APPENDIX

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 30, 2023
Lyle W. Cayce
Clerk

No. 21-20200

KEVION ROGERS,

Plaintiff—Appellant,

versus

JEFFREY JARRETT; JEREMY BRIDGES; TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-2330

Before RICHMAN, *Chief Judge*, and WIENER and WILLETT, *Circuit Judges*.

DON R. WILLETT, *Circuit Judge*:

A trusted prison inmate was working unsupervised in a hog barn when the ceiling collapsed, striking him in the head. He told the prison agricultural specialist that he needed medical attention. But the specialist thought the inmate looked no worse for wear and ordered him back to work. A short while later, the inmate asked another prison staffer for medical attention. The staffer radioed a supervisor. Based on the staffer's report, the supervisor, too, thought nothing serious had happened and did not immediately grant the

request. The inmate's condition later worsened. He was sent to the hospital and diagnosed with a traumatic brain injury. The district court granted summary judgment to Defendants based on qualified immunity. For the reasons below, we AFFIRM.

I

Kevion Rogers was a trusted inmate. Prison staff let Rogers work unsupervised and outside the prison's security fence. Rogers's daily job was to help take care of the prison's hogs. One day Rogers went into one of the prison's hog barns looking for a powder used to keep baby hogs healthy. As he was leaving, part of the barn's ceiling collapsed and hit him on the head. Rogers blacked out.

After he came to, another inmate took Rogers to see the prison's staff agricultural specialist, Jeffrey Jarrett. Rogers walked normally into Jarrett's office. And though Rogers "had dust on him," his only visible injury was a scraped knee. An agitated Rogers demanded "to go to the infirmary." But from Jarrett's perspective, Rogers "looked fine." Rogers didn't "look hurt," and spoke without a slur. Jarrett told Rogers to keep looking for the powder. Rogers walked normally out of the office. He did not see Jarrett again that morning. Jarrett's job responsibilities took him away from the prison to another unit.

Rogers tried to go on about his business. But he was "lightheaded" and had to sit down. Other inmates tried to keep him awake as he drifted "in and out of consciousness." Soon after another prison staffer arrived to get the inmates ready for lunch. Rogers told the staffer that "the ceiling collapsed on [his] head" and showed the staffer the "debris." Rogers again asked for medical attention. The staffer radioed Jarrett's supervisor, Jeremy Bridges, and informed him "that the ceiling had fallen on [Rogers's] head and that [Rogers] had sustained a head injury." Bridges radioed back to take Rogers

"back to [his] bunk" so Bridges could "take a look at [him] later." But Rogers objected—he still wanted "to go eat lunch." Rogers's objection made Bridges think whatever injuries Rogers had were not "serious." Bridges radioed back that going to lunch was fine. He'd be out to check on Rogers "soon."

For whatever reason though, Rogers was still brought back to his bunk. By the time he reached his dormitory his condition had begun to deteriorate. His head and eyes had begun to swell, his face was bruising, and he was showing signs of respiratory distress. Prison staff at the dormitory thought this was "abnormal," and so Rogers was redirected to the prison's administrative building. He collapsed on the way there, began to "seize violently," and started "vomiting." Rogers "lost consciousness." Within minutes prison staff at the administrative building summoned medical assistance. Emergency medical services evacuated Rogers to a nearby hospital by helicopter. Hospital staff diagnosed Rogers with a "traumatic brain injury; no hemorrhage."[1]

Rogers sued Jarrett, Bridges, and the Texas Department of Criminal Justice in Texas state court. Under 42 U.S.C. § 1983, Rogers alleged that prison staff violated his Eighth and Fourteenth Amendment rights by acting with deliberate indifference towards him. Under the Texas Tort Claims Act, Rogers alleged premises-liability claims. Defendants removed the case to federal court and moved for summary judgment on all claims. The district court granted summary judgment to Defendants on Rogers's § 1983 claims, declined to exercise supplemental jurisdiction over his TTCA claims, and remanded the case to state court. Rogers timely appealed. He argues that

[1] Hospital staff released Rogers back to the prison the next day with prescriptions for pain and anti-nausea medication. The district court found "no evidence in the record of subsequent problems or complications."

Jarrett and Bridges were deliberately indifferent towards his serious medical needs and thus not entitled to qualified immunity.[2]

II

We review summary judgment de novo.[3] Courts may grant summary judgment on an issue only when "no genuine dispute as to any material fact" exists "and the movant is entitled to judgment as a matter of law."[4] A fact dispute is "genuine" if "a reasonable jury could return a verdict for [the nonmovant] based on the evidence."[5] "[W]e must view all evidence and draw all justifiable inferences in favor of [Rogers], the nonmovant."[6] Still, "[c]onclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation" do not count for raising a genuine fact dispute.[7]

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[2] Rogers was represented by counsel in the district court and here. He also argued in the district court that Defendants were deliberately indifferent towards his safety by having him work in the hog barn. He did not raise that theory in his opening brief. Likewise, Rogers raised no claims against TDCJ in his opening brief. He also did not raise the district court's refusal to exercise supplemental jurisdiction. It is not our role to "raise and discuss legal issues that [a party] has failed to assert" on appeal. *Brinkmann v. Dall. Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). So Rogers has abandoned those issues and arguments. *Id.*

[3] *Batiste v. Lewis*, 976 F.3d 493, 500 (5th Cir. 2020).

[4] *Id.* (quoting *Rogers v. Bromac Title Servs., L.L.C.*, 755 F.3d 347, 350 (5th Cir. 2014)).

[5] *Coleman v. BP Expl. & Prod., Inc.*, 19 F.4th 720, 726 (5th Cir. 2021).

[6] *Id.*

[7] *Id.* (quoting *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002)).

III

Rogers contends that the district court improperly granted Jarrett and Bridges qualified immunity. We have explained before that plaintiffs bear the "burden" to "demonstrate the inapplicability of the defense."[8] And Rogers had to meet that burden for *each* defendant.[9] That means Rogers had to (1) raise a fact dispute on whether his constitutional rights were violated by the defendants' individual conduct, and (2) show those rights were "clearly established at the time of the violation."[10] On this record, Rogers failed to meet either prong.

A

Rogers contends that he raised a fact dispute on a constitutional violation. He argues that both Jarrett and Bridges acted with deliberate indifference towards his serious medical needs, violating his Eighth Amendment rights in the process. But "[d]eliberate indifference is an extremely high standard to meet."[11] As the Supreme Court has explained, Rogers needed to raise a fact dispute on whether Jarrett and Bridges were each "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," and actually "dr[ew] the inference."[12] And *serious* harm isn't just any harm. Rogers's medical need

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[8] *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc) (per curiam).

