United States Court of Appeals

FIFTH CIRCUIT
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March 09, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-40282 Richardson v. Belote
USDC No. 2:14-CV-464

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 9, 2021
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No. 19-40282
Summary Calendar

BRANDON RICHARDSON,

Plaintiff—Appellant,

versus

BRANDON BELOTE; WILLIAM STEPHENS; EILEEN KENNEDY; GARY CURRIE; CAROLE MONROE; THADDEUS HUNT; SAQUED SALINAS; JUAN TREVINO; ALBERTO VALDEZ; DOVIE BUNCH; LANNETTE LINTHICUM; REFUGIA CAMPOS; SONIA MORON; TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:14-CV-464

Before WIENER, SOUTHWICK, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

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

Brandon Richardson, Texas prisoner # 740705, has appealed the judgment dismissing his civil rights complaint following a jury trial. Richardson challenges the sufficiency of the evidence supporting the jury's rejection of his claims that the defendants acted with deliberate indifference to his serious medical condition and used excessive force against him during a use-of-force incident. He also challenges the district court's evidentiary rulings, and he asserts that his counsel rendered ineffective assistance.

As the appellant, Richardson is responsible for supporting his appellate issues with pertinent transcripts of proceedings in the district court, and he has failed to do so. FED. R. APP. P. 10(b)(1)(A), (2); *Richardson v. Henry*, 902 F.2d 414, 415-16 (5th Cir. 1990). Richardson's unsupported appellate issues are subject to dismissal. *See Richardson*, 902 F.2d at 416. The asserted errors by counsel do not present an appealable issue in this civil case. *See Sanchez v. U.S. Postal Serv.*, 785 F.2d 1236, 1237 (5th Cir. 1986).

The appeal is DISMISSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

BRANDON RICHARDSON,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:14-CV-464
	§	
BRANDON BELOTE, *et al*,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

On March 18, 2019, this matter was called for trial. The parties announced ready for trial. After a jury of seven qualified jurors was impaneled and sworn, the case proceeded to trial. The jury heard the evidence and arguments and the Court submitted the case to the jury on March 21, 2019. In response to the Charge, the jury made findings that this Court received, filed, and entered of record. D.E. 220. The jury returned a verdict in favor of Defendants and against Plaintiff on March 21, 2019. It is therefore ORDERED that Defendants have final judgment that Plaintiff TAKE NOTHING on his claims against Defendants in this suit. This action is DISMISSED WITH PREJUDICE.

ORDERED this 25th day of March, 2019.

Nelva Gonzales Ramos

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

BRANDON RICHARDSON,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:14-CV-464
	§	
BRAD LIVINGSTON, *et al*,	§	
	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION ON PENDING MOTION TO DISMISS

In this § 1983 prisoner civil rights action, Plaintiff Brandon Richardson raises claims of excessive force, failure to protect, and deliberate indifference to his serious medical needs concerning an August 29, 2014 incident at the McConnell Unit. Certain security defendants have filed a motion to dismiss pursuant to Rule 12(c), of the Federal Rules of Civil Procedure. (D.E.33). Plaintiff has filed a response in opposition. (D.E. 36). For the reasons stated herein, it is respectfully recommended that the Court grant the motion to dismiss as to Officer Alberto Valdez, but deny the motion as to defendants Captain Thaddeus Hunt, Sergeant Juan Trevino, and Lieutenant Salued Salinas.[1]

I. JURISDICTION.

The Court has federal question jurisdiction. 28 U.S.C. § 1331.

II. BACKGROUND FACTS.

Plaintiff has had a hernia for seven years. (D.E. 1, p. 9).

[1] Security defendants Sergeant Brandon Belote and Officer Dovie Bunch also join in the motion to dismiss but do not move for dismissal as to Plaintiff's excessive force claims against them individually.

On August 29, 2014, Plaintiff was outside in front of the chow hall on the sidewalk when he collapsed in pain caused by his hernia. (D.E. 1, p. 9). Sergeant Trevino called medical. *Id.* Nurse Moreno and Nurse Campos arrived, and they demanded that Plaintiff get up off the ground. *Id.* The nurses then administered "smelling salts/ammonia" under Plaintiff's nose to keep him conscious. *Id.* Sergeant Trevino and Lieutenant Salinas dragged Plaintiff to the gurney and roughly assisted him onto the stretcher. *Id.*

Once at medical, Officer Bunch ordered Plaintiff to get off the stretcher, but he could not do so because of his pain. (D.E. 1, p. 10). Plaintiff was forced to roll off the gurney onto the floor. *Id.* Officer Bunch and Sergeant Belote then grabbed their chemical agents and threatened to spray Plaintiff if he did not get up off the floor, but Plaintiff remained where he was. *Id.*

While on the floor, Officer Bunch taunted him and Sergeant Belote grabbed the gurney and ran over part of Plaintiff's leg, ankle, and foot, causing injury. (D.E. 1, p. 10). Plaintiff passed out from the pain, and when he woke up, Officer Bunch was kicking him in the back and side, further aggravating his condition. *Id.* Nurse Moreno attempted to give Plaintiff another dose of smelling salts, but Plaintiff pushed her hand away. *Id.* In response, the "security officers pounced" on Plaintiff and beat him. *Id.* The officers then forced Plaintiff's arms behind his back while he was lying on his stomach, and Officer Bunch dug both of her knees into his back. *Id.* Plaintiff was then removed from medical by gurney and taken to prehearing detention and charged with assaulting Nurse

Moreno. *Id.* Later that day, Plaintiff was taken back to medical and then to the hospital for emergency surgery. *Id.*

III. PROCEDURAL HISTORY.

On November 21, 2014, Plaintiff filed the instant lawsuit alleging claims of excessive force, failure to protect, and deliberate indifference to his serious medical needs against fifteen defendants identified as supervisory, security, and medical. (*See* D.E. 1, D.E. 15 at p. 2-3). On January 27, 2015, a *Spears*[2] hearing was held, and by Memorandum and Recommendation entered March 2, 2015, it was recommended that Plaintiff's claims for monetary damages against all defendants in their official capacities as well as the TDCJ be dismissed as barred by the Eleventh Amendment, and that Plaintiff's claims against the supervisory defendants be dismissed for failure to state a claim and/or as frivolous as he was seeking to impose liability based solely on those individuals' roles as supervisors of alleged tort-feasors. (D.E. 8). It was recommended further that Plaintiff's claims of excessive force against the security defendants, identified as Captain Thaddeus Hunt, Lieutenant Salued Salinas, Sergeant Juan Trevino, Sergeant Brandon Belote, Officer Alberto Valdez and Officer Dovie Bunch be retained, as well as his deliberate indifference claims against the medical defendants, Nurse Refugia Campos and Nurse Sonia Moreno. *Id.*

[2] *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

On March 25, 2015, Plaintiff filed a motion for leave to file an amended complaint (D.E. 10), and it was denied. (D.E. 12).

On April 6, 2015, the Court adopted the March 2, 2015 recommendation. (D.E. 11).

The security defendants have been served and filed answers herein. (*See* D.E. 13, 28).[3]

On August 20, 2015, the security defendants filed the instant motion to dismiss. (D.E. 33), and on September 30, 2015, Plaintiff filed his response in opposition. (D.E. 36).

