4th Cir. 2001) (noting plaintiff's "own self-serving affidavit containing conclusory assertions, . . . [is] insufficient to stave off summary judgment") (citation omitted); see also, Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649 (4th Cir. 2002); Fed. R. Civ. P. 56(e). Further, plaintiff's own medical records support defendants' version of events in that there is no indication that plaintiff suffered any injury as a result of the alleged incident.[7] Notably, a sick-call request plaintiff submitted five days after the alleged incident did not complain of any injuries related to the alleged use of force incident. See ((DE 64-3), p. 9). While lack of injury is not dispositive, Wilkins v. Gaddy, 559 U.S. 34, 38 (2010), this evidence in conjunction with plaintiff's failure to produce any evidence to support his claim, reflects the use of force was not objectively unreasonable. Id. at 37 ("The extent of injury may also provide some indication of the amount of force applied."). Based upon the foregoing, plaintiff

[7] In his affidavit supporting defendants' supplemental motion for summary judgment, Whitehurst attests that the medical records submitted at (DE 64-3) constitute the entirety of plaintiff's medical records covering the time of his incarceration at the jail. ((DE 124), ¶ 10).

failed to establish a Fourteenth Amendment violation. and defendants are entitled to qualified immunity.

To the extent plaintiff asserts a claim arising out the alleged fifteen minute delay following the use of pepper spray, he again cannot establish a constitutional violation. Here, the record reflects that plaintiff was permitted to decontaminate following the use of pepper spray/mace, and there is no evidence to suggest that the short delay in decontamination was the result of an intent to be malicious or to cause plaintiff harm. See Perkinson v. White, No. 5:13-CT-3004-FL, 2015 WL 333012, at *5 (E.D.N.C. Jan. 26, 2015). Thus, plaintiff has not established a constitutional violation, and defendants are entitled to qualified immunity for this claim. See Wilson v. Broddy, No. 9:14-2531-BM, 2015 WL 11143429, at *7 (D.S.C. Mar. 30.2015), aff'd, 621 F. App'x 246 (4th Cir. 2015).

2. Deliberate Indifference to Serious Medical Needs

Plaintiff alleges that defendants acted with deliberate indifference to his serious medical needs because they denied him medical care for a period of two weeks following the alleged use of force incident. Although plaintiff's claim arises under the Fourteenth Amendment because he was a pretrial detainee when this action accrued, the Eighth Amendment's prohibition of cruel and unusual punishment provides the framework for analyzing such a claim. See Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988).

A pretrial detainee makes out a due process violation if he shows "deliberate indifference to serious medical needs" as set forth in Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).).[8] To prove

[8] The Fourth Circuit has not applied the holding in Kingsley to claims other than for excessive force. See Durand v. Charles, No. 1:16cv86, 2018 WL 748723 at *n. 11 (M.D.N.C. Feb. 7, 2018), aff'd, 733 F. App'x 116 (4thCir. 2018).

such a claim, a plaintiff "must demonstrate that the officers acted with 'deliberate indifference' (subjective) to [his] 'serious medical needs' (objective)." Iko v. Shreve, 535 F.3d 225, 241 (4th Cir. 2008) (quoting Estelle, 429 U.S. at 104). When an inmate alleges that a prison official denied him medical care or did not provide such care in a timely manner, the inmate must prove that the prison official knew of and disregarded an objectively serious condition, known medical need, or substantial risk of serious harm. See, e.g., Scinto v. Stansberry, 841 F.3d 219, 225 (4th Cir. 2016). An inmate, however, is not entitled to choose his course of treatment. See Russell v. Sheffer, 528 F.2d 318, 318–19 (4th Cir. 1975) (per curiam). Finally, the court generally may rely on medical records concerning examination and treatment of the inmate. See Bennett v. Reed, 534 F. Supp. 83, 87 (E.D.N.C. 1981), aff'd, 676 F.2d 690 (4th Cir. 1982); see also, Oliver v. Daniels, No. 5:16-CT-3101-FL, 2019 WL 4858847, at *12 (E.D.N.C. Sept. 30, 2019), appeal dismissed, 2019 WL 8405461 (4th Cir. Oct. 31, 2019).