[9] *See Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983) ("Personal involvement is an essential element of a civil rights cause of action.").

[10] *See Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010).

[11] *Domino v. Tex. Dep't of Crim. Just.*, 239 F.3d 752, 756 (5th Cir. 2001).

[12] *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *see also Stewart v. Murphy*, 174 F.3d 530, 534 (5th Cir. 1999) (explaining that prison officials act with deliberate indifference only

had to be "so apparent that even laymen would recognize that care is required."[13] The district court found "no evidence that would permit a jury to infer that Jarrett and Bridges had subjective knowledge of the severity of Rogers's condition." We agree with the district court.

A reasonable jury could not conclude on this record that either Jarrett or Bridges actually inferred that Rogers was at substantial risk of serious harm. As the district court noted, the record supports that both Jarrett and Bridges knew that Rogers had been hit in the head. But as recounted above, Jarrett did not perceive any apparent injury to Rogers other than a scraped knee. From Jarrett's perspective, Rogers was "look[ing] alright" and "[didn't] look hurt." Rogers "had dust on him," but did not have visible injuries, did not slur his speech, and walked normally into and out of Jarrett's office. The same goes for Bridges. All he knew about Rogers's injuries was what he'd been told over the radio: that Rogers "had sustained a head injury" after a ceiling collapse. But Bridges testified that he did not think it was a particularly severe injury since Rogers had requested "to go eat lunch" while he waited for Bridges to come see him. Indeed, Rogers did not develop severe symptoms—seizures, vomiting, and loss of consciousness—until later on. And once he did, prison staff rendered medical aid within minutes.

Rogers disagrees. He argues that fact disputes over what happened preclude summary judgment; that the district court misapplied the deliberate-indifference standard; and that Supreme Court and our caselaw compel a contrary conclusion. We are unconvinced.

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when they "*know*[] *of and disregard*[] an excessive risk to inmate health or safety" (quoting *Farmer*, 429 U.S. at 837)).

[13] *See Gobert v. Caldwell*, 463 F.3d 339, 345 n.12 (5th Cir. 2006).

First, Rogers argues "that there is a genuine issue of material fact in dispute as to *what actually happened* on the morning of the incident," precluding summary judgment under our decisions. But the district court analyzed Rogers's claim under his version of events. And Jarrett and Bridges do not dispute what they knew when. Rather, the only dispute on appeal is what *inferences* Jarrett and Bridges drew from what they knew. Because the inferences Rogers asks us to make are speculative, this argument fails.[14]

Second, Rogers argues that the district court misapplied the deliberate-indifference standard. In Rogers's view, "the ultimate question" that his claim turns on is "was [he] exposed to a 'substantial risk of serious harm'"? But that misstates the standard. It is not enough for Rogers to have raised a fact dispute on whether Jarrett and Bridges "actually drew the inference that [a] *potential* for harm existed," as Rogers argues. The Supreme Court was clear in *Farmer v. Brennan*: "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."[15] We have likewise been clear: "[L]iability attaches only if [officials] actually knew—not merely should have known—about the risk."[16] Bottom line: Mere negligence is not enough.

Third, Rogers misreads Supreme Court and circuit caselaw. "[T]he takeaway" from the Supreme Court's decision in *Estelle v. Gamble*[17] is not that nonphysician prison staff are "expected to allow prisoners to consult medical experts because they themselves are not qualified to diagnose or

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[14] *Coleman*, 19 F.4th at 726.

[15] 511 U.S. at 838.

[16] *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 528 (5th Cir. 1999).

[17] 429 U.S. 97 (1976).

treat . . . medical condition[s]," as Rogers suggests. The takeaway is that courts must "separately consider" the allegations against physician and nonphysician staff alike when deciding deliberate-indifference claims.[18] And our decision in *Austin v. Johnson*[19] adds little, if anything, to support Rogers's claims. Rogers admits that his case is "unlike" *Austin* because neither Jarrett nor Bridges "failed to get medical treatment for [him] after [seeing] his conditions worsening."[20]

B

In sum, Rogers failed to raise a fact dispute over whether Jarrett and Bridges acted with deliberate indifference. But even if he had, he'd still need to show that his rights were "clearly established at the time of the violation."[21] As we have explained many times, that takes showing that "the violative nature of *particular* conduct is clearly established."[22] It just isn't enough to identify a right as "a broad general proposition."[23] The district court did not address qualified immunity's second step. Jarrett and Bridges argue, though, that even assuming a violation, the law was not clearly established under this standard. We agree with Jarrett and Bridges.

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[18] *See id.* at 108 ("The Court of Appeals focused primarily on the alleged actions of the doctors, and did not separately consider whether the allegations against the [nonphysician defendants] stated a cause of action.").

[19] 328 F.3d 204 (5th Cir. 2003).

[20] *See id.* at 210 (holding that "failure to call an ambulance for almost two hours while [a minor] lay unconscious and vomiting" after an afternoon of forced exercise "rises to the level of deliberate indifference").

[21] *Brown*, 623 F.3d at 253.

[22] *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

[23] *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

In barely half a page of briefing Rogers argues that the Supreme Court's decision in *Estelle* "clearly established [the] law govern[ing] the substance of this entire dispute." But the only right Rogers identifies as being violated was his right to be free from deliberate indifference towards his serious medical needs. That generalized proposition of law is not enough. The Supreme Court has articulated an exacting standard. Rogers needed to point to "a case or body of relevant case law in which an officer acting under similar circumstances was held to have violated the Constitution."[24] And *Estelle* just isn't that case. The Supreme Court *reversed* us in *Estelle* that the doctors had acted with deliberate indifference towards the prisoner.[25] And on remand, we held that the nonphysician prison staff likewise didn't act with deliberate indifference.[26] Therefore, we cannot agree with Rogers that he has shown that Jarrett and Bridges violated clearly established law.

For the first time at oral argument, though, Rogers's counsel argued that our recent decision in *Sims v. Griffin*[27] supports that Jarrett and Bridges violated clearly established law. "[W]e cannot and will not consider arguments raised for the first time at oral argument."[28] Under the Rules of Appellate Procedure, Counsel should have advised us of any "pertinent and significant authorities" that had come to his attention after briefing had concluded "*by letter*."[29] But even had Rogers's counsel filed that letter, *Sims* is not the helpful precedent he thinks it is.

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[24] *Batyukova v. Doege*, 994 F.3d 717, 726 (5th Cir. 2021) (cleaned up).

[25] 429 U.S. at 107–08.