III. RULE 12(c).

Rule 12(c) of the Federal Rules of Civil Procedure provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." The standard for addressing a Rule 12(c) motion is the same as that used for deciding motions to dismiss pursuant to Rule12(b)(6). *Great Plains Trust Co. v. Morgan Stanley Dean Witter,* 313 F.3d 305, 313 n. 8 (5th Cir. 2002) (citing 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and* Procedure, § 1368 at 591).

Thus, a motion brought pursuant to Rule 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts. *Great*

[3] Nurse Campos has filed an Answer (D.E. 41), but efforts to serve Nurse Sonia Moreno (or Moron) who is no longer employed at the TDCJ-CID, have been unsuccessful.

Plains Trust Co., 313 F.3d at 313 (quoting *Hebert Abstract co. v. Touchstone Props., Ltd.,* 914 F.2d 74, 76 (5th Cir. 1990)). The query for the Court is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief. *Hughes v. Tobacco Inst., Inc.* 278 F.3d 417, 420 (5th Cir. 2001) (quoting *St. Paul Mercury Ins. Co. v. Williamson,* 224 F.3d 425, 440 n. 8 (5th Cir. 2000)).

The Court can dismiss a claim under Fed. R. Civ. P. 12(c) when it is clear that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir. 1999) citing *Fee v. Herndon,* 900 F.2d 804, 807 (5th Cir. 1990)). In considering the motion, the pleadings should be construed liberally and judgment on the pleadings granted only if there are no disputed issues of fact and only questions of law remain. *Hughes,* 278 F.3d at 420 (citing *Voest-Alpine Trading USA Corp. v. Bank of China,* 142 f.3d 887, 891 (5th Cir. 1998)). "In analyzing the complaint, we will accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id.* (citation omitted).

The Court will not, however, accept as true conclusory allegations or unwarranted deductions of fact. *Great Plains Trust Co.,* 313 F.3d at 312-313. "The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. Thus, the court should not dismiss the claim unless the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in his complaint." *Jones,* 188 F.3d at 324 (citations omitted).

IV. ANALYSIS.

As previously noted, Plaintiff's claims have been screened pursuant to § 1915A and were determined to state claims of excessive force and failure to protect against the security defendants, assuming Plaintiff's allegations as true. (*See* D.E. 8, 11). Unless the security defendants establish that there are no factual disputes, but only issues of law, dismissal is not appropriate at this time.

(1) Captain Thaddeus Hunt.

In the motion to dismiss, Captain Hunt states that Plaintiff has sued him simply in his role as a supervisor and for failure to train his subordinates, allegations that fail to support claims for § 1983 liability because section 1983 requires personal involvement. However, at the *Spears* hearing, Plaintiff testified that Captain Hunt was "in the area" at the time he was brought to medical and that Captain Hunt had observed the other defendants mistreat him, but failed to intervene. In effect, Plaintiff claims that Captain Hunt failed to protect him from excessive force and/or mistreatment by the security and medical defendants. Plaintiff claims that Captain Hunt observed the medical staff demanding that he get off the stretcher by himself, falling to the floor, Nurse Moreno forcing salts into his face, and the use of force that occurred after Plaintiff pushed Nurse Moreno's hand away. (D.E. 8, p. 4).

Prison officials have a duty to protect prisoners from violence at the hand of other prisoners or from prison officers or officials. *Cantu v. Jones*, 293 F.3d 839, 844 (5th Cir. 2002) (citing *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). A prison official is deliberately indifferent to the inmate's safety if the official knows that the inmate faces a

substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. *Cantu*, 293 F.3d at 844 (citing *Farmer*, 511 at 847). Deliberate indifference describes a state of mind "more blameworthy than negligence"; there must be "more than ordinary lack of due care for the prisoner's interests or safety." *Farmer*, 511 U.S. at 835.

In this case, Plaintiff has described an escalating event in which he was unable to communicate due to severe pain, and the guards and medical staff who were present to assist him were, according to Plaintiff, unwilling to do so, such that a cool and clear head on the scene may have prevented further injury. Plaintiff observed Captain Hunt in the area and believed he would be this voice of reason as he was not involved in the events outside. If Captain Hunt did nothing while he observed other defendants order Plaintiff to get off the stretcher and fall to the floor, observed Sergeant Belote run the gurney over Plaintiff's leg and Officer Bunch kick him, and observed both officers apply force after Plaintiff hit Nurse Moreno's arm away, it cannot be said that Plaintiff has failed to allege any facts that, if true, state a claim under the Eighth Amendment. Plaintiff has not sued Captain Hunt merely because he is a supervisor; he claims that he was personally present, knew that Plaintiff was at a serious risk of harm, and failed to prevent that harm from occurring. Thus, it is respectfully recommended that the motion to dismiss as to Captain Hunt be denied.

(2) Sergeant Trevino and Lieutenant Salinas.

Defendants Trevino and Salinas claim that Plaintiff has failed to state an Eighth Amendment claim against them because he claims only that they "roughly" placed him

on the stretcher. Trevino and Salinas rightly point out that "not every malevolent touch by a prison guard gives rise to a federal action," *Hudson v. McMillian,* 503 U.S. 1, 6 (1992), and that since they were attempting to help Plaintiff by placing him on the gurney, they cannot be sued because they did so in a manner that was less than gentle. (D.E. 33, pp. 4-5).

Although Plaintiff did complain about the manner in which Trevino and Salinas placed him on the stretcher, this is not his primary claim against these defendants. Instead, like Captain Hunt, Plaintiff testified that these officers were "in the area" and observed what happened in medical: Plaintiff's fall off the gurney, the running over with the gurney, the kicking of Plaintiff, and then the use of force, with failure to intervene. Defendants do not dispute that they were "in the area," nor suggest that they did not observe the events as alleged by Plaintiff. Genuine disputed facts exist such that Plaintiff's failure to protect claims are not appropriate for Rule 12(c) dismissal.

Defendants also argue that Plaintiff's allegations do not state a failure to protect claim because Plaintiff "concedes that he failed to obey their orders and stayed on the floor hoping someone would intervene" after he fell off the stretcher. (D.E. 33, p. 10). However, the fact that Sergeant Belote and Officer Bunch ordered Plaintiff to get off the floor when he was suffering excruciating pain, and what Sergeant Trevino and Lieutenant Salinas observed create fact issues that go to the very nature of the failure to protect claim. There is a difference between *refusing* to obey orders and being *physically unable* to obey orders, and the fact that Plaintiff was in surgery later that evening suggests the latter.

Moreover, because it is recommended that Trevino and Salinas not be dismissed, it is recommended that Plaintiff should be able to develop his excessive force claims against these individuals as well. Plaintiff claims that Trevino and Salinas dragged him across the concrete to the gurney such that he suffered scrapes and bruises, and there is no reason why the gurney could not have been brought directly to Plaintiff. Genuine issues of fact preclude Rule 12(c) resolution, and therefore, it is respectfully recommended that the motion to dismiss as to defendants Trevino and Salinas be denied.