Here, defendants have presented a complete copy of plaintiff's medical records for the entire period plaintiff was incarcerated at the jail. ((DE 124), ¶ 10; (DE 64-3), pp. 1-23). There is no indication in plaintiff's medical records that he filed a sick call request for treatment related to the injuries he allegedly suffered as a result of the March 19, 2017 incident. (Id.) Plaintiff's medical records indicate that he requested an extra blanket the day after the incident at issue, and that he submitted a sick call request on March 25, 2017. (Id. pp. 9, 13). Plaintiff did not mention the incident at issue in either submission to the medical department. (Id.) In fact, plaintiff makes no mention of any injury related to the incident at issue in any of his sick call requests or medical appointments for the duration of his incarceration at the jail. (Id. pp. 1-23). Thus, plaintiff fails to

establish a Fourteenth Amendment violation, and defendants are entitled to qualified immunity for this claim.

3. First Amendment Claim

To the extent plaintiff asserts defendants violated his rights pursuant to the First Amendment when they denied him access to his legal materials, plaintiff provides no facts to support this claim. See Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (4th Cir. 2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice [to state a plausible claim to relief]. . . . While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."); White v. White, 886 F.2d 721, 723 (4th Cir. 1989) (stating minimum level of factual support required). Plaintiff, additionally, made no allegations that defendants were personally involved in the alleged deprivation of property. See, e.g., Iqbal, 556 U.S. at 676; Wilcox v. Brown, 877 F.3d 161, 170 (4th Cir. 2017) (citation omitted). Finally, plaintiff has not alleged that he suffered any injury as a result of the alleged inability to access his legal materials. See Lewis v. Casey, 518 U.S. 343, 351-53 (1996); Cochran v. Morris, 73 F.3d 1310, 1317 (4th Cir. 1996) (en banc). Thus, this claim is DISMISSED. See 28 U.S.C. § 1915(e)(2)(B)(i)(ii) (stating that the Prison Litigation Reform Act directs the court to dismiss a prisoner's complaint at any time "if the court determines that . . . the action . . . is frivolous . . . [or] fails to state a claim on which relief may be granted.").

To the extent plaintiff attempts to raise new claims in response to defendants' supplemental motion for summary judgment, he cannot raise new claims in response to summary judgment without moving to amend his complaint. See Barclay White Skanska, Inc. v. Battelle Mem'l Inst.,

262 F. App'x 556, 563 (4th Cir. 2008) (citation omitted). Thus, plaintiff's new claims are DISMISSED without prejudice.

CONCLUSION

Based upon the foregoing, the court DENIES plaintiff's motion for recusal/change of venue (DE 143). Plaintiff's First Amendment claim is DISMISSED pursuant to 28 U.S.C. § 1915(e)(2)(B)(i)(ii). The court GRANTS defendants' supplemental motion for summary judgment (DE 121), and DISMISSES this action without prejudice for failure to exhaust administrative remedies. A dismissal without prejudice allows the inmate an opportunity to exhaust the administrative process and then file a new suit, if he so chooses. Alternatively, the court GRANTS defendants' supplemental motion for summary judgment (DE 121) on the merits. Plaintiff's pleading captioned "Motion for Judgment Independent of the Motion: Fed. R. Civ. P. Rule 56(f), Fed. R. Civ. P rule 56(H)" (DE 129) lacks merit and is DENIED. Any new claims plaintiff raised in response to defendants' dispositive motion are DISMISSED without prejudice. The Clerk is DIRECTED to close this case.

SO ORDERED, this the 30 day of July, 2020.