[26] 554 F.2d 653, 653–54 (5th Cir. 1977) (per curiam).

[27] 35 F.4th 945 (5th Cir. 2022).

[28] *Jackson v. Gautreaux*, 3 F.4th 182, 188 n.* (5th Cir. 2021).

[29] *See* FED. R. APP. P. 28(j) (emphasis added).

All we recognized in *Sims* was what had already been clearly established in our circuit: "[A] prisoner can show his clearly established rights under the Eighth Amendment were violated if a prison official 'refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any *serious medical needs*.'"[30] We have held officials liable for violating that standard before, including when the record supported that they:

- "offered no treatment options to a patient with a history of cardiac problems who was experiencing severe chest pains;"[31]
- "knew [a prisoner] had swallowed a bag full of drugs, vomited multiple times, screamed for help, pleaded to go to the hospital, and had steadily deteriorated since his arrival at the jail;"[32] and
- personally witnessed a prisoner's head being struck "repeatedly," causing him to go "unconscious."[33]

Rogers, though, would have us read these cases as clearly establishing that *any* report of *any* strike to a prisoner's head is enough to trigger a duty for officials to seek advanced medical care for the prisoner. They do not. No reasonable official would read them that way, and so we disagree with Rogers's formulation of clearly established law.[34]

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[30] 35 F.4th at 951 (quoting *Easter v. Powell*, 467 F.3d 459, 465 (5th Cir. 2006) (per curiam)) (emphasis added).

[31] *Easter*, 467 F.3d at 465.

[32] *Sims*, 35 F.4th at 952.

[33] *Moore v. LaSalle Mgmt. Co.*, 41 F.4th 493, at 502 (5th Cir. 2022).

[34] *See Buehler v. Dear*, 27 F.4th 969, 981 (5th Cir. 2022) ("Although the plaintiff need not identify 'a case *directly* on point' in order to make such a showing, he or she must point to 'authority at a sufficiently high level of specificity to put a reasonable official on

IV

What happened to Rogers was unfortunate. Maybe it was negligent. But was it the product of deliberate indifference? Not on this record. And even if it were, these officials did not violate clearly established law on these facts. Bound by our controlling immunity precedent, we AFFIRM.

notice that his conduct is definitively unlawful.'" (quoting *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015)).

DON R. WILLETT, *Circuit Judge*, concurring:

Today's decision upholding qualified immunity is compelled by our controlling precedent. I write separately only to highlight newly published scholarship that paints the qualified-immunity doctrine as flawed—foundationally—from its inception.[1]

For more than half a century, the Supreme Court has claimed that (1) certain common-law immunities existed when § 1983 was enacted in 1871,[2] and (2) "no evidence" suggests that Congress meant to abrogate these immunities rather than incorporate them.[3] But what if there *were* such evidence? Indeed, what if the Reconstruction Congress had explicitly stated—right there in the original statutory text—that it was nullifying all common-law defenses against § 1983 actions? That is, what if Congress's literal language unequivocally negated the original interpretive premise for qualified immunity? Professor Alexander Reinert argues precisely this in his new article, *Qualified Immunity's Flawed Foundation*—that courts have been construing the wrong version of § 1983 for virtually its entire legal life.

Wait, what?

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[1] Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201 (2023) ("This Article takes aim at the roots of the doctrine—fundamental errors that have never been excavated.").

[2] *Pierson v. Ray*, 386 U.S. 547, 556–57 (1967) (tethering qualified immunity to common-law defenses that existed circa 1871, like subjective good faith). Professor William Baude has challenged this historical premise—forcefully and methodically—arguing that qualified immunity departs significantly from traditional common-law principles. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 49–60 (2018). Professor Joanna Schwartz likewise questions the doctrine's origins, contending there were no common-law immunities. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

[3] *Briscoe v. Lahue*, 460 U.S. 325, 337 (1983) ("[W]e find no evidence that Congress intended to abrogate the traditional common-law . . . immunity in § 1983 actions.").

As passed by the Reconstruction Congress, Section 1 of the Civil Rights Act of 1871 (now colloquially known as § 1983) read this way:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall*, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding,* be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .[4]

The italicized language—the "Notwithstanding Clause," as Professor Reinert calls it—explicitly displaces common-law defenses.[5] The language that Congress passed makes clear that § 1983 claims are viable notwithstanding "any such law, statute, ordinance, regulation, custom, or usage of the State to contrary." The language is unsubtle and categorical, seemingly erasing any need for unwritten, gap-filling implications, importations, or incorporations. Rights-violating state actors are liable—period—*notwithstanding* any state law to the contrary.

Then things went off the rails, quickly and stealthily. For reasons lost to history, the critical "Notwithstanding Clause" was inexplicably omitted from the first compilation of federal law in 1874.[6] The Reviser of Federal

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[4] Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871).

[5] Reinert, *supra* at 235 and n.230 (observing that "this clause meant to encompass state common law principles," noting that this understanding—that "custom or usage" was synonymous with common law—was, "after all," why the Court overruled *Swift v. Tyson*, 41 U.S. 1 (1842), in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and also citing *W. Union Tel Co. v. Call Pub. Co.*, 181 U.S. 92, 102 (1901), which in turn cites BLACK'S LAW DICTIONARY for the proposition that common law derives from "usages and customs").

[6] Reinert, *supra* at 207, 237.

Statutes made an unauthorized alteration to Congress's language. And that error was compounded when the various revised statutes were later published in the first United States Code in 1926. The Reviser's error, whether one of omission or commission, has never been corrected. Today, 152 years after Congress enlisted the federal courts to secure Americans' constitutional rights, if one were to Google "42 U.S.C. § 1983," the altered version that pops up says nothing about common-law defenses. According to Professor Reinert, that fateful, unexplained omission means that courts and scholars have never "grappled" with the Notwithstanding Clause's significance.[7]

All to say, the Supreme Court's original justification for qualified immunity—that Congress wouldn't have abrogated common-law immunities absent explicit language—is faulty because the 1871 Civil Rights Act *expressly included such language*. Those sixteen lost words, by presumably encompassing state common-law principles, undermine the doctrine's long-professed foundation and underscore that what the 1871 Congress meant for state actors who violate Americans' federal rights is not immunity, but liability—indeed, liability *notwithstanding* any state law to the contrary.[8]

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[7] *Id.* at 236, 244.