3. Officer Valdez.

Officer Valdez moves for dismissal on the grounds that Plaintiff failed to allege any specific facts against this defendant to indicate that he was personally involved in the events of August 29, 2014. (D.E. 33, p. 11). Indeed, in his Rule 12(c) response, Plaintiff does not oppose the dismissal of Officer Valdez. (D.E. 36). Moreover, a review of the *Spears* hearing testimony failed to reveal any specific facts alleged against this individual. Accordingly, it appears that Officer Valdez was mistakenly joined as a defendant herein, and it is respectfully recommended that claims that he be dismissed as Plaintiff has not stated a constitutional claim against this individual.

V. Recommendation.

For the reasons stated herein, it is respectfully recommended that the Court:

(1) Grant the motion to dismiss as to Officer Alberto Valdez and dismiss this defendant from the lawsuit; and,

(2) In all other respects, deny the security defendants' Rule 12(c) motion to dismiss.

Respectfully submitted this 14th day of December, 2015.

B. JANICE ELLINGTON
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within FOURTEEN (14) DAYS after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1), General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within FOURTEEN (14) DAYS after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United* Servs. *Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

BRANDON RICHARDSON,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:14-CV-464
	§	
BRAD LIVINGSTON, *et al*,	§	
	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In this prisoner civil rights action, Plaintiff Brandon Richardson complains that defendants violated his Eighth Amendment rights on August 29, 2013, when he was suffering from a strangulated hernia and they were deliberately indifferent to his serious medical needs. (D.E. 1). Certain defendants have filed a motion for summary judgment to dismiss Plaintiff's claims against them on the grounds that he failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). Plaintiff has filed a response in opposition arguing that he adequately explained his claims so as to notify all defendants of his claims against them. (D.E. 55).

For the reasons stated herein, it is respectfully recommended that the Court deny defendants' motion for summary judgment and that Plaintiff's Eighth Amendment claims proceed.[1]

[1] Defendant Campos filed a motion for summary judgment on May 12, 2016 (D.E. 58). Plaintiff's response is not due until June 13, 2016, and that motion is not addressed in this memorandum and recommendation.

I. JURISDICTION.

The Court has federal question jurisdiction over this civil action pursuant to 28 U.S.C. § 1331.

II. PROCEDURAL BACKGROUND.

Plaintiff is a prisoner in the Texas Department of Criminal Justice, Criminal Institutions Division (TDCJ-CID), and is currently confined at the McConnell Unit (MCU) in Beeville, Texas. Plaintiff filed his original complaint on November 21, 2014, alleging that on August 29, 2013, while walking in front of the chow hall, he fell due to severe pain in his abdomen. Both medical and security personnel responded to the scene, but according to Plaintiff, they mocked him and forced him to get on a medical gurney without assistance. At the infirmary, he claims that other officers continued to harass and physically hurt him, while supervising officers looked on and failed to intervene. He was later rushed to the local emergency room for surgery. Plaintiff sued fourteen (14) individuals in their individual capacity for money damages, as well as the TDCJ. (D.E. 1).

On January 27, 2015, a *Spears*[2] hearing was conducted, following which service was ordered on two medical defendants, Nurse Refugia Campos and Nurse Sonia Moreno,[3] and on the security defendants, Captain Thaddeus Hunt, Lieutenant Salued Salinas, Sergeant Juan Trevino, Officer Dovie Bunch, Sergeant Brandon Belote, and

[2] *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

[3] Plaintiff identified this individual as Nurse Moreno. Throughout the medical records and correspondence, she is identified as both "Moreno" and "Moron."

Officer Alberto Valdez. (*See* D.E. 8, 11, 13). The remaining defendants were dismissed. (D.E. 13).

On April 15, 2015, Sergeant Trevino and Officer Valdez filed their Answer. (D.E. 13). On June 4, 2015, September 15, 2014, Officer Bunch, Sergeant Delute, Captain Hunt, and Lieutenant Salinas filed their Answer. (D.E. 28). On October 29, 2015, Nurse Campos filed her Answer. (D.E. 41). Nurse Moreno is no longer employed with the University of Texas Medical Branch, Correctional Managed Care (UTMB-CMC), is not working at a TDCJ-CID facility, and efforts to serve her at her last known address have been unsuccessful. (D.E. 43).

On August 20, 2015, the security defendants filed a motion to dismiss pursuant to Rule 12(b)(6). (D.E. 33). It was recommended that the motion be granted as to Officer Valdez because Plaintiff had failed to identify any specific facts showing how this officer was personally involved in the deprivation of Plaintiff's constitutional rights, and Plaintiff did not object to the dismissal. (D.E. 45). On January 21, 2016, the Court adopted the recommendation and dismissed Officer Valdez from this lawsuit. (D.E. 51).

On February 12, 2016, certain defendants filed the instant motion for summary judgment seeking dismissal for failure to exhaust administrative remedies. (D.E. 52).

Following an extension of time (D.E.53, 54), Plaintiff filed his response in opposition to defendants' motion for summary judgment for failure to exhaust administrative remedies. (D.E. 55).

III. SUMMARY JUDGMENT EVIDENCE ON EXHAUSTION.

In support of their exhaustion summary judgment motion, defendants offer the following:

Ex. A: Step 1 Grievance, Grievance No, 2014007825, dated September 10, 2013, with investigation worksheets, as well as related Step 2 grievance and work sheets, all concerning the August 29, 2013 Use of Force (UOF) (D.E. 52-2, pp. 2-62); and

Ex. B: Investigation concerning Nurse Moreno's response and whether or not she worked on August 29, 2013 (D.E. 52-3, pp. 1-70).

The summary judgment evidence establishes the following:

Medical records.

Plaintiff has had a hernia for seven years. (D.E. 1, p. 9).

On August 28, 2013, at approximately 10:00 p.m., Plaintiff was escorted to the MCU infirmary complaining of nausea and dizziness. (D.E. 52-2, p. 30). Nursing notes indicate that Plaintiff was being "triaged," but that he left after fifteen minutes against medical advice. (D.E. 52-2, p. 31). The notes are electronically signed by Nurse Campos on 8/29/13 and Nurse Moron on 8/30/13. (D.E. 52-2, p. 31). There is no explanation as to what it means to have nursing notes signed electronically one or two days after the patient was seen in the infirmary.

On August 29, 2013 at approximately 5:08 a.m. in the morning, Plaintiff was walking outside of the chow hall when he doubled over and fell to the ground from the severe pain he was experiencing in his abdomen. (D.E. 52-2, p. 19). An "Incident

Command System" (ICS) was initiated.[4] Nursing notes indicate that Plaintiff was unresponsive and so an ammonia inhalant was administered by Nurse Moron. (D.E. 52-2, p. 20). Following the inhalant, Plaintiff began to get up with the assistance from a ranking officer. (D.E. 52-2, p. 20). Sergeant Trevino and Lieutenant Salinas assisted Plaintiff to a medical gurney that had been brought to the scene, but Plaintiff claims they did so "roughly" while mocking him. (D.E. 52-2, p. 20). Plaintiff was then transported to the infirmary. (D.E. 52-2, p. 20).