Terrence W. Boyle

TERRENCE W. BOYLE
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:17-CT-3136-BO

ABDU-SALIM GOULD, Plaintiff, v. LESLIE BESS, TRINITRA LEE-BOONE, CORPORAL AMBROSE, and TYRONE PUGH, Defendants.	)	ORDER

The matter comes before the court on plaintiff's motions for recusal (DE 61),[1] for default judgment (DE 73), and for service of documents (DE 72). Also before the court is defendants' motion for summary judgment (DE 62) pursuant to Federal Rule of Civil Procedure 56. The issues raised are ripe for adjudication. For the following reasons, the court grants in part and denies in part defendants' motion for summary judgment, and denies plaintiff's motions.

STATEMENT OF THE CASE

On May 24, 2017, plaintiff, a pretrial detainee incarcerated at Bertie Regional Jail ("the Jail"), filed this civil rights action *pro se* pursuant to 42 U.S.C. § 1983, and subsequently filed a motion to amend his complaint. On September 12, 2017, the court granted plaintiff's motion to amend, and directed plaintiff to file one amended complaint. The court instructed plaintiff that his amended complaint would be considered his complaint in its entirety, and that the court would not

[1] The clerk of court construed plaintiff's August 27, 2018, motion as a motion for recusal, to stay, and for default judgment. Upon a review of the motion, the court construes the motion simply as a motion for recusal.

review any of plaintiff's other filings to glean any misplaced claims. Plaintiff complied. On December 11, 2017, the court reviewed plaintiff's amended complaint and allowed him to proceed with his allegations that defendants Leslie Bess ("Bess"), Trinitra Lee-Boone ("Lee-Boone"), Corporal Ambrose ("Ambrose"), and Tyrone Pugh ("Pugh") violated his rights pursuant to the Fourteenth Amendment to the United States Constitution when they used excessive force, subjected him to extremely cold cell temperatures, and denied him medical care following an alleged assault. In that same order, the court, additionally, dismissed without prejudice plaintiff's remaining claims against the remaining defendants. On March 19, 2018, defendants filed a motion to dismiss requesting that this court revoke plaintiff's *in forma pauperis* status pursuant to 28 U.S.C. § 1915(g), which the court subsequently denied. North Carolina Prisoner Legal Services ("NCPLS") then conducted discovery on plaintiff's behalf. (See (DE 53)).

On August 27, 2018, plaintiff filed a motion for recusal. On August 31, 2018, defendants filed a motion for summary judgment arguing that plaintiff is unable to establish a constitutional violation, and, alternatively, assert the affirmative defense of qualified immunity. The motion was fully briefed. Plaintiff subsequently filed a motion for service of documents, and a motion for default judgment.

STATEMENT OF FACTS

Except as where otherwise noted below, the undisputed facts are as follows. Plaintiff arrived at the Jail on March 19, 2017, and initially was assigned to the dormitory area. (Def.s' Ex. A, pp. 39-41). The next day, Jail staff decided that it would be preferable to assign plaintiff to an isolation cell, specifically isolation cell number one, because plaintiff was well known to Jail staff as disruptive, and had a history of aggression toward officers and other inmates. ((DE 27), p. 4; (DE

45), p. 4; Def.s' Ex. B, p. 2). Plaintiff then was escorted to a visitation room, which did not contain a restroom, while isolation cell number one was being cleaned. ((DE 27), p. 4; (DE 45), p. 4).

The parties' accounts of events at this point differ. According to plaintiff, the incident at issue began when he informed defendant Ambrose that he had diarrhea, and needed to visit the restroom. (Am. Compl. (DE 11), p. 5). Plaintiff states that defendants Ambrose, Lee-Boone, and Pugh responded with hostility and "literally beat [plaintiff] and maced [plaintiff] leaving [him] soiled in defecation[.]" (Id.) Defendants dispute plaintiff's characterization of how the incident arose. According to defendants, the incident arose when defendant Ambrose peered into the visitation room, and observed plaintiff unclothed smearing feces on himself, a door, and a window. ((DE 27), p. 4; (DE 45), p. 4). Defendants then decided to remove plaintiff from the visitation room in order to decontaminate the area. ((DE 27, p. 4; (DE 45), p. 4).

Defendants likewise present different facts regarding the extraction of plaintiff from the visitation room. Specifically, defendants state that defendant Ambrose and Pugh entered the visitation room, and that Ambrose ordered plaintiff to exit the room.[2] (Def.s' Ex. A, p. 36). Plaintiff refused to comply. (Id.) Ambrose again ordered plaintiff to exit the visitation room, and warned plaintiff that Ambrose would spray him with OC spray if plaintiff did not comply. (Id.) In response, plaintiff stood up and attempted to hit defendant Ambrose. (Id.) Ambrose then stepped back and sprayed a one-second burst of OC spray at plaintiff. (Ex. A, p. 36). According to defendants, plaintiff then became more combative and continued to charge at defendants Ambrose and Pugh. (Ex. A, pp. 35-36). While plaintiff was still under the effects of the OC spray, defendants Ambrose

[2] Defendants state that Ambrose and Pugh entered the visitation room, but that defendants Bess and Lee-Boone remained in the booking area. ((DE 27), p. 5; (DE 45, p. 5).

and Pugh secured plaintiff's arms and legs using their hands, and worked together to bring plaintiff down to the ground. (Id. Ex. B, p. 2). The officers then secured plaintiff in handcuffs behind his back. (Id.)

After plaintiff was restrained, he was placed in isolation cell number one. ((DE 27), p. 5; (DE 45), p. 5). Defendants state that plaintiff did not complain of any injuries, and did not request to be taken to medical. (Defs. Ex. p. 37). Plaintiff, however, states that he suffered shoulder and head injuries, as well as bruising to his back, but was denied medical treatment for a period of two weeks following the alleged assault. (Am. Compl. (DE 11), p. 7). Plaintiff states that his injuries had "basically" healed by the time he obtained medical care. (Id.) Defendant Ambrose documented the incident as a "Use of Chemical Irritant Report" and an "Incident Report." (Def.s Ex. A, pp. 6, 35-38). Defendant Lee, additionally, completed an "Incident Report." (Id.) Jail staff did not obtain a written statement regarding the incident from plaintiff. (Id.)

According to plaintiff, he was placed in isolation cell number one with a broken shower and without bed linen for a period of two weeks. (Am. Compl. (DE 11), p. 5). Plaintiff additionally contends that he "suffered hyperthermia in a cold cell on a plastic mat which [made him] sweat from Anemia." (Id. 6). Finally, plaintiff was provided an extra blanket on March 21, 2017. (Def.s' Ex. A, pp. 45-46).

DISCUSSION

A. Plaintiff's Motions

Plaintiff filed a motion requesting that the instant judge recuse himself pursuant to 28 U.S.C. § 455(a). Title 28 U.S.C. § 455(a) requires that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Disqualification is required if a

reasonable factual basis exists for doubting the judge's impartiality. Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978). Here, plaintiff makes blanket claims of bias and prejudice. Although plaintiff has expressed dissatisfaction with rulings made by this court, plaintiff has presented no reasonable factual basis for doubting the undersigned's impartiality. Therefore, plaintiff's motion for recusal is DENIED.

The court now turns to plaintiff's motion for service. Plaintiff requests that the court serve defendants with a copy of his response to defendants' motion for summary judgment. The court, in an order entered on July 20, 2018, relieved plaintiff of the obligation to serve defendants with copies of his filings because defendants have access to any documents plaintiff files through CM/ECF. As a result, plaintiff's motion is DENIED.

Finally, the court considers plaintiff's motion for default judgment. Plaintiff's motion is not a model of clarity. Plaintiff appears to seek default judgment as a sanction for alleged perjury contained in defendants' motion for summary judgment. Plaintiff, however, provides no evidence or factual support for his motion. Thus, the motion is DENIED.

B. Motion for Summary Judgment

1. Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate that there exists a genuine issue of material

fact requiring trial. Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson, 477 U.S. at 250.

2. Analysis

Defendants raise the affirmative defense of qualified immunity in this § 1983 action. Government officials are entitled to qualified immunity from civil damages so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In other words, a government official is entitled to qualified immunity when (1) the plaintiff has not demonstrated a violation of a constitutional right, or (2) the court concludes that the right at issue was not clearly established at the time of the official's alleged misconduct. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

a. Excessive Force

Conditions of confinement of pretrial detainees in state custody are evaluated under the Due Process Clause of the Fourteenth Amendment. See Bell v. Wolfish, 441 U.S. 520, 535 (1979). In Kingsley v. Hendrickson, 135 S. Ct. 2466 (2016), the United States Supreme Court recently held that a pretrial detainee asserting an excessive force claim must demonstrate "only that the force purposely or knowingly used against him was objectively unreasonable." Id. at 2473. In determining whether the force was objectively unreasonable, a court considers the evidence "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." Id. (citing Graham v. Connor, 490 U.S. 386, 396 (1989)). Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: the relationship between the need for the use of force and the amount of force used; the extent of the

plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. Kingsley, 135 S. Ct. at 2473.

"[A]lthough it is not per se unconstitutional for guards to spray mace at prisoners confined in their cells, it is necessary to examine the 'totality of the circumstances, including the provocation, the amount of gas used, and the purposes for which the gas is used [to] determin[e] the validity of the use of tear gas in the prison environment.'" Williams v. Benjamin, 77 F.3d 756, 763 (4th Cir. 1996) (quoting Bailey v. Turner, 736 F.2d 963, 969 (4th Cir. 1984)). "It is generally recognized that it is a violation of the Eighth Amendment for prison officials to use mace, tear gas or other chemical agents in quantities greater than necessary or for the sole purpose of infliction of pain." Iko v. Shreve, 535 F.3d 225, 440 (4th Cir. 2008) (quoting Williams, 77 F.3d at 763)).

Applying the Kingsley factors to the instant action, there are genuine issues of material fact which preclude summary judgment. With respect to the first Kingsley factor–the relationship between the need for the use of force and the amount of force used–defendant Ambrose states that he deployed one burst of OC spray after plaintiff refused to obey a direct order to exit the visitation room. (Def.s' Ex. A, p. 36). Plaintiff, however, states that defendants Ambrose and Pugh beat and sprayed him with OC spray, without provocation, after plaintiff simply notified officer Ambrose that he needed to use the restroom. (Am. Compl. (DE 11), p. 5). Use of OC spray on a docile inmate may qualify as excessive force. See Iko, 535 F.3d at 239–40 (finding genuine issue of material fact when prison guard deployed several bursts of pepper spray on docile inmate); Williams, 77 F.3d at 763. Given the conflicting versions of events, the first Kingsley factor weighs in favor of plaintiff.

With respect to the remaining Kingsley factors, which include the extent of any injuries, the effort made by defendants to limit the amount of force, the severity of the security problem at issue, the threat reasonably perceived by defendant, and whether plaintiff was actively resisting, the parties provide conflicting statements without any evidentiary support. There is no video-tape of the incident in the record to support either parties' differing characterization of the events. Accordingly, the court finds that there are genuine issues of material fact with regard to whether defendants purposely and knowingly used force against plaintiff that was objectively unreasonable, and that the bystander defendants failed to protect plaintiff from the alleged excessive force. Thus, there is a genuine issue of material fact with regard to whether defendants violated plaintiff's Fourteenth Amendment rights. See, e.g., Thompson v. Shelton, 541 F. App'x 247, 250 (4th Cir. 2013) (per curiam).

The court now determines whether defendants are entitled to the affirmative defense of qualified immunity. It is clearly established that the Fourteenth Amendment forbids the purposeful or knowing use of objectively unreasonable force. Kingsley, 135 S. Ct. at 2473. Given that a fact finder in this case could find, viewing the evidence in the light most favorable to plaintiff, that defendants purposely or knowingly used objectively unreasonable force against plaintiff, a reasonable officer would have known that his conduct violated the law. See Iko, 535 F.3d at 239–40; see also, Davidson v. City of Statesville, No. 5:10-CV-182-RLV-DSC, 2012 WL 5208603, at *3 (W.D.N.C. Oct. 22, 2012) ("As Plaintiff has . . . established a genuine issue of material fact as to whether the remaining individual Defendants acted in a manner intended to be injurious and used their tasers needlessly and without a legitimate purpose, Defendants' claims of qualified immunity

cannot bar suit.") (internal quotations omitted). Thus, defendants are not entitled to qualified immunity for plaintiff's excessive force claim.

b. Deliberate Indifference to Serious Medical Needs

Plaintiff alleges that defendants acted with deliberate indifference to his serious medical needs because they denied him medical care for a period of two weeks following the alleged use of force incident. A pretrial detainee makes out a due process violation if he shows "deliberate indifference to serious medical needs" as set forth in Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).).[3] See Heyer v. U.S. Bureau of Prisons, 849 F.3d 202, 210 (4th Cir. 2017); Martin v. Gentile, 849 F.2d 863 (4th Cir. 1988) (applying the deliberate indifference standard to an arrestee's claim of inadequate medical care). To prove such a claim, a plaintiff "must demonstrate that the officers acted with 'deliberate indifference' (subjective) to [his] 'serious medical needs' (objective)." Iko, 535 F.3d at 241 (quoting Estelle, 429 U.S. at 104). When an inmate alleges that a prison official denied him medical care or did not provide such care in a timely manner, the inmate must prove that the prison official knew of and disregarded an objectively serious condition, known medical need, or substantial risk of serious harm. See, e.g., Scinto v. Stansberry, 841 F.3d 219, 225 (4th Cir. 2016); Sosebee v. Murphy, 797 F.2d 179, 182 (4th Cir. 1986). An inmate, however, is not entitled to choose his course of treatment. See Russell v. Sheffer, 528 F.2d 318, 318–19 (4th Cir. 1975) (per curiam).

Here, defendants do not dispute that they did not take plaintiff to medical staff for treatment following the alleged use of force incident. Further, the parties present conflicting testimony with

[3] The Fourth Circuit has not applied the holding in Kingsley to claims other than for excessive force. See Durand v. Charles, No. 1:16cv86, 2018 WL 748723 at *n. 11 (M.D.N.C. Feb. 7, 2018), aff'd, 733 F. App'x 116 (4thCir. 2018).

respect to whether plaintiff was in need of medical attention at that time.[4] (Am. Compl. (DE 11) p. 7;(Defs. Ex. A, p. 37). Thus, the court finds that genuine issues of material facts exist as to whether defendants acted with deliberate indifference to plaintiff's serious medical needs. Because the court finds that genuine issues of material fact exist as to plaintiff's Fourteenth Amendment claim alleging deliberate indifference to his serious medical needs, and courts have clearly established the law on this issue, defendants are not entitled to qualified immunity. See Pearson, 555 U.S. at 236 (explaining the test for qualified immunity).

c. Cell Temperature

Plaintiff contends that he "suffered hyperthermia in a cold cell on a [] mat which [made him] sweat from Anemia." (Am. Compl. p. 6). Generally, cold temperatures alone do not violate the Fourteenth Amendment. See, e.g., Williams v. Ozmint, No. 3:08-cv-4139-GRA, 2010 WL 3814287, at *7-8 (D.S.C. Sept. 23, 2010) (defendants were not deliberately indifferent to plaintiff's placement in a cell which "was 'so cold as to [cause him] to catch a cold or flu'" where they "provided Plaintiff with clothing . . . and ensured that he was monitored by medical personnel"); Coil v. Peterkin, No. 1:07CV145, 2009 WL 3247848, at *4, n.11 (M.D.N.C. Oct. 5, 2009) (no injury to detainee who "'might' have gotten a cold" where jail provided detainee with extra blankets and cold medication), aff'd, 401 F. App'x 773 (4th Cir. Nov. 12, 2010) (per curiam).

Here, the record reflects that jail staff provided plaintiff an extra blanket on May 21, 2017. (Def.s' Ex. A, pp. 45-46). There, additionally, is no evidence to suggest that plaintiff complained to jail staff that his cell was cold or to support plaintiff's contention that he suffered from

[4] The court notes that defendants state in their memorandum in support of their motion for summary judgment that they have provided a complete copy of plaintiff's medical records for the time he was incarcerated at the jail, but have not provided an affidavit to support such contention.

NO Affidavit

hypothermia while in the isolation cell. Finally, plaintiff failed to present any evidence that he sustained a significant physical or emotional injury resulting from the alleged "freezing" cell temperatures. See Strickler v. Waters, 989 F.2d 1375, 1381 (4th Cir. 1993) (finding that in order to "withstand summary judgment" on an Eighth Amendment claim, an inmate "must produce evidence of a serious or significant physical or emotional injury resulting from the challenged conditions."); see also, Fleming v. Francis, No. 5:13-cv-21991, 2014 WL 2589755, at *6 (S.D.W. Va. June 10, 2014) (finding that a plaintiff failed to state an Eighth Amendment claim where he failed to allege significant physical or emotional injury resulting from the challenged prison conditions) (citations omitted); Carballo v. Ingram, No. 5:10-CT-3056-FL, 2012 WL 699518, at *5 (E.D.N.C. Mar. 1, 2012). Thus, plaintiff failed to establish a Fourteenth Amendment violation with respect to his cell temperature, and defendants are entitled to qualified immunity for this claim.

d. New Claims

In response to defendants' motion for summary judgment, plaintiff attempts to raise new allegations. Plaintiff cannot raise new claims without filing a motion to amend. See Barclay White Skanska, Inc. v. Battelle Mem'l Inst., 262 F. App'x 556, 563 (4th Cir. 2008) (finding that a plaintiff cannot raise new claims in response to a motion for summary judgment, unless the plaintiff first amends their complaint) (citation omitted); Mohammed v. Daniels, No. 5:13-CT-3077-FL, 2015 WL 470469, at *3, n.2 (E.D.N.C. Feb. 4, 2015) ("To the extent plaintiff attempts to raise new claims in his responses to defendants' motions to dismiss, those claims are not properly before the court and will not be considered.") (citation omitted); Miles v. Owen, No. 4:12–998–MGL, 2013 WL 227766, at *2 (D.S.C. Jan. 22, 2013). Thus, plaintiff's new claims are DISMISSED without prejudice.

CONCLUSION

Based upon the foregoing, the court ORDERS as follows:

(1) Defendants' motion for summary judgment (DE 62) is GRANTED as to plaintiff's claim regarding freezing cell temperature, and DENIED as to plaintiff's remaining claims. Any new claims raised by plaintiff in response to defendants' motion for summary judgment are DISMISSED without prejudice;

(2) Plaintiff's motions (DE 61, 72, 73) are DENIED;

(3) Pursuant to Local Alternative Dispute Rule 101.1, EDNC, this case is REFERRED to United States Magistrate Judge Robert B. Jones, Jr. for a court-hosted settlement conference, for the purpose of resolving all issues in dispute. The magistrate judge will enter an order requesting that the parties propose mutually agreeable dates. In the event the parties fail to agree to a resolution of this action, the matter will be set for trial;

(3) The court APPOINTS North Carolina Prisoner Legal Services ("NCPLS") to represent plaintiff in this action. The Clerk of Court is DIRECTED to send a copy of this order to NCPLS.

SO ORDERED, this the 6 day of March, 2019.

Terrence Boyle

TERRENCE W. BOYLE
Chief United States District Judge