[8] Beyond excavating the long-lost text of what the Reconstruction Congress actually passed, Professor Reinert asserts a second fundamental misstep: qualified immunity is rooted in a flawed application of the checkered "Derogation Canon." This canon of statutory interpretation urges that statutes in "derogation" of the common law should be strictly construed. The Court misapplied this canon, says Professor Reinert, reading § 1983's silence regarding immunity as implicit *adoption* of common-law immunity defenses rather than *rejection* of them. *Id.* at 211 n.56 (collecting cases). Professor Reinert maintains that the Derogation Canon has always rested on shaky ground, with Justice Scalia, writing with lexicographer Bryan Garner, branding it "a relic of the courts' historical hostility to the emergence of statutory law." *Id.* at 218 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012)). Even more importantly, Reconstruction-era legislators would

These are game-changing arguments, particularly in this text-centric judicial era when jurists profess unswerving fidelity to the words Congress chose. Professor Reinert's scholarship supercharges the critique that modern immunity jurisprudence is not just *a*textual but *counter*textual. That is, the doctrine does not merely *complement* the text—it brazenly *contradicts* it.

In arguing that qualified immunity is flawed from the ground up, Professor Reinert poses a provocative question: "If a legislature enacts a statute, but no one bothers to read it, does it still have interpretive force?"[9] It seems a tall order to square the modern qualified-immunity regime with Congress's originally enacted language. But however seismic the implications of this lost-text research, "'[a]s middle-management circuit judges,' we cannot overrule the Supreme Court."[10] Only that Court can definitively grapple with § 1983's enacted text and decide whether it means what it says—and what, if anything, that means for § 1983 immunity jurisprudence.[11]

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not have understood the canon as operating to dilute § 1983 by implying common-law defenses. Why? Because since the Founding era, the Supreme Court had only used the Derogation Canon (criticized by mid-nineteenth courts and treatises for arrogating power to judges) to protect preexisting common law *rights*, never to import common law *defenses* into new remedial statutes. Reinert, *supra* at 221–28. In short, the Derogation Canon does not validly apply to defenses. The more applicable canon, around which Reconstruction-era courts *had* coalesced, was a contrary one: remedial statutes—such as § 1983—should be read broadly. *Id*. at 219, 227–28. In any event, as argued above, even if the Derogation Canon *did* apply to defenses, the as-passed language of § 1983 explicitly displaced any existing common-law immunities.

[9] *Id*. at 246.

[10] *Sims v. Griffin*, 35 F.4th 945, 951 n.17 (5th Cir. 2022) (quoting *Whole Woman's Health v. Paxton*, 978 F.3d 896, 920 (5th Cir. 2020) (Willett, J., dissenting), *rev'd en banc*, 10 F.4th 430 (5th Cir. 2021)).

[11] Not all Supreme Court Justices have overlooked the Notwithstanding Clause. In *Butz v. Economou*, the Court quoted the as-passed statutory language, including the Notwithstanding Clause, yet, in the same breath, remarked that § 1983's originally enacted

text "said nothing about immunity for state officials." 438 U.S. 478, 502–03 & n.29 (1978) (citing *Pierson v. Ray*, 386 U.S. 547 (1967), *Imbler v. Pachtman*, 424 U.S. 409 (1976), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974)). Indeed, members of the Supreme Court have often noted the Notwithstanding Clause's existence and omission from the U.S. Code. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 510 (1939); *Monroe v. Pape*, 365 U.S. 167, 228 (1961) (Harlan, J., concurring); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 203 n.15 (1970) (Brennan, J., concurring); *see also Screws v. United States*, 325 U.S. 91, 99 n.8 (1945) (quoting the originally enacted text, including the Notwithstanding Clause); *Monroe*, 365 U.S. at 181 n.27 (majority) (same); *Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572, 582 n.11 (1976) (same); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691–92 (1978) (same); *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 608 n.15 (1979) (same); *Briscoe v. LaHue*, 460 U.S. 325, 357 n.17 (1983) (Marshall, J., dissenting) (same); *Wilson v. Garcia*, 471 U.S. 261, 262 n.1 (1985) (same); *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 723 (1989) (same); *Ngiraingas v. Sanchez*, 495 U.S. 182, 188 n.8 (1990) (same).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KEVION ROGERS,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4:19-CV-2330
	§	
JEFFREY JARRETT, *et al*,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court are a joint motion for summary judgment filed by Defendants Jeffrey Jarrett ("Jarrett") and Jeremy Bridges ("Bridges") (Dkt. 20) and a separate motion for summary judgment filed by their employer, Defendant Texas Department of Criminal Justice ("TDCJ"). (Dkt. 17) Jarrett, Bridges, and TDCJ are the only three defendants. The Court has considered the parties' briefing, the summary judgment record, the applicable law, and the other filings on the Court's docket. The motion filed by Jarrett and Bridges is **GRANTED**. The motion filed by TDCJ is **GRANTED** as to Plaintiff's claims under 42 U.S.C. § 1983 ("Section 1983") and **DENIED AS MOOT** as to Plaintiff's claims under the Texas Tort Claims Act ("the TTCA"). Plaintiff's claims under the Eighth and Fourteenth Amendments to the United States Constitution are **DISMISSED WITH PREJUDICE**. The Court declines to

exercise supplemental jurisdiction over Plaintiff's claims under the TTCA, and Plaintiff's TTCA claims are **REMANDED** to the 278th District Court of Madison County, Texas.[1]

BACKGROUND

Plaintiff Kevion Rogers ("Rogers") suffered a closed traumatic brain injury when a piece of a drop ceiling fell on his head while he was working in a hog barn at TDCJ's Ferguson Unit in Madison County. The problem with the barn's ceiling evidently stemmed from a leaking pipe or water hose connection. When he was injured, Rogers was classified as a low-risk "G1" inmate, meaning that he was allowed to live in a dormitory outside the prison unit's security fence and was allowed to work outside the security fence with periodic unarmed supervision. (Dkt. 26-3 at p. 25)[2] Rogers was in the hog barn working on a task assigned by Jarrett, a TDCJ agricultural specialist, when the ceiling piece fell; but neither Jarrett nor any other TDCJ officer was in the barn at the time. Bridges, the other individual defendant in this case, supervised Jarrett and Jarrett's subordinate, William Schmidt ("Schmidt").