At the infirmary, Plaintiff was ordered off the gurney. (D.E. 52-2, p. 20). Plaintiff was in too much pain to get off the gurney himself, so Officer Bunch and Sergeant Delute lowered the gurney to its lowest setting and Plaintiff rolled off the gurney and onto the floor. (D.E. 52-2, p. 20). Plaintiff passed out again and was unresponsive to commands to get up and sit in a chair. (D.E. 52-2, p. 20). Nurse Moron applied the ammonia smelling salts and Plaintiff woke up, shoving Nurse Moron's arm away. A UOF was called because of Plaintiff's aggressive movement toward Nurse Moron. (D.E. 52-2, p. 20).

At approximately 5:25 a.m., Plaintiff was evaluated for pre-segregation lock-up based on his shoving Nurse Moron's arm away. (D.E. 52-2, pp. 20-25). Physician Assistant Eshavarry authorized that Plaintiff be held in prehearing segregation until he could be seen by a provider for evaluation of his hernia. (D.E. 52-2, p. 25).

[4] An ICS involves five officers suiting up in protective gear to administer a use of force (UOF) to subdue an inmate if necessary. A UOF is usually videotaped.

On August 29, 2013 at approximately noon, Plaintiff was brought to the infirmary where he was evaluated by Registered Nurse Jose Chapa. (D.E, 52-2, pp. 26-29). Upon observation, Nurse Chapa noted the Plaintiff had a very large left inguinal hernia, veins bulging, extremely tender to touch, with the appearance of loops of bowl in the testicles. (D.E.52-2, p. 26). His assessment was strangulated hernia and he called Practitioner Lori Hudson for approval to transfer Plaintiff to the emergency room. (D.E. 52-2, p 26). Practitioner Hudson approved, Plaintiff was started on IV fluids, Tylenol #3, and Robaxin, and was transported by ambulance to the local ER. (D.E. 52-2, p 26). He underwent surgery that day for the strangulated hernia.

Post surgery.

When Plaintiff returned to MCU, he was not placed in pre-hearing segregation for striking a nurse. In fact, there is no disciplinary case or UOF record for the August 29, 2013 incident in which Plaintiff allegedly pushed Nurse Moron's arm away in the infirmary when she was applying smelling salts. Nurse Moron contends that she was not working at all, despite her electronic signature on August 28 and 29, 2013, and her supervisor, Drew Stalinsky, has been unable to confirm whether or not she worked that day. She has since left the employment of UTMB. (D.E. 52-3, p. 25).

IV. SUMMARY JUDGMENT STANDARD.

Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court must examine "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." *Id.* at 251-52. In making this determination, the Court must consider the record as a whole by reviewing all pleadings, depositions, affidavits and admissions on file, and drawing all justifiable inferences in favor of the party opposing the motion. *Caboni v. Gen. Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002). The Court may not weigh the evidence, or evaluate the credibility of witnesses. *Id.* Furthermore, "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e); *see also Cormier v. Pennzoil Exploration & Prod. Co.*, 969 F.2d 1559, 1561 (5th Cir. 1992) (per curiam) (refusing to consider affidavits that relied on hearsay statements); *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987) (per curiam) (stating that courts cannot consider hearsay evidence in affidavits and depositions). Unauthenticated and unverified documents do not constitute proper summary judgment evidence. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) (per curiam).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party demonstrates an absence of evidence supporting the nonmoving party's case, then the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To sustain this burden, the nonmoving party cannot

rest on the mere allegations of the pleadings. Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 248. "After the nonmovant has been given an opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted." *Caboni*, 278 F.3d at 451. "If reasonable minds could differ as to the import of the evidence ... a verdict should not be directed." *Anderson*, 477 U.S. at 250-51.

The evidence must be evaluated under the summary judgment standard to determine whether the moving party has shown the absence of a genuine issue of material fact. "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

V. DISCUSSION.

A. Exhaustion.

Defendants move for summary judgment to dismiss Plaintiff's claims for failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). (*See* D.E. 24). The Prison Litigation Reform Act, 42 U.S.C. § 1997e, provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S. C. § 1997e(a).

The exhaustion requirement applies to all inmate suits about prison life, whether involving general circumstances or specific incidents. *Porter v. Nussle*, 534 U.S. 516, 532 (2002); *Clifford v. Gibbs*, 298 F.3d 328, 330 (5th Cir. 2002). Moreover, a prisoner is

required to exhaust his administrative remedies even if damages are unavailable through the grievance process. *Booth v. Churner*, 532 U.S. 731, 734 (2001); *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001). A prisoner must complete the administrative review process in accordance with all procedural rules, including deadlines, as a precondition to bringing suit in federal court. *Woodford v. Ngo*, 548 U.S. 81, 83 (2006). Because exhaustion is an affirmative defense, inmates are not required to plead or demonstrate exhaustion in their complaints. *Jones v. Bock*, 549 U.S. 199, 215 (2006).

The TDCJ provides a two-step procedure for presenting administrative grievances.[5] *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999) (per curiam). The Fifth Circuit requires that both steps be completed in order to file suit in federal court. *Johnson v. Johnson*, 385 F.3d 503, 515-16 (5th Cir. 2004) ("[A] prisoner must pursue a grievance through both steps for it to be considered exhausted."). *See also Dillion v. Rogers,* 596 F.3d 260, 268 (5th Cir. 2010) ("under our strict approach, we have found that mere 'substantial compliance' with administrative remedy procedures does not satisfy exhaustion; instead, we have required prisoners to exhaust available remedies properly.").

[5] Step 1 requires the inmate to present an administrative grievance at his unit within fifteen days from the date of the complained-of incident. *Johnson v. Johnson*, 385 F.3d 503, 515 (5th Cir. 2004). The inmate should then receive a response from the unit official, and if unsatisfied with the response, the inmate has fifteen days to appeal by filing a Step 2 grievance, which is handled at the state level. *Id.*

(1) Captain Hunt and Lieutenant Salinas.

Captain Hunt and Lieutenant Salinas argue that Plaintiff failed to exhaust his administrative remedies against them because he failed to identify them by name on his Step 1 grievance. In his Step 1 grievance, Plaintiff successfully names all of the defendants complained of herein, except for Captain Hunt and Lieutenant Salinas whom he claims refused to give their names. (D.E. 52-2). At the *Spears* hearing, Plaintiff testified that Lieutenant Salinas was one of the officers who saw him fall outside and roughly got him on the gurney while making disparaging comments. He claimed that Captain Hunt observed the conduct of the other officers in the infirmary when they forced Plaintiff to roll off the gurney and Sergeant Delote run over his leg with the gurney. Interestingly, although a UOF was called when Plaintiff pushed Nurse Moron's hand away when she applied the ammonia inhalant in the infirmary, there is no paper work signed by a supervisor, such as Hunt or Salinas, and the matter appears to have been abandoned. Defendants offer no explanation of what happened in regards to the UOF.

Plaintiff's Step 1 grievance clearly lists all defendants and adds "and other staff who failed to give their names." Between this grievance, the grievance investigation, and the UOF, prison officials would have had adequate notice that Plaintiff was challenging the conduct of all individuals who dealt with him from the time he fell outside to the time a UOF was called against him in the infirmary.