The facts outlined below are either uncontroverted or drawn from Rogers's summary judgment evidence and taken as true. On the morning that Rogers was injured, Jarrett, as was typical, began the workday by getting the inmates whom he supervised out of their dormitories and taking them to the hog barns. (Dkt. 27-1 at pp. 3–5) Jarrett then began his morning count of the pigs. (Dkt. 27-1 at p. 5) During the morning count, Jarrett

[1] The state-court case is cause number 19-16359 in the 278th District Court of Madison County, Texas.
[2] The Court has taken judicial notice of TDCJ's general description of a G1 inmate, which can be found in the TDCJ Offender Orientation Handbook on the TDCJ website.

entered one of the hog barns and saw that "[t]here was water coming out of the ceiling" and that part of the drop ceiling had fallen to the floor (Dkt. 27-1 at pp. 5–8) Another piece of a drop ceiling tile was hanging down from the area of the water leak. (Dkt. 27-1 at pp. 6–7) It had not rained recently, so Jarrett believed that the leak was coming from "[t]he water hose flow[.]" (Dkt. 27-1 at p. 5) Jarrett shut off the water to the hog barn and removed the piece of tile that was hanging. (Dkt. 27-1 at pp. 5–7) This left a small hole in the drop ceiling; Jarrett testified that "[i]t's like the false tile ceiling. It's like that, like there was a piece of tile missing." (Dkt. 27-1 at p. 8) However, Jarrett further testified that "[t]he rest of the ceiling was fine" and that he did not think that there was any problem with the remainder of the drop ceiling that required immediate attention. (Dkt. 27-1 at pp. 6–7, 13) Jarrett testified that he had not previously seen any problems with roof leaks in any of the hog barns. (Dkt. 27-1 at p. 6) Bridges testified that some work had been done on the barn's ceiling "a couple of months prior to the accident" to "[p]rovide better ventilation for the sows and the babies[,]" but he echoed Jarrett's testimony that roof leaks had not been a problem in the hog barns in the past. (Dkt. 27-2 at p. 4)

After shutting off the water to the barn and removing the hanging piece of tile, Jarrett left the barn and "went back to [his] job doing the rest of [his] daily schedule[,]" which began with "weaning a barn" and "doing [his] paperwork." (Dkt. 27-1 at pp. 6–7) At about 8:30 a.m., Jarrett told Rogers to go into the barn to get Disrupt, which Jarrett described in his deposition as "a powder that we put on the babies to dry them off and keep them from getting sick." (Dkt. 27-1 at p. 7; Dkt. 27-3 at p. 25; Dkt. 27-5 at p. 2)

Rogers went to a storage room in the barn, looked for the Disrupt, "saw that it was not there, and turned around to leave the barn." (Dkt. 27-5 at p. 2) As Rogers was leaving the barn, part of the barn's ceiling fell and hit him on the head. (Dkt. 27-5 at p. 2) Rogers briefly blacked out. (Dkt. 27-5 at pp. 2–3)

"Shortly thereafter," Rogers came to; and Casey Turner ("Turner"), another inmate who was working in the barn, took Rogers to Jarrett's office, where Rogers "informed Jarrett that [he] was seriously injured." (Dkt. 17-3 at p. 26; Dkt. 27-1 at p. 16; Dkt. 27-5 at p. 3) Rogers "told [Jarrett] that the ceiling had collapsed on [him] causing [him] to black out." (Dkt. 27-5 at p. 3) Jarrett responded, "Well you look alright, I mean you don't look hurt . . . what . . . you wanna see a doctor or something?" (Dkt. 27-5 at p. 3) (quotation marks omitted; ellipses in original) Rogers replied, "Yes I need to go to the infirmary, the hell, a whole ceiling just fell on me!" (Dkt. 27-5 at p. 3) (quotation marks omitted)[3] Rogers "had dust on him" but did not have any visible injuries. (Dkt. 27-1 at p. 13)[4] Rogers spoke without slurring his speech, walked normally into and out of Jarrett's office, and "looked fine" during his brief conversation with Jarrett. (Dkt. 27-1 at p. 13)[5]

[3] Jarrett disputes Rogers's account of this exchange. Jarrett testified that he "asked [Rogers] if he was okay, if he'd been hit, if he needed to go to the infirmary" and that "[Rogers] said no." (Dkt. 27-1 at p. 7) The Court must credit Rogers's account at this stage of the case.

[4] The next day, unit medical personnel noted that Rogers had an abrasion on his left knee. (Dkt. 21-1 at p. 13)

[5] During TDCJ's internal investigation of the incident, one of Rogers's fellow inmates, who was outside the barn when the ceiling fell, provided a written statement indicating that he saw Rogers "stagger" out of the barn and then "walk over to [Jarrett's] office, dusting himself off." (Dkt. 27-2 at p. 18) Turner provided a statement indicating that he saw Rogers stagger out of the barn, but Turner's statement did not say anything about how Rogers looked walking into and out of Jarrett's office. (Dkt. 27-2 at p. 17) Rogers's summary judgment affidavit does not controvert Jarrett's testimony that Rogers was walking normally when he entered and left Jarrett's office. In short, even if Rogers staggered out of the barn, there is no evidence controverting Jarrett's

Jarrett told Rogers to keep looking for the Disrupt, and Rogers and Turner left Jarrett's office to continue looking for it. (Dkt. 27-1 at p. 9; Dkt. 27-5 at p. 3) Rogers "walked away and sat down as [he] was lightheaded." (Dkt. 27-5 at p. 3) Rogers and Jarrett did not see each other again that morning.

At some point between 9:30 a.m. and 10:00 a.m., Jarrett's job responsibilities required him to leave the Ferguson Unit. (Dkt. 27-1 at p. 7) Jarrett had to take a load of pigs from the Ferguson Unit; drive to the Ellis Unit, where he picked up more pigs; and then deliver the combined Ferguson/Ellis load of pigs to the Eastham Unit. (Dkt. 27-1 at p. 16; Dkt. 27-2 at p. 12) Jarrett's departure left Rogers and his fellow inmates unsupervised until Schmidt arrived at approximately 10:00 a.m. (Dkt. 17-3 at p. 19) Before Schmidt arrived, Rogers "asked one of the inmates to go see if Jarrett called the infirmary" and was told that Jarrett had left. (Dkt. 27-5 at p. 3) Rogers was "sitting and going in and out of consciousness," and other inmates were trying to keep him awake. (Dkt. 27-5 at p. 3)

When Schmidt arrived, he did a count of the inmates who were working at the hog barn. (Dkt. 17-3 at p. 19) At about 10:20 a.m., Schmidt called all of the inmates to the hog barn office to get ready for lunch. (Dkt. 17-3 at p. 19) Schmidt gave the inmates their identification cards and began loading them into his truck to take them to lunch. (Dkt. 17-3 at p. 19) There were too many inmates for Schmidt to transport at once, so he made two trips. (Dkt. 17-3 at p. 19) On the second trip, Rogers "told [Schmidt] the ceiling collapsed