After his release from the hospital, Plaintiff filed a Step 1 grievance on September 11, 2013, and identified by name all defendants except Hunt and Salinas who he claimed

were present but had refused to give their names. (D.E. 52-2, pp. 5-6). A grievance investigation was opened which, quite frankly, is filled with miscommunications and errors. For example, Nurse "Moron" is identified as Nurse "Moreno," and vice-versa, with different spellings of her first name. It is never confirmed whether or not she worked on the date at question, although Nurse Sonia Moron is identified as working on both August 28, 2013, and August 29, 2013. (*See* D.E. 52-2, p. 25, 19-23).

Defendants did not offer affidavits from Hunt or Salinas that they were not working that day, or stating that they did not have any involvement with Plaintiff on August 28, 2013. Plaintiff was in terrible pain and did his best to identify those he believed were deliberately indifference to his serious medical needs, and he described the situation in detail. His Step 1 grievance was adequate notice to prison officials of his claims.

(2) Sergeant Trevino and Officer Bunch.

Sergeant Trevino and Officer Bunch also claim that Plaintiff failed to exhaust his claims against them and move for summary judgment to dismiss. (D.E. 52). These officers claim that Plaintiff's allegations against them were to "vague" to adequately put them on notice.

In *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004), the Fifth Circuit discussed how much detail is required in a grievance for purposes of effectively exhausting administrative remedies. The Court noted that one of the purposes of the exhaustion requirement is to give officials "'time and opportunity to address complaints internally.'" *Johnson*, 385 F.3d at 517 (citations omitted). A grievance "should be considered

sufficient to the extent that the grievance gives officials a fair opportunity to address the problem that will later form the basis of the lawsuit." *Id.* Further, the nature of the complaint will influence how much detail is necessary. *Id.* For example, a complaint about a correctional officer would identify a specific person, whereas a complaint about a prison condition, such as vermin in a cell or that commissary costs are too high, might not identify any individual. *Id.* Finally, the *Johnson* Court noted that the intent of the grievance procedure is not to provide personal notice to a particular official that he may be sued; the grievance is not the summons and complaint that initiates adversarial litigation. *Id.*, 385 F.3d at 522 (citing *Brown v. Sikes,* 385 F.3d 503, 522 (11th Cir. 2000)).

Based on the holding in *Johnson*, defendants' summary judgment argument fails as to Plaintiff's claims. In response to Plaintiff's Step 1 grievance, an investigation was opened. The Step 1 grievance was denied on December 2, 2013, but the Step 2 investigation continued well into 2014. (*See* D.E. 52-2, p. 41, 52-2, p. 43, D.E. 52-2, p. 45). As time went on, the officers' statements became more inconsistent. For example, in his September 13, 2013 statement, Sergeant Trevino states:

> I Sergeant J. Trevino did not act indifferent with offender Richardson, Brandon 740705. I Sergeant Trevino did not make any sarcastic remarks. I Sergeant Trevino did not mistreat said offender.

(D.E. 52-2, p. 12).

Four months later, on January 15, 2014, Sergeant Trevino wrote:

> On 8/29/13 I Sergeant J Trevino was assigned to Bee County hospital. I Sergeant Trevino have no knowledge of their [sic] incident.

(D.E. 52-2, p. 45).

That is, Sergeant Trevino went from denying that he was deliberately indifferent to denying that he was even present.

Defendant Bunch was able to respond to the charges against her. (*See* D.E. 52-2, pp. 10, 41). She offers no evidence to suggest that she did not understand the charges against her. She admits that she ordered Plaintiff off the gurney and denies that Sergeant Belote ran the gurney over his leg. Plaintiff's claims against her were clear and concise.

The two-year internal investigation of this case suggests that defendants were not forthright with their testimony or with investigators. For example, Investigator Nash had to make repeated requests to Officer Valdez, Sergeant Belote and Sergeant Trevino to address Plaintiff's allegations that Officer Bunch called him "a baby." (D.E. 52-2, p. 51). In addition, there was a discrepancy that some officers stated Plaintiff was on a gurney when taken to medical, but Sergeant Belote testified that Plaintiff walked. *Id.* Investigator Nash also raised the issue of a UOF being called but none being processed. *Id.* Indeed, Plaintiff's file contains an undated memorandum to George Crippen with TDCJ Health Services identifying several issues of concern that his case posed with various inconsistencies, mistakes, and the outright refusal of officers to provide complete statements to investigators. (*See* D.E. 52-3, p. 25).

Plaintiff's Step 1 grievance adequately placed prison officials on notice of the basis of his claims, and he exhausted the grievance process by filing a Step 2 appeal. (D.E. 52-2, pp. 3-4). Thus, it is respectfully recommended that Defendants' motion for

summary judgment to dismiss Plaintiff's deliberate indifference to his serious medical needs claims for failure to exhaust administrative remedies be denied as the summary judgment evidence establishes these claims are in fact exhausted.

VI. RECOMMENDATION.

Based on the foregoing, it is respectfully recommended that the Court deny defendants' motion for summary judgment for failure to exhaust administrative remedies (D.E. 52) as Plaintiff successfully exhausted his claims against the named defendants.

Respectfully submitted this 7th day of June, 2016.

B. JANICE ELLINGTON
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within FOURTEEN (14) DAYS after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1), General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within FOURTEEN (14) DAYS after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United* Servs. *Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

BRANDON RICHARDSON,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL NO. 2:14-CV-464
	§	
BRAD LIVINGSTON, *et al*,	§	
	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION

Plaintiff, a prisoner proceeding *pro se* and *in forma pauperis*, filed this civil rights complaint pursuant to 42 U.S.C. § 1983, alleging that his rights under the Eighth Amendment to the United States Constitution were violated by multiple defendants while he was incarcerated at the McConnell Unit of the Texas Department of Criminal Justice—Correctional Institutions Division (TDCJ-CID). The motion for summary judgment under consideration (D.E. 58) concerns only one of the defendants, Refugia Campos, a licensed vocational nurse at the Unit. Responses and replies to the motion have been filed (D.E. 63, 65, 69). For the reasons stated herein, it is respectfully recommended that Defendant Campos's motion for summary judgment be denied.

JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. § 1331 and venue is proper in this court because the actions about which plaintiff complains occurred in Bee County, Texas.

BACKGROUND

The following recitation of facts is taken from Plaintiff's complaint and from his testimony at the Spears hearing held on January 27, 2015.[1] Plaintiff has suffered from a left inguinal hernia for many years. On August 29, 2013 the hernia was causing Plaintiff severe pain and he collapsed on the sidewalk in front of the chow hall, which is located less than fifty yards from the prison infirmary. A sergeant called for medical assistance. Defendant Campos, a licensed vocational nurse, and Sonia Moron, a registered nurse,[2] responded with medical equipment and a gurney. The nurses told Plaintiff to stand up, but he could not comply because he was in pain. Nurse Moron held an ammonia inhalant under his nose, prompting Plaintiff to tell the officers and nurses that he was conscious, but he could not move because of the severe pain he was experiencing.

The correctional officers, also named as defendants by Plaintiff, assisted Plaintiff to his feet and then dragged him to the gurney. Plaintiff was in excruciating pain and the officers laughed at him. Plaintiff also was dizzy and nauseous from the ammonia inhalant and felt like he was going to pass out. The officers roughly placed him on the gurney and took him to the infirmary, all while cracking jokes at his expense.