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testimony that Rogers "looked fine" and walked normally when he entered and left Jarrett's office.

on [his] head and showed Schmidt the debris." (Dkt. 27-5 at p. 3) Rogers asked for medical attention, and at 11:10 a.m. Schmidt informed Bridges over the radio "that the ceiling had fallen on [Rogers's] head and that [Rogers] had sustained a head injury." (Dkt. 17-3 at p. 17; Dkt. 27-5 at p. 3) Bridges "responded that [Rogers] should be taken back to [his] bunk and that Bridges would take a look at [Rogers] later." (Dkt. 27-5 at p. 4)

Rogers was taken to the building where his bunk was located. (Dkt. 27-5 at p. 4) By this point, he was wheezing, he had mucus draining, his face was bruising, and his eye and head were swelling. (Dkt. 27-5 at p. 4) At about 11:45 a.m., a correctional officer named Gerald Havens ("Havens") noticed that Rogers was "acting abnormal" and sent him to the Ferguson Unit's administrative building. (Dkt. 17-3 at pp. 9, 21) Havens notified Lieutenant Latwala Molett ("Molett") at the administrative building about Rogers. (Dkt. 17-3 at pp. 9, 21)

Rogers, assisted by two other inmates, walked to the administrative building, where he collapsed on the front lawn. (Dkt. 17-3 at pp. 9, 21) Rogers "began to seize violently, began vomiting, and lost consciousness." (Dkt. 27-5 at p. 4) A few minutes later, at about 11:57 a.m., Molett walked out of the administrative building, saw Rogers, and radioed for medical assistance. (Dkt. 17-3 at pp. 9, 21) Ferguson Unit medical personnel arrived on the scene at about noon, called 911, and cared for Rogers until Emergency Medical Services ("EMS") arrived at about 12:15 p.m. (Dkt. 21-1 at p. 17) EMS left with Rogers in a helicopter at about 12:55 p.m. and transported him to a nearby hospital. (Dkt. 21-1 at p. 17)

After a CT scan, Rogers was diagnosed at the hospital with a "traumatic brain injury; no hemorrhage." (Dkt. 17-3 at pp. 9–10; Dkt. 21-1 at p. 10) The next day, Rogers was returned to the Ferguson Unit, where unit medical personnel prescribed pain medication and anti-nausea medication for him. (Dkt. 21-1 at pp. 10–14) There is no evidence in the record of subsequent problems or complications.

Rogers sued Jarrett, Bridges, and TDCJ in Texas state court under Section 1983 and sued TDCJ under the TTCA. The defendants removed the case to this Court under the federal-question jurisdiction statute, 28 U.S.C. § 1331. (Dkt. 1 at p. 1) Under Section 1983, Rogers alleges that the defendants violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution by showing deliberate indifference to his safety and his medical needs. (Dkt. 1-5 at pp. 9–12) Under the TTCA, Rogers alleges a premises-liability theory. (Dkt. 1-5 at pp. 7–9) The defendants have moved for summary judgment on all claims.

SUMMARY JUDGMENTS AND QUALIFIED IMMUNITY

A. Rule 56

Federal Rule of Civil Procedure 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding a motion for summary judgment, the Court must determine whether the pleadings, the discovery and disclosure materials on file, and any affidavits

show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Id*. at 322–23.

For summary judgment, the initial burden falls on the movant to identify areas essential to the non-movant's claim in which there is an absence of a genuine issue of material fact. *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005). The movant, however, need not negate the elements of the non-movant's case. *See Boudreaux v. Swift Transp. Co*., 402 F.3d 536, 540 (5th Cir. 2005). The movant may meet its burden by pointing out the absence of evidence supporting the non-movant's case. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995).

If the movant meets its initial burden, the non-movant must go beyond the pleadings and designate specific facts showing that there is a genuine issue of material fact for trial. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001). "An issue is material if its resolution could affect the outcome of the action. A dispute as to a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *DIRECT TV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2006) (citations omitted). In deciding whether a genuine and material fact issue has been created, the facts and inferences to be drawn from those facts must be reviewed in the light most favorable to the non-movant. *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co*., 336 F.3d 410, 412 (5th Cir. 2003).

B. Qualified Immunity

The motion for summary judgment filed by Jarrett and Bridges invokes qualified immunity. In civil rights actions such as this one where the non-movant is suing a

government official, the issue of qualified immunity alters the summary judgment analysis. *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). If the qualified immunity defense is raised, the burden shifts to the non-movant to rebut it. *Id*. All inferences are still drawn in the non-movant's favor. *Id*.

"The qualified immunity defense has two prongs: whether an official's conduct violated a statutory or constitutional right of the plaintiff; and whether the right was clearly established at the time of the violation." *Id*. For the right to have been clearly established for purposes of qualified immunity, the contours of the right must have been sufficiently clear that a reasonable official would have understood that what he was doing violated that right. *Brown v. Miller*, 519 F.3d 231, 236 (5th Cir. 2008). The unlawfulness of the official's actions must have been readily apparent from sufficiently similar situations, though there need not have been commanding precedent holding the very action in question unlawful. *Id*. at 236–37. The first prong of the qualified immunity analysis is governed by current law, while the second prong is governed by the law as it was clearly established at the time of the conduct in question. *Petta v. Rivera*, 143 F.3d 895, 899–900 (5th Cir. 1998). The legal standards can, and sometimes will, conflict; but both prongs must be satisfied. *Id*.

Qualified immunity "establishes a high bar"—*Wyatt v. Fletcher*, 718 F.3d 496, 503 (5th Cir. 2013)—that protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Essentially, a plaintiff must demonstrate that no reasonable official could have believed that his actions were proper. *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994).

SECTION 1983

Rogers has sued the defendants under Section 1983, claiming that they violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution and showed deliberate indifference to his safety and his medical needs by sending him into the hog barn and then failing to send him to the infirmary after a piece of the barn's ceiling hit him in the head. Section 1983 allows a person to sue for a violation of Constitutional rights that is committed by a person acting under color of state law. *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995).

Rogers's claims under Section 1983 fail. TDCJ is immune from suit under Section 1983, *Aguilar v. Texas Dep't of Criminal Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998), and Rogers has not presented competent summary judgment evidence that would allow a reasonable jury to find that Jarrett and Bridges violated his Constitutional rights.