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[1] *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985); *see also Eason v. Holt*, 73 F.3d 600, 603 (5th Cir. 1996)(stating that testimony given at a Spears hearing is incorporated into the pleadings).

[2] The second nurse was identified as Sonia Moron, but also is sometimes referred to as "Moreno" in the pleadings. Plaintiff named her as a defendant in this lawsuit, but has been unable to serve her because she terminated her employment with TDCJ.

At the infirmary, an officer ordered Plaintiff to get off the gurney and Plaintiff replied that he could not do so because of the pain he was suffering. Defendant Campos and Nurse Moron yelled at him and told him to get up and move to a chair. Plaintiff tried to get off the gurney, but fell to the floor. The correctional officers threatened to spray Plaintiff with chemical agents if he did not get up. Plaintiff stayed on the ground, hoping that another officer in the area would see what was happening and help him.

One of the correctional officers ran the gurney over Petitioner's leg, injuring it. Plaintiff passed out and then awoke to a correctional officer kicking him in the back and side. Plaintiff screamed for help and Nurse Moron bent down and administered the ammonia inhalant. Plaintiff tried to turn his head because the odor made him nauseous, but she pushed them into his face. Plaintiff pushed the nurse's hand away and the correctional officers pounced on him and beat him as they forced his arms back and put him in restraints. While Plaintiff was restrained and lying face down on his stomach, one of the correction officers dropped both knees into Plaintiff's back.

At that point Plaintiff was placed on a stretcher and taken to a solitary cell without a hearing. The cell was extremely hot and filthy and had no bedding so Plaintiff had to lie on a roach-infested floor. A short while later he was asked to give a statement related to his alleged assault of Nurse Moron.

At the beginning of the new work shift, Plaintiff asked to be taken to the infirmary. He spent several more hours in the cell, suffering acute and intense pain, until he was taken to the infirmary. Once there, he was seen by a nurse practitioner who

examined his hernia and ordered that he be taken by ambulance to the hospital. Plaintiff had surgery to repair the hernia the same day and spent two days in the hospital.

Plaintiff was not placed in pre-hearing detention when he was returned to the McConnell Unit. Nor was he ever subjected to disciplinary proceedings regarding his alleged assault of Nurse Campos. In addition, there is no record regarding the use of force against Plaintiff while he was in the infirmary.

Plaintiff asserts that Defendant Campos was deliberately indifferent to his serious medical needs in violation of his Eighth Amendment right to be free of cruel and unusual punishment. In Campos's motion for summary judgment, she argues that she is entitled to qualified immunity on Plaintiff's claims. In addition she asserts that there are no fact issues precluding a finding on summary judgment that she was not deliberately indifferent to Plaintiff's serious medical need.

APPLICABLE LAW

A. Summary Judgment Standard

Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must examine "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." *Id.* at 251-52. In making this determination, the Court must consider the record as a whole by reviewing all pleadings, depositions, affidavits and admissions on

file, and drawing all justifiable inferences in favor of the party opposing the motion. *Caboni v. Gen. Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002). The Court may not weigh the evidence, or evaluate the credibility of witnesses. *Id.*

Affidavits must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. Fed. R. Civ. P. 56(c)(4). *See also Cormier v. Pennzoil Exploration & Prod. Co.*, 969 F.2d 1559, 1561 (5th Cir. 1992)(per curiam) (refusing to consider affidavits that relied on hearsay statements); *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987)(per curiam) (stating that courts cannot consider hearsay evidence in affidavits and depositions). Unauthenticated and unverified documents do not constitute proper summary judgment evidence. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994)(per curiam).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party demonstrates an absence of evidence supporting the nonmoving party's case, then the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To sustain this burden, the nonmoving party cannot rest on the mere allegations of the pleadings. Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 248. "After the nonmovant has been given an opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be

granted." *Caboni*, 278 F.3d at 451. "If reasonable minds could differ as to the import of the evidence . . . a verdict should not be directed." *Anderson*, 477 U.S. at 250-51.

The usual summary judgment burden of proof is altered in the case of a qualified immunity defense. *See Milchalik v. Hermann*, 422 F.3d 252, 262 (5th Cir. 2005). When a government official has pled the defense of qualified immunity, the burden is on the plaintiff to establish that the official's conduct violated clearly established law. *Id.* Plaintiff cannot rest on his pleadings; instead, he must show a genuine issue of material fact concerning the reasonableness of the official's conduct. *Bazen v. Hidalgo County*, 246 F.3d 481, 490 (5th Cir. 2001).

B. Qualified Immunity

The doctrine of qualified immunity affords protection against individual liability for civil damages to officials insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). When a defendant invokes the defense of qualified immunity, the burden shifts to the plaintiff to demonstrate the inapplicability of the defense. *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002)(en banc). To discharge this burden, a plaintiff must satisfy a two-prong test. *Atteberry,* 430 F.3d at 251-252. First he must claim that the defendant committed a constitutional violation under current law. *Id.* (citation omitted). Second, he must claim that the defendant's actions were objectively unreasonable in light of the law that was clearly established at the time of the actions about which he complained. *Id.* While it will often be appropriate

to conduct the qualified immunity analysis by first determining whether a constitutional violation occurred and then determining whether the constitutional right was clearly established, that ordering of the analytical steps is no longer mandatory. *Pearson*, 555 U.S. at 236 (receding from *Saucier v. Katz*, 533 U.S. 194 (2001)).

C. Eighth Amendment Violation

Prisoners are protected from cruel and unusual punishment by the Eighth Amendment. Although the Eighth Amendment does not mandate a certain level of medical care for prisoners, the Supreme Court has found that it imposes a duty on prison officials to ensure that inmates receive adequate medical care. *Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006)(internal citations omitted).

Prison officials are liable for failure to provide medical treatment if they are deliberately indifferent to a prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97 (1976). Deliberate indifference may be exhibited by prison doctors in their response to prisoners' needs, but it may also be shown when prison officials have denied an inmate prescribed treatment or have denied him access to medical personnel capable of evaluating the need for treatment. *Id.*, 429 U.S. at 104-05. A prison official acts with deliberate indifference if she knows that an inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 842, 847 (1994). The official must both be aware of facts from which an inference of substantial risk of serious harm can be drawn and also draw the inference. *Easter*, 467 F.3d at 463. A prison official's knowledge of substantial risk may be inferred if the risk was obvious. *Id.*

Deliberate indifference is an extremely high standard to meet. A plaintiff must show that the official refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in similar conduct that would clearly evince a wanton disregard for his serious medical needs. *Domino v. Texas Dept. of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001)(citations omitted). Although inadequate medical treatment may, at some point, rise to the level of a constitutional violation, malpractice or negligent care does not. *Stewart v. Murphy*, 174 F.3d 530, 534 (5th Cir. 1999)(citations omitted). Deliberate indifference encompasses only unnecessary and wanton infliction of pain repugnant to the conscience of mankind. *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997)(citations omitted). "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle*, 429 U.S. at 106.

DISCUSSION

Defendant Campos did not submit an affidavit regarding her involvement in the incident involving Plaintiff on August 29, 2013, but submitted an affidavit prepared by Martha Blackwell, R.N., a facility nurse manager at the McConnell Unit (Aff. of Martha Blackwell, R.N., Ex. A to Mot. for Sum. Jmt.; D.E. 58-1 at pp. 2-6). To the extent Blackwell describes facts relating to the incident, her testimony is hearsay because she was not present and it will not be considered. *Cormier*, 969 F.2d at 1561. Blackwell's affidavit will be considered for her description of the role and authority of a licensed professional nurse in TDCJ-CID.

A clinic note made at 5:08 a.m. on August 29, 2013 and signed by Nurse Moron shows that Plaintiff had fallen on the ground outside the chow hall complaining of hernia

pain (Ex. B, p. 16 to Mot. for Sum. Jmt.; D.E. 58-2 at p. 17, filed under seal). Medical and security personnel responded with medical equipment and a gurney. After use of an ammonia inhalant, Plaintiff began to get up and was placed on a gurney and transported to the medical department. When they arrived, Plaintiff was asked to get off the gurney and sit in a chair for a medical assessment, but refused. The gurney was lowered and Plaintiff rolled himself off the gurney and onto the floor. Plaintiff again was asked to get up and sit in the chair but was unresponsive. After officers applied several verbal and physical stimuli in an effort to have Plaintiff get up off the floor, Plaintiff continued to be unresponsive and an ammonia inhalant again was used. At that time Plaintiff shoved Nurse Moron on the right side of her knee. Correctional officers intervened and the medical visit was terminated (Ex. B, p. 17 to Mot. for Sum. Jmt.; D.E. 58-2 at p. 18, filed under seal).

Defendant Campos prepared and signed a pre-segregation note on August 29, 2013. The note appears to have been begun at 5:25 a.m. and finished at 5:32 a.m. (Ex. B, pp. 18-20 to Mot. for Sum. Jmt.; D.E. 58-2 at pp. 19-21, filed under seal). The note states that Plaintiff was being seen for a pre-segregation health evaluation after assaulting the charge nurse and that he was escorted to 11 Building on a stretcher. Campos noted that Plaintiff had no chronic conditions or illnesses, no lacerations, contusions or bruises, no abdominal pain or genitourinary or flank pain; that he was not dizzy and had normal speech. She described his emotional state as social and his upper and lower extremities as normal. She checked a statement that "No contraindications for placement in

segregation were identified." She also indicated that Plaintiff was not to be referred for further evaluation (Ex. B, pp. 19-20 to Mot. for Sum. Jmt.; D.E. 58-2 at pp. 20-21).

A clinic note signed by Campos the same morning at 5:56 a.m. indicates that at 5:20 a.m. Campos called Echavarry, the on-call physician's assistant, and reported that Plaintiff was complaining of a unilateral inguinal hernia that had been an ongoing problem since 2007, according to review of his chart. It was noted that Plaintiff was not wearing his scrotal support. In addition, it was noted that Plaintiff was uncooperative with the assessment (Ex. B, pp. 14-15 to Mot. for Sum. Jmt.; D.E. 58-2 at pp. 15-16, filed under seal). The note indicates that Echavarry gave orders over the telephone to medically clear Plaintiff and release him to security to be housed in 11-Building. Plaintiff was to be escorted back to the medical department when a medical provider was available for evaluation of the hernia (Ex. B, p. 15 to Mot. for Sum. Jmt.; D.E. 58-2 at p. 16). Campos's shift ended at 6:15 that same morning (Ex. D, p. 3 to Mot. for Sum. Jmt.; D.E. 58-4 at p. 4).

The pre-segregation note was signed the next day by Erick Echaverry, a Physician's Assistant and by Nurse Moron (Ex. B, p. 20 to Mot. for Sum. Jmt.; D.E. 58-2 at p. 21). Echaverry stated in an affidavit that Campos contacted him regarding her assessment of Plaintiff and he gave orders over the telephone for Plaintiff to be medically cleared, released to security and escorted to medical when a medical provider was available on the unit for evaluation of the hernia (Aff. of Erick Echaverry, Ex. B to Reply to Response to Mot. for Sum. Jmt., D.E. 66).

Additional records show that Plaintiff was returned to the clinic for follow-up approximately six hours later that same day (Ex. B, pp. 2-3 to Mot. for Sum. Jmt., D.E. 58-2 at pp. 3-4, filed under seal). He reported to the person who examined him that he had severe pain in his inguinal area and that his hernia had enlarged "this morning" and he could not get it to go back in. Plaintiff was observed to have a "[v]ery large inguinal hernia, veins bulging, extremely tender to touch, appears loops of bowel in testicles," suspected to be a strangulated inguinal hernia (*Id.*). This information was reported to a nurse practitioner, who recommended that Plaintiff be transferred by ambulance to the hospital for evaluation. Plaintiff was given IV fluids, Robaxin, and Tylenol #3 and transported to the hospital (*Id.*). He had surgery to repair the hernia the same day (Ex. B. to Mot. for Sum. Jmt., pp. 7-8; D.E. 58-2 at pp. 8-9, filed under seal).

Campos argues that based on the summary judgment evidence, she did not violate Plaintiff's constitutional rights and that even if she did, her actions were objectively reasonable. According to Nurse Blackwell, Plaintiff, as a licensed vocational nurse, was not authorized to provide a medical diagnosis or prescribe corrective measures. She could not have ordered or referred Plaintiff for hernia repair surgery or any other emergent care treatment. She made the on-call provider aware of Plaintiff's complaints of an inguinal hernia and sought orders from the provider. Campos also made the charge nurse aware of the situation and noted that the on-coming charge nurse would be made aware of the situation. Plaintiff later was returned to the medical department for evaluation of a provider in accordance with the earlier orders and subsequently referred for surgery (Blackwell Aff., Ex. A to Mot. for Sum. Jmt.; D.E. 58-1 at pp. 2-6).

When the evidence is examined in the light most favorable to Plaintiff, it reveals fact issues which preclude summary judgment on both the question of whether Campos violated Plaintiff's Eighth Amendment right and if so, whether her actions were objectively reasonable. Plaintiff asserts that after he initially fell outside the chow hall, he passed out from pain caused by the hernia and was unable to get up by himself. Notes by Nurse Moron indicate that Plaintiff was unresponsive and needed help to get up off the floor and onto the gurney. After they arrived at the medical department, Plaintiff asserts that he could not get himself off the gurney and when he tried, he fell on the floor and passed out again. Moron's notes indicate that the gurney was put in a low position and Plaintiff rolled himself off of it and onto the floor and again became unresponsive. When the ammonia stimulant was used, Plaintiff pushed Nurse Moron and security intervened. Plaintiff was taken by gurney to a solitary cell.

Despite both Plaintiff's account and Nurse Moron's notes that Plaintiff was unresponsive and could not stand up or walk without assistance because of pain caused by the hernia, none of this information is reflected in Defendant Campos's notes. When Campos completed the pre-segregation note she did not indicate that Plaintiff was having any trouble walking but checked that both his upper and lower extremities were normal. In addition, she checked that his emotional state was social, that he had normal speech, and that he was not complaining about abdominal or genitourinary pain (D.E. 58-2 at pp. 19-21). Under "Description," Campos noted "Nursing Level 1 Complete Visit and under "Diagnosis" she wrote "physical examination, pre-segregation/lock-up physical exam."

Her comments are significantly at odds with Plaintiff's and Nurse Moron's descriptions of Plaintiff that morning.

In addition, despite Campos's representation that she examined Plaintiff, the record does not show that she took his vital signs,[3] or observed his hernia at all, although he complained of pain sufficient to cause him to collapse and become non-responsive. While Campos might not have been authorized to diagnose Plaintiff or prescribe corrective measures, she was responsible for providing accurate information to the on-call provider who would make the determination about what level of care Plaintiff needed. Deliberate indifference can be manifested by prison personnel who intentionally deny or delay access to medical care. *Gamble*, 429 U.S. at 104-105. *See also Monceaux v. White*, 266 Fed. Appx. 362, 366 (5th Cir. 2008)(fact issues precluded summary judgment when evidence showed that only a doctor could order certain medical treatment or refer a prisoner for transfer to a hospital and the nurses did not notify the doctor of a prisoner's condition, in violation of a standing order at the prison) and *Easter*, 467 F.3d at 463 (nurse who knew inmate had history of heart disease was subjectively aware of a risk to his health and ignored it when he complained of chest pain and she sent him back to his cell without his prescribed nitroglycerin or any other treatment).

If a jury were presented with the evidence of Defendant Campos's notes, along with Plaintiff's testimony and Nurse Moron's notes, it could conclude that Defendant Campos ignored Plaintiff's complaints and deliberately failed to describe the severity of

[3] The vital signs listed on the form were taken the day before (D.E. 58-2 at p. 19, filed under seal).

Plaintiff's symptoms to the physician's assistant, resulting in Plaintiff not receiving urgent medical care he needed. Accordingly, fact issues preclude entry of summary judgment on the issue of whether Campos was deliberately indifferent to Plaintiff's serious medical need.

Even if a prison official violates an inmate's Eighth Amendment right to be free of cruel and unusual punishment, she may still be entitled to qualified immunity if her conduct was objectively reasonable in light of clearly established law. *Easter*, 467 F.3d at 465. The law is clearly established that a prison inmate can show an Eighth Amendment violation by demonstrating that a prison official refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in similar conduct that would clearly evince a wanton disregard for his serious medical needs. *Domino*, 239 F.3d at 756. The record in this case shows that Defendant Campos knew that Plaintiff had twice passed out from pain from an inguinal hernia that morning, but ignored his complaints, did not examine him, and failed to notify the on-call health care provider of the serious symptoms he was suffering. No reasonable prison official could have believed the conduct was lawful given the clearly established law.

For the reasons stated above, fact issues preclude a finding that Defendant Campos is entitled to qualified immunity from Plaintiff's claims. Accordingly it is recommended that her motion for summary judgment be denied.

RECOMMENDATION

Based on the foregoing, it is respectfully recommended that Defendant Campos's motion for summary judgment (D.E. 58) be DENIED. Plaintiff should be allowed to proceed on his 42 U.S.C. § 1983 cause of action against her.

Respectfully recommended this 28th day of October, 2016.

B. JANICE ELLINGTON
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within FOURTEEN (14) DAYS after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1), General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within FOURTEEN (14) DAYS after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United* Servs. *Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

CLERK OF COURT
P.O. Box 61010
HOUSTON, TEXAS 77208

www.txs.uscourts.gov

Brandon Richardson
#740705 McConnell Unit
3001 South Emily Drive
Beeville TX US 78102

Case: 2:14-cv-00464 Instrument: 51 (2 pages) pty
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1 Deodorant ~~4.50~~ 2.15
1 Coffee ~~4.50~~ 2.15
2 Anti Bacteria lotion 1.70
1 Baby Shampoo 1.25
1 AA Battery 2.75
4 Hot Chewy 3.40
2 Jalapeno chip 2.70
2 Party Mix 3.10
1 Big Bang 1.25
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

BRANDON RICHARDSON,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:14-CV-00464
	§	
BRAD LIVINGSTON, *et al*,	§	
	§	
Defendants.	§	

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION

On December 14, 2015, United States Magistrate Judge B. Janice Ellington issued her "Memorandum and Recommendation" (D.E. 45), recommending that Defendants' "Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(c)" be granted in part as to Officer Alberto Valdez and otherwise denied. The parties were provided proper notice of, and opportunity to object to, the Magistrate Judge's Memorandum and Recommendation. FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1); General Order No. 2002-13. No objections have been filed.

When no timely objection to a magistrate judge's memorandum and recommendation is filed, the district court need only satisfy itself that there is no clear error on the face of the record and accept the magistrate judge's memorandum and recommendation. *Guillory v. PPG Industries, Inc.*, 434 F.3d 303, 308 (5th Cir. 2005) (citing *Douglass v. United Services Auto Ass'n*, 79 F.3d 1415, 1420 (5th Cir. 1996)).

Having reviewed the findings of fact and conclusions of law set forth in the Magistrate Judge's Memorandum and Recommendation (D.E. 45), and all other relevant

documents in the record, and finding no clear error, the Court **ADOPTS** as its own the findings and conclusions of the Magistrate Judge. Accordingly, the motion to dismiss (D.E. 33) is **GRANTED IN PART** and Plaintiff's claims against Officer Alberto Valdez are **DISMISSED**. The motion (D.E. 33) is **DENIED IN PART** as to the remaining claims.

ORDERED this 21st day of January, 2016.

Nelva Gonzales Ramos

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

20161128-8

Brandon Richardson
#740705 McConnell Unit
3001 South Emily Drive
Beeville, TX US 78102

CLERK OF COURT
P.O. BOX 61010
HOUSTON, TEXAS 77208
http://www.txs.uscourts.gov

Date: Monday, November 28, 2016
Case Number: 2:14-cv-00464
Document Number: 75 (2 pages)
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

BRANDON RICHARDSON,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:14-CV-00464
	§	
BRAD LIVINGSTON, *et al*,	§	
	§	
Defendants.	§	

ORDER ADOPTING
MEMORANDUM AND RECOMMENDATION

On October 28, 2016, United States Magistrate Judge B. Janice Ellington issued her "Memorandum and Recommendation" (D.E. 72), recommending that Defendant Refugia Campos's motion for summary judgment (D.E. 58) be denied. The parties were provided proper notice of, and opportunity to object to, the Magistrate Judge's Memorandum and Recommendation. FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1); General Order No. 2002-13. No objections have been filed.

When no timely objection to a magistrate judge's memorandum and recommendation is filed, the district court need only satisfy itself that there is no clear error on the face of the record and accept the magistrate judge's memorandum and recommendation. *Guillory v. PPG Industries, Inc.*, 434 F.3d 303, 308 (5th Cir. 2005) (citing *Douglass v. United Services Auto Ass'n*, 79 F.3d 1415, 1420 (5th Cir. 1996)).

Having reviewed the findings of fact and conclusions of law set forth in the Magistrate Judge's Memorandum and Recommendation (D.E. 72), and all other relevant documents in the record, and finding no clear error, the Court **ADOPTS** as its own the