A. Rogers has not presented evidence showing that Jarrett and Bridges were deliberately indifferent to his safety.

First, Rogers's summary judgment evidence does not establish that Jarrett and Bridges showed deliberate indifference to his safety by sending him into the hog barn. Under the Eighth Amendment, prisoners have a right to "humane conditions of confinement[,]" and prison officials are required to provide the prisoners with adequate food, shelter, clothing, and medical care. *Herman v. Holiday*, 238 F.3d 660, 664 (5th Cir. 2001) (quotation marks omitted). Prison officials must take reasonable measures to guarantee the safety of the inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). However, the Eighth Amendment mandates *reasonable* safety, not *absolute* safety; and

prison officials are not liable when they make good-faith errors in assessing a potential danger. *Newton v. Black*, 133 F.3d 301, 308 (5th Cir. 1998). Not every injury suffered by a prisoner translates into Constitutional liability for prison officials responsible for the inmate's safety. *Farmer*, 511 U.S. at 834. Rather, Rogers must show that Jarrett and Bridges were deliberately indifferent to his safety. *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976).

The standard for deliberate indifference is extremely high and requires more than a showing that the defendants were negligent or mistaken in their judgment. *Id*.; *Domino v. Texas Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 1999). Establishing deliberate indifference, in fact, requires even more than a showing of gross negligence. *Whitley v. Hanna*, 726 F.3d 631, 641 (5th Cir. 2013) (pointing out that gross negligence is "a heightened degree of negligence" while deliberate indifference is "a lesser form of intent") (quotation marks omitted). To establish deliberate indifference in a prison conditions case, a prisoner must show that the prison officials: (1) were aware of facts from which an inference of an excessive risk to the prisoner's health or safety could be drawn; and (2) actually drew an inference that such potential for harm existed. *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999). The deliberate-indifference standard is designed to be stringent enough to separate acts or omissions that amount to intentional choices from those that are merely unintentionally negligent oversights. *Southard v. Tex. Bd. Of Criminal Justice*, 114 F.3d 539, 551 (5th Cir. 1997). To that end, it draws on the test for "subjective recklessness" used in criminal law, which "generally permits a finding of recklessness only when a person disregards a risk of harm of which he is

aware" and does not permit such a finding based on mere "failure to alleviate a significant risk that [the person] should have perceived but did not[.]" *Farmer*, 511 U.S. at 836–40.

In short, it would not be enough for Rogers to establish that he was injured by the negligence, or even the gross negligence, of Jarrett and Bridges. In order to establish an Eighth Amendment violation, Rogers must show that Jarrett and Bridges knowingly exposed him to and consciously disregarded a substantial risk of serious harm. *Brewer v. Dretke*, 587 F.3d 764, 770 (5th Cir. 2009).

There is no evidence in the record establishing that Jarrett and Bridges were deliberately indifferent to Rogers's safety. When he discovered the water leak, Jarrett shut off the water to the barn and removed the part of the ceiling that he thought had been affected by the leak. Jarrett testified that "[t]he rest of the ceiling was fine" and that he did not think that there was any problem with the remainder of the drop ceiling that required immediate attention. (Dkt. 27-1 at pp. 6–7, 13) There is no evidence in the record showing that Jarrett's corrective measures were so obviously inadequate that his failure to take further action amounted to deliberate indifference, as opposed to a good-faith error in assessing the extent of the water damage and the state of the ceiling. There is also no evidence that roof leaks had been a problem in the hog barns in the past or that any inmates had previously been endangered by any problems with the ceilings in the hog barns. "Under exceptional circumstances, a prison official's knowledge of a substantial risk of harm may be inferred by the obviousness of the substantial risk." *Hegmann*, 198 F.3d at 159 (quotation marks omitted). However, no evidence in this summary judgment

record establishes that the ceiling posed such an obvious risk when Rogers entered the barn that Jarrett's knowledge of the extent of the risk can be inferred. As for Bridges, he was not at the hog barn, had no apparent involvement in Jarrett's decision to send Rogers into the hog barn, and cannot be held liable solely on account of his position as Jarrett's supervisor. *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1982) ("Personal involvement is an essential element of a civil rights cause of action.").

Jarrett and Bridges are entitled to qualified immunity on Rogers's claims that Jarrett and Bridges showed deliberate indifference to his safety by sending him into the hog barn.

B. Rogers has not presented evidence showing that Jarrett and Bridges were deliberately indifferent to his medical needs.

The deliberate-indifference standard also applies to Rogers's claim that Jarrett and Bridges should have sent him to the infirmary after the piece of drop ceiling hit him in the head. A prisoner may succeed on a claim under Section 1983 for inadequate medical care only if he demonstrates "deliberate indifference to serious medical needs" on the part of prison officials or other state actors. *Estelle*, 429 U.S. at 104. The conduct alleged must "constitute an unnecessary and wanton infliction of pain" or "be repugnant to the conscience of mankind." *Id*. at 104–06 (quotation marks omitted). As previously noted, deliberate indifference is an "extremely high standard to meet." *Domino*, 239 F.3d at 756. "Deliberate indifference is a degree of culpability beyond mere negligence or even gross negligence; it must amount to an intentional choice, not merely an unintentionally

negligent oversight." *James v. Harris County*, 577 F.3d 612, 617–18 (5th Cir. 2009) (quotation marks omitted).

The analysis of a claim of inadequate medical care proceeds in four steps. The prisoner must first prove objective exposure to a substantial risk of serious harm. *Gobert v. Caldwell*, 463 F.3d 339, 345–46 (5th Cir. 2006). To then prove subjective deliberate indifference to that risk, the prisoner must show both: (1) that the defendant was aware of facts from which the inference of an excessive risk to the prisoner's health or safety could be drawn; and (2) that the defendant actually drew the inference that such potential for harm existed. *Farmer*, 511 U.S. at 837; *Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999). The prisoner must then prove that the defendant, despite actual subjective knowledge of the substantial risk, denied or delayed the prisoner's medical treatment. *Petzold v. Rostollan*, 946 F.3d 242, 249 (5th Cir. 2019). The plaintiff must finally prove that the delay in or denial of medical treatment resulted in substantial harm, such as suffering additional pain. *Id*.

Rogers's claim fails at the second step. Even though they knew that Rogers had been hit in the head, there is no evidence showing that Jarrett and Bridges were subjectively aware that Rogers had suffered a traumatic brain injury before Rogers collapsed. *See id*. at 249 n.31 ("Petzold's substantial risk of bodily harm is his fractured ankle, not his limp."). Although Rogers eventually exhibited severe symptoms indicating a possible brain injury (namely seizures, vomiting, and loss of consciousness), those symptoms did not materialize until several hours after he was struck in the head, long after his brief conversation with Jarrett. There is no evidence in the record showing that

Rogers exhibited such symptoms when he told Jarrett that the ceiling had fallen on him; to the contrary, Jarrett testified that, when he and Rogers talked, Rogers had no visible injuries, was not slurring his words, walked normally, and "looked fine."[6] (Dkt. 27-1 at p. 13) Even Rogers's own account of the conversation indicates that Rogers was coherent, if angry. (Dkt. 27-5 at p. 3) Medical records show that Rogers might have had an abrasion on his left knee at the time (Dkt. 21-1 at p. 13), but there is no other evidence contradicting Jarrett's account of how Rogers appeared when the two spoke. And Bridges did not see Rogers at all until Rogers collapsed in front of the administrative building. (Dkt. 17-3 at p. 17) Before Rogers's collapse, Bridges only knew what Schmidt had told him over the radio: that a ceiling had collapsed on Rogers and that Rogers "had sustained a head injury." (Dkt. 17-3 at p. 17; Dkt. 27-5 at p. 3) There is no evidence showing that Jarrett and Bridges were subjectively deliberately indifferent to the risk of harm posed by Rogers's brain injury.

A comparison of this case with *Austin v. Johnson*, 328 F.3d 204 (5th Cir. 2003), illustrates why Rogers's evidence cannot establish a claim for deliberate indifference. In *Austin*, a minor who was sentenced to a day of boot camp for stealing a candy bar developed heat stroke and had to be transported by ambulance to a hospital, where he spent two weeks in treatment for various heat-stroke-related conditions. *Austin*, 328 F.3d at 206. The minor's parents sued the boot camp director and a drill sergeant. *Id.* at 206–07. The summary judgment evidence established that, during the day, the minor told the

[6] As noted earlier, even if Rogers staggered out of the barn, there is no evidence controverting Jarrett's testimony that Rogers "looked fine" and walked normally when he entered and left Jarrett's office.

director and drill sergeant that he was having difficulty performing the exercises and was feeling sick. *Id*. at 206. The minor was told to continue. *Id.* During an afternoon march, the minor collapsed several times and was left behind. *Id.* at 206, 210. The minor was taken inside at some time after 2:00 p.m. and began vomiting. *Id*. at 210. At 3:00 p.m., the minor lost consciousness. *Id*. Even though the minor never regained consciousness, the defendants waited until 4:42 p.m. to call an ambulance. *Id*. The Fifth Circuit found that the defendants were not entitled to qualified immunity. The Court held that, while "[b]efore 3:00 p.m., defendants' conduct was perhaps only negligent, . . . their failure to call an ambulance for almost two hours while [the minor] lay unconscious and vomiting r[ose] to the level of deliberate indifference." *Id*. Here, unlike the defendants in *Austin*, Jarrett and Bridges never saw Rogers when he was exhibiting the severe symptoms that led to his transfer to the hospital. There is no evidence that either Jarrett or Bridges saw any symptoms in Rogers comparable to the collapses on the march in *Austin*.

There is no evidence that would permit a jury to infer that Jarrett and Bridges had subjective knowledge of the severity of Rogers's condition before Rogers collapsed in front of the administrative building. Jarrett spoke to Rogers before Rogers's severe symptoms began to manifest, and Bridges did not see Rogers until just before Rogers's transfer to the hospital. Accordingly, Jarrett and Rogers are entitled to qualified immunity on Rogers's claim that Jarrett and Bridges should have sent him to the infirmary after the piece of drop ceiling hit him in the head.

The Court will dismiss all of Rogers's claims under Section 1983 with prejudice.

SUPPLEMENTAL JURISDICTION

Having dismissed all federal causes of action in this case, the Court will decline to exercise supplemental jurisdiction over Rogers's TTCA claims and will deny TDCJ's motion for summary judgment on those claims as moot. Federal district courts have the discretion to decline to exercise supplemental jurisdiction over state-law claims; that discretion is guided by the statutory factors set forth in 28 U.S.C. § 1367(c) and the common-law factors of judicial economy, convenience, fairness, and comity. *Mendoza v. Murphy*, 532 F.3d 342, 346 (5th Cir. 2008).

The factors listed in 28 U.S.C. § 1367(c) are:

> (1) the claim raises a novel or complex issue of State law;
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction;
>
> (3) the district court has dismissed all claims over which it has original jurisdiction; or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

"These interests are to be considered on a case-by-case basis, and no single factor is dispositive." *Mendoza*, 532 F.3d at 346. The general rule is that a court should decline to exercise jurisdiction over remaining state-law claims when all federal-law claims are eliminated before trial. *Brookshire Bros. Holding, Inc. v. Dayco Products, Inc.*, 554 F.3d 595, 602 (5th Cir. 2009).

Having considered the statutory and common-law factors, the Court will follow the general rule, decline to exercise supplemental jurisdiction over Rogers's TTCA

claims, and remand Rogers's TTCA claims to state court. In seeking dismissal of Rogers's TTCA claims, TDCJ argues: (1) that it did not receive pre-suit notice that was sufficient to satisfy the jurisdictional requirements of Section 101.101 of the Texas Civil Practice and Remedies Code; and (2) that Rogers has failed to produce evidence sufficient to raise a fact issue regarding TDCJ's actual knowledge of a dangerous condition under the standards set out in the TTCA and Texas caselaw. Acceptance or rejection of TDCJ's arguments will determine whether TDCJ's sovereign immunity remains intact under Texas state law. Under the circumstances, those important determinations should be made by the Texas state courts, where this case originated.

CONCLUSION

The motion for summary judgment filed by Jarrett and Bridges (Dkt. 20) is **GRANTED**.

The motion for summary judgment filed by TDCJ (Dkt. 17) is **GRANTED** as to Plaintiff's claims under 42 U.S.C. § 1983 and **DENIED AS MOOT** as to Plaintiff's claims under the Texas Tort Claims Act.

Plaintiff's claims under the Eighth and Fourteenth Amendments to the United States Constitution are **DISMISSED WITH PREJUDICE**. The Court declines to exercise supplemental jurisdiction over Plaintiff's claims under the Texas Tort Claims Act, and Plaintiff's claims under the Texas Tort Claims Act are **REMANDED** to the 278th District Court of Madison County, Texas.[7]

[7] The state-court case is cause number 19-16359 in the 278th District Court of Madison County, Texas.

The Clerk is directed to provide a copy of this order to the parties. The Clerk is further directed to send a certified copy of this order via certified mail, return receipt requested, to the District Clerk of Madison County, Texas and the Clerk of the 278th District Court of Madison County, Texas.

SIGNED at Houston, Texas, this 15th day of March, 2021.

George C. Hanks Jr

GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE