Kissner v. Orr

United States Court of Appeals for the Sixth Circuit

October 10, 2023, Filed

No. 22-2076

Reporter
2023 U.S. App. LEXIS 26886 *

DONALD LEE KISSNER, Plaintiff-Appellant, v. OFFICER JOSEPH MICHAEL ORR, ET AL., Defendants-Appellees.

Core Terms

petition for rehearing, en banc

Counsel: **[*1]** DONALD LEE KISSNER, Plaintiff - Appellant, Pro se, Macomb Correctional Facility, Lenox Township, MI.

For OFFICER JOSEPH MICHAEL ORR, OFFICER LUKE ROGERS, Defendant - Appellees: Joanne G. Swanson, Kevin Andrew McQuillan, Kerr, Russell & Weber, Detroit, MI.

Judges: BEFORE: SUHRHEINRICH, GIBBONS, and MATHIS, Circuit Judges.

Opinion

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

* Judge Davis recused herself from participation in this ruling.

Kissner v. Orr

United States Court of Appeals for the Sixth Circuit

August 31, 2023, Filed

No. 22-2076

Reporter
2023 U.S. App. LEXIS 23274 *; 2023 WL 5687037

DONALD LEE KISSNER, Plaintiff-Appellant, v. OFFICER JOSEPH MICHAEL ORR, et al., Defendants-Appellees.

Notice: CONSULT *6TH CIR. R. 32.1* FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Prior History: **[*1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

Kissner v. Orr, 2022 U.S. Dist. LEXIS 208745, 2022 WL 17069559 (E.D. Mich., Nov. 17, 2022)

Core Terms

district court, qualified immunity, police officer, dispatch, report and recommendation, motion to dismiss, recommended, immunity, magistrate judge, allegations, amended judgment, rights

Counsel: DONALD LEE KISSNER, Plaintiff - Appellant, Pro se, Lenox Township, MI.

For OFFICER JOSEPH MICHAEL ORR, OFFICER LUKE ROGERS, Defendant - Appellee: Joanne G. Swanson, Kevin Andrew McQuillan, Kerr, Russell & Weber, Detroit, MI.

Judges: Before: SUHRHEINRICH, GIBBONS, and MATHIS, Circuit Judges.

Opinion

ORDER

Donald Lee Kissner, a Michigan prisoner proceeding pro se, appeals the district court's amended judgment entered in accordance with its order granting in part and denying in part his motion for relief from judgment under *Federal Rule of Civil Procedure 60(b)*. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*. As set forth below, we affirm in part and vacate in part the district court's amended judgment and remand for further proceedings consistent with this order.

Kissner filed a complaint against Officers Joseph Michael Orr and Luke Rogers of the Durand Police Department, an unknown dispatch officer for Shiawassee County (with "Chris Brown Prosecutor" named as the "answering" defendant), and Dr. Jeremy Zarski, generally claiming that they violated his constitutional rights **[*2]** and neglected their duties. Kissner alleged that, on August 20, 2020, he "was drugged and attempted to set [him]self on fire naked." After 911 was called, Officers Orr and Rogers responded and confirmed that Kissner was suicidal. Kissner alleged that neither the dispatch officer nor the police officers called emergency medical services. According to Kissner, the police officers placed him in a patrol car, where he sat, "covered from his head to his toes in lighter fluid," for an hour and 40 minutes. Kissner alleged that Officers Orr and Rogers later "attempted [to] pass" him onto the Shiawassee County Sheriff's Department, which declined to take him "until he was medically cleared." The police officers then transported Kissner to Owosso Memorial Hospital, where Dr. Zarski examined him. According to Kissner, Officers Orr and Rogers, the dispatch officer, and Dr. Zarski all knew that he was covered in lighter fluid, yet no one cleaned him up for several hours. Because of that neglect, Kissner alleged, he ended up with first-through fourth-degree chemical burns on his body and has scars on his genitals, belly, head, and underarms from those burns.

A magistrate judge allowed Kissner to **[*3]** proceed in forma pauperis and ordered service of the complaint. Officers Orr and Rogers filed a motion to dismiss under *Rule 12(b)(6)*, while Dr. Zarski filed a motion for summary judgment under *Rule 56*. The magistrate

judge recommended that the district court grant Officers Orr and Rogers's motion to dismiss, concluding that the police officers were entitled to qualified immunity because Kissner had failed to plead a plausible constitutional claim against them and that, to the extent that Kissner asserted a state-law negligence claim against the police officers, they were entitled to immunity under Michigan's involuntary-commitment statutes. With respect to Dr. Zarski's motion for summary judgment, the magistrate judge recommended that the district court grant the motion on the basis that the doctor was not a state actor; Kissner did not object to that recommendation. Kissner did file objections to the magistrate judge's recommendation regarding the police officers' motion to dismiss but only general ones. The district court adopted the magistrate judge's recommendations, concluding that Kissner had waived any objections, and granted the defendants' motions. The district court entered a judgment dismissing **[*4]** Kissner's complaint with prejudice.

Kissner did not appeal the district court's judgment. Instead, over four months later, Kissner filed a motion for relief from judgment under *Rule 60(b)*. Kissner argued that Shiawassee County Prosecutor Chris E. Brown never answered or otherwise responded to the allegations against him in this civil rights action and that the district court never ruled on those allegations or on Brown's failure to respond to them. Kissner also asserted that Officers Orr and Rogers were not entitled to qualified immunity because they were not performing discretionary functions as first responders to a 911 call about a suicidal person. Finally, Kissner asked the district court to reopen his civil rights action and reissue its judgment to allow him to file a timely notice of appeal, asserting that an outbreak of COVID-19 at his prison had prevented him from using the law library and obtaining the items needed to file an appeal.

The district court granted in part and denied in part Kissner's *Rule 60(b)* motion. Vacating its original judgment, the district court concluded that it made a mistake in prematurely entering a judgment without addressing any claims against Brown. The district court **[*5]** went on to summarily dismiss Kissner's claims against Brown based on prosecutorial immunity. *See 28 U.S.C. § 1915(e)(2)*. As for Officers Orr and Rogers, the district court determined that Kissner had failed to demonstrate entitlement to relief from judgment under *Rule 60(b)*. The district court entered an amended judgment dismissing Kissner's complaint with prejudice.

Kissner timely appealed the district court's amended judgment. Upon the parties' stipulation, we terminated Dr. Zarski as a party to this appeal. *Kissner v. Orr*, No. 22-2076 (6th Cir. Feb. 21, 2023).

Kissner argues on appeal that, in ruling on his *Rule 60(b)* motion, the district court failed to address his request for reissuance of its original judgment to allow him to file a timely notice of appeal. But reissuance of the district court's original judgment was unnecessary. We have jurisdiction over appeals from final decisions of the district courts. *28 U.S.C. § 1291*. A decision is final if it "ends the litigation on the merits and leaves nothing for the [district] court to do but execute the judgment." *Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945)*. In the absence of certification for an interlocutory appeal under *Federal Rule of Civil Procedure 54(b)*, a decision "disposing of fewer than all claims in a civil action is not immediately appealable." *Adler v. Elk Glenn, LLC, 758 F.3d 737, 739 (6th Cir. 2014)*. Because the district court's original judgment did not dispose **[*6]** of Kissner's claims against Brown, it was not a final decision and therefore was not ripe for appeal. *See Witherspoon v. White, 111 F.3d 399, 402 (5th Cir. 1997)* ("[W]hen the record clearly indicates that the district court failed to adjudicate the rights and liabilities of all parties, the order is not and cannot be presumed to be final, irrespective of the district court's intent.").

To the extent that Kissner challenges the district court's order granting Officers Orr and Rogers's motion to dismiss, he has forfeited appellate review of that decision. A party who does not file timely and specific objections to a magistrate judge's report and recommendation, after being advised to do so, forfeits the right to appeal. *Thomas v. Arn, 474 U.S. 140, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Berkshire v. Dahl, 928 F.3d 520, 530-31 (6th Cir. 2019)*; *Miller v. Currie, 50 F.3d 373, 380 (6th Cir. 1995)*. "The filing of vague, general, or conclusory objections does not meet the requirement of specific objections and is tantamount to a complete failure to object." *Cole v. Yukins, 7 F. App'x 354, 356 (6th Cir. 2001)*. Here, the magistrate judge recommended that the district court grant the police officers' motion to dismiss. In the report and recommendation, the magistrate judge advised Kissner that he had 14 days to file specific written objections and that failure to file specific objections constituted a waiver of any further right of appeal. Kissner's objections to the **[*7]** magistrate judge's report and recommendation consisted of the following blanket statements: (1) the motion "should not be granted," (2) "Qualified Immunity should not apply," and (3)

"Governmental Immunity should not apply." The district court concluded that Kissner's general objections had "the same effect[] as . . . a failure to object" and that he had therefore waived any objection to the magistrate judge's report and recommendation. *See Howard v. Secretary of HHS, 932 F.2d 505, 509 (6th Cir. 1991)*.

Kissner's blanket statements that the motion should not be granted and that qualified and governmental immunity do not apply are conclusory objections, not the required specific objections. *See Cole, 7 F. App'x at 356*; *Martin v. LaBelle, 7 F. App'x 492, 494 (6th Cir. 2001)* (holding that objections consisting of "general legal standards and conclusory statements that plaintiffs met those standards" are insufficiently specific). By failing to object with specificity to the magistrate judge's report and recommendation, Kissner forfeited appellate review of the district court's order granting Officers Orr and Rogers's motion to dismiss. *See Howard, 932 F.2d at 508-09*. Although this forfeiture rule is non-jurisdictional and may be excused "in the interests of justice," *Thomas, 474 U.S. at 155*, the circumstances of Kissner's case do not warrant an exception from the general **[*8]** rule. *See Carter v. Mitchell, 829 F.3d 455, 472 (6th Cir. 2016)* (citations omitted) (noting that we have excused forfeiture when a case is "exceptional," when hearing the issue serves a purpose beyond "simply reaching the correct result," and when the issue requires no additional factual development).

We review the district court's denial of Kissner's *Rule 60(b)* motion for relief from its judgment in favor of Officers Orr and Rogers for an abuse of discretion. *See Yeschick v. Mineta, 675 F.3d 622, 628 (6th Cir. 2012)*. "An abuse of discretion exists when a court 'commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact.'" *Id.* (quoting *In re Ferro Corp. Derivative Litig., 511 F.3d 611, 623 (6th Cir. 2008)*). In reviewing the district court's denial of *Rule 60(b)* relief, we do not review the underlying decision—the dismissal of Kissner's claims against Officers Orr and Rogers. *See Feathers v. Chevron U.S.A., Inc., 141 F.3d 264, 268 (6th Cir. 1998)*. Our inquiry is limited to whether one of the circumstances specified in *Rule 60(b)* "exists in which [Kissner] is entitled to reopen the merits of his underlying claims." *Id.*

In his *Rule 60(b)* motion, Kissner argued that Officers Orr and Rogers were not entitled to qualified immunity because they were not performing discretionary functions as first responders to a 911 call about a suicidal person. Under the **[*9]** doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*. "[O]nly officials performing discretionary, as opposed to ministerial, functions[] are entitled to qualified immunity." *Perez v. Oakland County, 466 F.3d 416, 429 (6th Cir. 2006)*.

Courts use a two-part test to determine whether a government official is entitled to qualified immunity: "(1) whether the alleged facts, viewed in the light most favorable to the plaintiff, show that the official's conduct violated a constitutional right, and (2) whether that constitutional right was 'clearly established.'" *Rieves v. Town of Smyrna, 959 F.3d 678, 695 (6th Cir. 2020)* (citing *Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)*). In recommending that the district court grant Officers Orr and Rogers's motion to dismiss, the magistrate judge determined that the police officers were entitled to qualified immunity based on the first part of that test—Kissner had failed to plead a plausible constitutional claim against these defendants. The district court adopted the magistrate judge's report and recommendation and, without mentioning qualified immunity, discussed the magistrate **[*10]** judge's conclusion that Kissner's allegations did not support a deliberate-indifference claim against the police officers. In denying Kissner's *Rule 60(b)* motion, the district court addressed Kissner's discretionary-function argument, despite his failure to object to the magistrate judge's report and recommendation on this basis, and pointed out that this argument had no bearing on its conclusion that he had failed to establish a deliberate-indifference claim against Officers Orr and Rogers. Because Kissner failed to show that a circumstance specified under *Rule 60(b)* warranted the reopening of his claims against Officers Orr and Rogers, the district court did not abuse its discretion in denying his motion for relief from its judgment in favor of the police officers.

The district court granted *Rule 60(b)* relief to address Kissner's allegations against Brown. According to Kissner, the district court erred in ruling that Brown was entitled to prosecutorial immunity. Kissner asserts that he did not raise any claim about Brown bringing criminal charges against him and that he instead named Brown as the respondent for the dispatch officer because no one would give him the dispatch officer's name and

address. Kissner **[*11]** is correct: his complaint listed "Chris Brown Prosecutor answering unknown name dispatch officer" and did not include any factual allegations against Brown. Because Kissner apparently did not intend to name Brown as a defendant in his individual capacity, prosecutorial immunity did not apply. *See Cady v. Arenac County, 574 F.3d 334, 342 (6th Cir. 2009)* (recognizing that absolute prosecutorial immunity is a "personal defense").

Kissner apparently intended to sue the dispatch officer, whose name he did not know. "Plaintiffs are permitted to bring suit against unnamed 'John Doe' defendants until discovery or other information reveals the identity of the party." *Brown v. Owens Corning Inv. Rev. Comm., 622 F.3d 564, 572 (6th Cir. 2010), abrogated on other grounds by Intel Corp. Inv. Pol'y Comm. v. Sulyma, 140 S. Ct. 768, 206 L. Ed. 2d 103 (2020)*. Because the district court did not address Kissner's allegations against the unnamed dispatch officer, we will remand for further proceedings.

Kissner raises other arguments and claims on appeal that he did not raise before the district court. But we will not review issues raised for the first time on appeal. *See Jolivette v. Husted, 694 F.3d 760, 770 (6th Cir. 2012)*.

For these reasons, we **AFFIRM IN PART** and **VACATE IN PART** the district court's amended judgment and **REMAND** for further proceedings consistent with this order.

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Kissner v. Orr

United States District Court for the Eastern District of Michigan, Southern Division

November 17, 2022, Decided; November 17, 2022, Filed

Civil Case No. 20-13445

Reporter
2022 U.S. Dist. LEXIS 208745 *; 2022 WL 17069559

DONALD LEE KISSNER, Plaintiff, v. JOSEPH MICHAEL ORR, LUKE ROGERS, CHRIS BROWN, and JEREMY ZARSKI, Defendants.

Subsequent History: Vacated by, in part, Affirmed by, in part, Remanded by *Kissner v. Orr, 2023 U.S. App. LEXIS 23274 (6th Cir. Mich., Aug. 31, 2023)*

Prior History: *Kissner v. Orr, 2021 U.S. Dist. LEXIS 242741, 2021 WL 5997976 (E.D. Mich., Dec. 20, 2021)*

Core Terms

prosecutorial immunity, absolute immunity, initiating, dispositive motion, qualified immunity, motion for relief, enter a judgment, functions, civil commitment proceeding, commitment proceeding, judicial proceedings, civil rights action, vacate a judgment, amended judgment, sua sponte, involuntary, preparation, proceedings, summarily, asserts, charges, enjoyed, Courts, immune

Counsel: **[*1]** Donald Lee Kissner, Plaintiff, Pro se, Corunna, MI.

For Joseph Michael Orr, officer, Luke Rogers, Oficer, Defendants: James E. Tamm, Kerr, Russell, and Weber, PLC, Detroit, MI; Kevin Andrew McQuillan, Kerr, Russell and Weber, PLC, Detroit, MI.

For Jeremy Zarski, Dr., Defendant: Marcy R. Matson, Hall Matson, PLC, East Lansing, MI.

Judges: Honorable LINDA V. PARKER, UNITED STATES DISTRICT JUDGE.

Opinion by: LINDA V. PARKER

Opinion

OPINION AND ORDER (I) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT; (II) VACATING JUDGMENT; AND (III) SUA SPONTE DISMISSING PLAINTIFF'S CLAIMS AGAINST DEFENDANT CHRIS BROWN

After adopting Magistrate Judge Patricia Morris' two reports and recommendations and granting the dispositive motions filed by Defendants Joseph Michael Orr, Luke Rogers, and Jeremy Zarski, this Court entered a Judgment dismissing Plaintiff's Complaint with prejudice. Plaintiff has filed a motion for relief from judgment pursuant to *Federal Rule of Civil Procedure 60(b)*, arguing that no dispositive motion was filed by Defendant Chris Brown and that Defendants Orr and Rogers were not entitled to qualified immunity.

The Court is granting in part and denying in part Plaintiff's motion. Defendant Brown was not required to respond **[*2]** to Plaintiff's Complaint, as the Court never directed him to do so. *See* 28 U.S.C. § 1997e(g). Nevertheless, it was premature for the Court to enter a judgment without ever addressing any claim Plaintiff has against this defendant. Thus, the Court made a "mistake" when entering the Judgment when it did, *see Fed. R. Civ. P. 60(b)(1)*, and is vacating the Judgment as relief from that mistake.

The Court is entering an amended judgment, however, because the only conceivable allegations Plaintiff asserts against Defendant Brown relate to his role as a prosecutor. As such, he is entitled to prosecutorial immunity. And the Court finds no basis for granting Plaintiff relief from judgment with respect to his claims against Defendants Orr and Rogers.

Except for listing Defendant Brown as the third defendant being sued (ECF No. 1 at Pg ID 4), Plaintiff does not mention him by name or in his role as a prosecutor anywhere in the Complaint (*see id.* at Pg ID 1-9.) In a December 25, 2020 letter, which is attached to

the Complaint, Plaintiff refers only to the "Shiawassee County Prosecutor's Office" and asserts that it is "only concerned with charging [him] and not [his] suicide attempt . . .." (*Id.* at Pg ID 12.)

The Supreme Court has observed that **[*3]** courts are virtually unanimous in holding "that a prosecutor enjoys absolute immunity from *[42 U.S.C.] § 1983* suits for damages when [the prosecutor] acts within the scope of his [or her] prosecutorial duties." *Imbler v. Pachtman, 424 U.S. 409, 420, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)*. A prosecutor is absolutely immune for "acts undertaken . . . in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of [the prosecutor's] role as an advocate for the State." *Buckley v. Fitzsimmons, 509 U.S. 259, 273, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993)*; *see also Cooper v. Parrish, 203 F.3d 937, 946-47 (6th Cir. 2000)*. Prosecutorial immunity extends to "actions preliminary to the initiation of a prosecution and actions apart from the courtroom[.]" *Buckley, 509 U.S. at 272* (quoting *Imbler, 424 U.S. at 431, n.33*).

Nevertheless, prosecutorial immunity is not absolute. *Id. at 273*. Prosecutorial immunity does not extend to situations where "a prosecutor 'functions as an administrator rather than as an officer of the court[.]'" *Id.* (quoting *Imbler, 424 U.S. at 431 n.22*). For example, a prosecutor is not immune when "perform[ing] the investigative functions normally performed by a detective or police officer[.]" *Id.* (quoting *Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973)*); *see also Cooper, 203 F.3d at 947*.

Gleaned from Plaintiff's filings, the only conduct of Defendant Brown—pursuing criminal charges against Plaintiff—are actions intimately associated with judicial proceedings. Courts have found prosecutors absolutely immune from *§ 1983* liability for **[*4]** such actions. *See, e.g., Imbler, 424 U.S. at 431* (prosecutorial immunity applied to actions in initiating a prosecution and presenting the State's case). Even if Defendant Brown was somehow involved in the petition seeking mental health treatment for Plaintiff, prosecutorial immunity has been found to apply to such actions, as well. *Scott v. Hern, 216 F.3d 897, 909 (10th Cir. 2000)* (state prosecutor enjoyed absolute immunity for acts and omissions relating to preparation and submission of petition for involuntary commitment); *Cornejo v. Bell, 592 F.3d 121, 127-28 (2d Cir. 2010)* (absolute immunity extended to state and federal officials initiating noncriminal proceedings such as administrative proceedings and civil litigation); *Smith v. Shorstein, 217 F. App'x 877, 880 (11th Cir. 2007)* (holding that prosecutors who initiated civil commitment proceedings were entitled to absolute prosecutorial immunity in subsequent civil rights action, absent evidence that they had acted outside of their territorial jurisdiction); *Diestelhorst v. Ryan, 20 F. App'x 544, 546 (7th Cir. 2001)* (holding that prosecutor was absolutely immune by instituting commitment proceedings); *Jones v. Howard, No. 18-1207, 2018 U.S. Dist. LEXIS 196351, 2018 WL 6039974, at *3 (D. Del. Nov. 19, 2018)*, *aff'd 779 F. App'x 151 (3d Cir. 2019)* (holding that the deputy attorney general had prosecutorial immunity for claims arising out of involuntary commitment proceedings); *Roache v. Attorney Gen.'s Office, No. 9:12-cv-1034, 2013 U.S. Dist. LEXIS 141225, 2013 WL 5503151, at *13-14 (N.D.N.Y. Sept. 30, 2013)* (attorneys from the New York State Attorney General's Office who commenced civil commitment proceeding pursuant to Mental Health **[*5]** Law entitled to prosecutorial immunity). Such immunity is absolute and is not overcome by a showing that the prosecutor acted wrongfully or maliciously. *Grant v. Hollenbach, 870 F.2d 1135, 1138 (6th Cir. 1989)*. Therefore, the Court is sua sponte dismissing Plaintiff's claims against Defendant Brown.

As to Defendants Orr and Rogers, Plaintiff fails to demonstrate entitlement to relief under *Rule 60(b)*. Plaintiff argues that these defendants are not entitled to qualified immunity because they were not engaged in discretionary functions. (*See* ECF No. 30 at Pg ID 192 (quoting *Caldwell v. Moore, 968 F.2d 595, 599 (6th Cir. 1992)*; *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*).) The Court, however, did not dismiss Plaintiff's claims against Defendants Orr or Rogers based on qualified immunity. In other words, the Court did not conclude that the relevant law was so unsettled that these officers would not have known that their conduct was unlawful. *See Harlow, 457 U.S. at 818-19* ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful."). Instead, the Court concluded that Plaintiff failed to establish the objective and subjective components of his deliberate indifference claim against them. **[*6]** (*See* ECF No. 27 at Pg ID 177.)

Accordingly,

IT IS ORDERED that Plaintiff's motion for relief from judgment is **GRANTED IN PART AND DENIED IN**

PART.

IT IS FURTHER ORDERED that the December 20, 2021 Judgment is **VACATED.**

IT IS FURTHER ORDERED that Plaintiff's claims against Defendant Chris Brown are summarily dismissed pursuant to *28 U.S.C. § 1915(e)(2)*.

IT IS SO ORDERED.

/s/ Linda V. Parker

LINDA V. PARKER

U.S. DISTRICT JUDGE

Dated: November 17, 2022

AMENDED JUDGMENT

Plaintiff filed this pro se civil rights action pursuant to *42 U.S.C. § 1983* against Defendants on December 18, 2020. In an Opinion and Order entered December 20, 2021, the Court granted dispositive motions filed by Defendants Joseph Michael Orr, Luke Rogers, and Jeremy Zarski. On today's date, the Court summarily dismissed Plaintiff's claims against Defendant Chris Brown pursuant to *28 U.S.C. § 1915(e)(2)*.

Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff's Complaint is **DISMISSED WITH PREJUDICE.**

/s/ Linda V. Parker

LINDA V. PARKER

U.S. DISTRICT JUDGE

Dated: November 17, 2022

Kissner v. Orr

United States District Court for the Eastern District of Michigan, Southern Division

December 20, 2021, Decided; December 20, 2021, Filed

Civil Case No. 20-13445

Reporter
2021 U.S. Dist. LEXIS 242741 *; 2021 WL 5997976

DONALD LEE KISSNER, Plaintiff, v. JOSEPH MICHAEL ORR, LUKE ROGERS, CHRIS BROWN, and JEREMY ZARSKI, Defendants.

Subsequent History: Vacated by, Dismissed by, in part, Judgment entered by, Motion granted by, in part, Motion denied by, in part *Kissner v. Orr, 2022 U.S. Dist. LEXIS 208745, 2022 WL 17069559 (E.D. Mich., Nov. 17, 2022)*

Prior History: *Kissner v. Orr, 2021 U.S. Dist. LEXIS 244110, 2021 WL 6618768 (E.D. Mich., Aug. 31, 2021)*

Core Terms

motion to dismiss, summary judgment motion, lighter fluid, recommendations, report and recommendation, deliberate indifference, failure to object, right to appeal, no objection, immunity, advises, matters, parties, waived

Counsel: **[*1]** Donald Lee Kissner, Plaintiff, Pro se, Corunna, MI.

For Joseph Michael Orr, officer, Luke Rogers, Oficer, Defendants: James E. Tamm, Kerr, Russell, and Weber, PLC, Detroit, MI; Kevin Andrew McQuillan, Kerr, Russell and Weber, PLC, Detroit, MI.

For Jeremy Zarski, Dr., Defendant: Marcy R. Matson, Hall Matson, PLC, East Lansing, MI.

Judges: Honorable LINDA V. PARKER, UNITED STATES DISTRICT JUDGE.

Opinion by: LINDA V. PARKER

Opinion

OPINION AND ORDER (i) ADOPTING MAGISTRATE JUDGE'S REPORTS AND RECOMMENDATIONS (ECF NOS. 22, 23); (ii) REJECTING PLAINTIFF'S OBJECTION (ECF NO. 24); AND (iii) GRANTING DEFENDANTS JOSEPH MICHAEL ORR AND LUKE ROGERS' MOTION TO DISMISS (ECF NO. 14) AND DEFENDANT JEREMY ZARSKI'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 15)

Plaintiff filed this pro se civil rights action pursuant to *42 U.S.C. § 1983* against Defendants on December 18, 2020. Defendants Joseph Michael Orr and Luke Rogers are police officers who responded to an August 20, 2020 incident where Plaintiff was believed to have attempted suicide by covering himself in lighter fluid in preparation to light himself on fire. Defendant Jeremy Zarski, D.O., is an emergency room physician who examined Plaintiff and completed a Clinical Certificate diagnosing Plaintiff **[*2]** as mentally ill, which was submitted to a State probate court. On April 20, Officers Orr and Rogers filed a motion to dismiss (ECF No. 14) and Dr. Zarski filed a motion for summary judgment (ECF No. 15). The matter has been referred to Magistrate Judge Patricia T. Morris for all pretrial proceedings, including a hearing and determination of all non-dispositive matters pursuant to *28 U.S.C. § 636(b)(1)(A)* and/or a report and recommendation ("R&R") on all dispositive matters pursuant to *28 U.S.C. § 636(b)(1)(B)*.

On August 20, Magistrate Judge Morris issued an R&R recommending that the Court grant Dr. Zarski's summary judgment motion. (ECF No. 22.) Magistrate Judge Morris concludes that Dr. Zarski is entitled to summary judgment because he was not a state actor. (*Id.* at Pg ID 149-52.) On August 31, Magistrate Judge Morris issued an R&R recommending that the Court grant Officer Orr and Roger's motion to dismiss Plaintiff's deliberate indifference claim against them. (ECF No. 23.) Magistrate Judge Morris concludes that under the circumstances presented, including the fact that Plaintiff never told the officers that he was suffering

discomfort from the lighter fluid, "it would not have been objectively obvious to these officers that there **[*3]** was a medical need to wash off the lighter fluid, or that failure to do so immediately posed a 'substantial risk of serious harm.'" (*Id.* at Pg ID 163 (quoting *Troutman v. Louisville Metro Dep't of Corr., 979 F.3d 472, 482 (6th Cir. 2020)*). Further, Magistrate Judge Morris concludes, the facts do not support the officers' subjective knowledge of a serious risk of harm to Plaintiff. (*Id.*) In response to Plaintiff's behavior, and the fact that he smelled of lighter fluid, the officers conducted a short investigation, restrained Plaintiff for his safety, and took him to the hospital. (*Id.*) The delay in washing off the lighter fluid occurred at the hospital. (*Id.*) At most, Magistrate Judge Morris concludes, the officers were negligent, which does not support a deliberate indifference claim. (*Id.* at Pg ID 164 (citing *Farmer v. Brennan, 511 U.S. 825, 835, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)*.)

At the conclusion of both R&Rs, Magistrate Judge Morris advises the parties that they may object to and seek review of the R&R within fourteen days of service upon them. She further specifically advises the parties that "[f]ailure to file specific objections constitutes a waiver of any further right to appeal." No objections were filed with respect to Magistrate Judge Morris' R&R with respect to Dr. Zarski's summary judgment motion. Plaintiff filed **[*4]** objections to Magistrate Judge Morris' R&R with respect to the officers' motion to dismiss, however. (ECF No. 24.)

When objections are filed to a magistrate judge's R&R on a dispositive matter, the Court "make[s] a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *28 U.S.C. § 636(b)(1)*. The Court, however, "is not required to articulate all of the reasons it rejects a party's objections." *Thomas v. Halter, 131 F. Supp. 2d 942, 944 (E.D. Mich. 2001)* (citations omitted). A party's failure to file objections to certain conclusions of the report and recommendation waives any further right to appeal on those issues. *See Smith v. Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987)*. Likewise, the failure to object to certain conclusions in the magistrate judge's report releases the Court from its duty to independently review those issues. *See Thomas v. Arn, 474 U.S. 140, 149, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*.

Plaintiff states only the following as objections to Magistrate Judge Morris' August 31 R&R: (1) the officers' motion to dismiss "should not be granted"; (2) "[q]ualified immunity should not apply"; and (3) "[g]overnmental immunity should not apply." (ECF No. 24 at Pg 167-68.) Plaintiff states no basis for the objections presented. He identifies no error in Magistrate Judge Morris' conclusions. A "general objection **[*5]** to the entirety of the magistrate[judge]'s report has the same effect[] as . . . a failure to object." *Howard v. Sec'y of Health & Human Servs., 932 F.2d 505, 509 (6th Cir. 1991)*.

For this reason, and because Plaintiff filed no objections to Magistrate Judge Morris' earlier R&R, the Court deems Plaintiff to have waived any objections to both. Therefore, the Court is adopting Magistrate Judge Morris' recommendations.

Accordingly,

IT IS ORDERED that Defendant Jeremy Zarski's Motion for Summary Judgment (ECF No. 15) is **GRANTED**;

IT IS FURTHER ORDERED that Defendants Luke Rogers and Joseph Michael Orr's Motion to Dismiss (ECF No. 14) is **GRANTED**.

IT IS SO ORDERED.

/s/ Linda V. Parker

LINDA V. PARKER

U.S. DISTRICT JUDGE

Dated: December 20, 2021

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Kissner v. Orr

United States District Court for the Eastern District of Michigan, Southern Division

August 31, 2021, Decided; August 31, 2021, Filed

CASE NO. 2:20-CV-13445

Reporter
2021 U.S. Dist. LEXIS 244110 *; 2021 WL 6618768

DONALD LEE KISSNER, Plaintiff, v. JOSEPH MICHAEL ORR, LUKE ROGERS, CHRIS BROWN, and JEREMY ZARSKI, Defendants.

Subsequent History: Adopted by, Objection overruled by, Dismissed by, Summary judgment granted by *Kissner v. Orr, 2021 U.S. Dist. LEXIS 242741, 2021 WL 5997976 (E.D. Mich., Dec. 20, 2021)*

Prior History: *Kissner v. Orr, 2021 U.S. Dist. LEXIS 252109, 2021 WL 6618770 (E.D. Mich., Aug. 19, 2021)*

Core Terms

lighter fluid, qualified immunity, allegations, deliberate indifference, motion to dismiss, custody, RECOMMENDATION, scene, serious medical needs, responded, detainee, arrived, suicide, burns

Counsel: **[*1]** Donald Lee Kissner, Plaintiff, Pro se, Corunna, MI.

For Joseph Michael Orr, officer, Luke Rogers, Oficer, Defendants: James E. Tamm, Kerr, Russell, and Weber, PLC, Detroit, MI; Kevin Andrew McQuillan, Kerr, Russell and Weber, PLC, Detroit, MI.

For Jeremy Zarski, Dr., Defendant: Marcy R. Matson, Hall Matson, PLC, East Lansing, MI.

Judges: Patricia T. Morris, United States Magistrate Judge. DISTRICT JUDGE LINDA V. PARKER.

Opinion by: Patricia T. Morris

Opinion

REPORT AND RECOMMENDATION ON DEFENDANTS JOSEPH MICHAEL ORR AND LUKE ROGERS' MOTION TO DISMISS PURSUANT TO *FED. R. CIV P. 12(B)(6)* (ECF NO. 14)

I. RECOMMENDATION

For the reasons set forth below, **IT IS RECOMMENDED** that Defendants Joseph Michael Orr and Luke Rogers'[1] Motion to Dismiss Pursuant to *Fed. R. Civ. P. 12(b)(6)* (ECF No. 14) be **GRANTED.**

II. REPORT

A. Background

On December 18, 2020, Plaintiff Donald Lee Kissner filed a *pro se* civil complaint in this Court under *42 U.S.C. § 1983* (ECF No. 1.) He alleges that on August 20, 2020, he "was drugged" and attempted to set himself on fire. (ECF No. 1, PageID.6.) One Shannon Boudro called 911, and Police Officers Joseph Orr and Luke Rogers responded. (*Id.*) Plaintiff alleges that the officers placed him in their patrol car "with no medical attention via calling for EMS or anything." (**[*2]** *Id.*) He states that he sat in the patrol car for one hour and 40 minutes "covered from his head to his toes in lighter fluid." (*Id.* at PageID.6-7.) After that time, the officers took Plaintiff to the hospital. (*Id.* at PageID.7.) He alleges that the officers knew that he was covered in lighter fluid at 8:43 p.m. (*Id.* at PageID.8.) Plaintiff states that Dr. Zarski knew of his suicide attempt at 10:30 p.m., but that it was not until 3:43 a.m. that a nurse asked if anyone had cleaned up his chemical burns. (*Id.*) At that time the nurse made him take a shower. (*Id.*) Plaintiff alleges that as a result of the delay, he has "scars on his

[1] I note that this officer's name is spelled "Rogers" in the docket and the complaint (ECF No. 1) but spelled "Rodgers" in Defendants' motion to dismiss. (ECF No. 14.) This Report and Recommendation will defer to the spelling as reflected in the docket at this time.

genitals, belly, head, and underarms from the chemical burns." (*Id.*)

Exhibit B to Plaintiff's complaint is a written report of Officer Orr, who writes that on August 20, 2020, he and Officer Rogers were dispatched to the scene where Plaintiff had attempted suicide, and their investigation into the call "lead (sic) to the hospitalization of the suspect for a Psych Evaluation and investigation into Felonious Assault and Attempted Arson." (*Id.* at PageID.14.) Orr stated that upon arriving at the scene, they observed Plaintiff, wearing no clothes other than a shirt **[*3]** tied around his waist. There was a strong odor of lighter fluid emanating from the Plaintiff. The officers detained Plaintiff for safety reasons. (*Id.*) Charcoal lighter fluid and a lighter were recovered from the Plaintiff. (*Id.*)

Plaintiff's Exhibit C appears to be a continuation of Orr's report. He states that he double locked the handcuffs for Plaintiff's safety, and advised him that he was under arrest for felonious assault. Officer Orr, along with Officer Rogers, began to transport Plaintiff to the jail, but after Plaintiff made several statements about wanting to kill himself, they instead took him to the Owosso Memorial Hospital for a psychiatric evaluation. (*Id.* at PageID.16.) During this time, Plaintiff told the officers that he was only trying to kill himself, and that he was only trying to spray himself with lighter fluid. He admitted that the purple lighter found at the scene was his. (*Id.*)

Upon arriving at the hospital, the officers escorted Plaintiff to the emergency room, where Orr completed an Involuntary Petition for a Psychological Evaluation. Plaintiff was then released into the hospital's custody pending the petition. (*Id.*) The report does not indicate that Plaintiff **[*4]** complained about burns or skin irritation from the lighter fluid.

Released who and how?

B. Motion to Dismiss Standard

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the complaint with regard to whether it states a claim upon which relief can be granted. When deciding a motion under this subsection, "[t]he court must construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief." Bovee v. Coopers & Lybrand C.P.A., 272 F.3d 356, 360 (6th Cir. 2001). As the Supreme Court held in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), a complaint must be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted if the complaint does not plead "enough facts to state a claim to relief that is plausible on its face." Id. at 570 (rejecting the traditional Rule 12(b)(6) standard set forth in Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). Under Rule 12(b)(6), "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). Even though a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right **[*5]** to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations omitted).

The Supreme Court has explained that the "tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Although Rule 8 "marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era," it "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679. Thus, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.... When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* "In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in **[*6]** the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." Nieman v. NLO, Inc., 108 F.3d 1546, 1554 (6th Cir. 1997) (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed. 1990)). This circuit has further "held that 'documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claim.'" Weiner v. Klais & Co., 108 F.3d 86, 89 (6th Cir. 1997) (quoting Venture Assoc. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993)); Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 445 (6th Cir. 1997).

C. Qualified Immunity

Defendants argue that they are entitled to qualified immunity. "The doctrine of qualified immunity protects government officials from liability for civil damages 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, 129 S. Ct. 808, 172 L. Ed. 2d 565 (1999)* (internal citations omitted). Further,

> Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless **[*7]** of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.
>
> Because qualified immunity is an immunity from suit rather than a mere defense to liability[,] it is effectively lost if a case is erroneously permitted to go to trial. Indeed, we have made clear that the driving force behind the creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials will be resolved prior to discovery. Accordingly, we repeatedly have stressed the importance of resolving immunity questions at the earliest stage in litigation.

Id. at 231-32 (internal citations omitted).

"If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier v. Katz, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)*. The *Saucier* Court laid out a two-step process for determining whether an official may claim qualified immunity: first, "Taken in the light most favorable to the party asserting the injury, do the facts show the officer's conduct violated a constitutional right?"; and second, "the next . . . step is to ask whether the right was clearly established." *Id. at 201*. Under *Saucier*, the inquiry **[*8]** was sequential, requiring the district court to first consider whether there was a constitutional violation. However, in *Pearson*, the Supreme Court held that the two-step sequential analysis set forth in *Saucier* is no longer mandatory. Rather, *Pearson* commended the order of inquiry to the judge's discretion, to be exercised on a case-by-case basis.

The inquiry into whether the right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition; and it serves to advance understanding of the law . . ." *Id.* The right at issue must be clearly established "in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)*. The facts are to be "viewed in the light most favorable to the plaintiff[.]" *Radvansky v. City of Olmsted Falls, 395 F.3d 291, 302 (6th Cir. 2005)*.

Once the defense of qualified immunity is raised, the plaintiff bears the burden of proving that the defendant is not entitled to qualified immunity. *Rodriguez v. Passinault, 637 F.3d 675, 689 (6th Cir. 2011)*.

In the present case, Plaintiff was in police custody from the time he was handcuffed and placed in the patrol car until he was released to the custody of the hospital, a period **[*9]** that Plaintiff alleges was one hour and 40 minutes. (ECF No. 1, PageID.7.) In a generalized sense, he had a right under the *Fourteenth Amendment* to be afforded medical care for his serious medical needs during this time, analogous to the Eight Amendment deliberate indifference standard for individuals who are serving custodial sentences. *See Winkler v. Madison Cty., 893 F.3d 877, 890 (6th Cir. 2018)* ("The *Eighth Amendment's* prohibition on cruel and unusual punishment generally provides the basis to assert a *§ 1983* claim of deliberate indifference to serious medical needs, but where that claim is asserted on behalf of a pre-trial detainee, the Due Process Clause of the Fourteenth Amendment is the proper starting point."). *See also Troutman v. Louisville Metro Dep't of Corr., 979 F.3d 472, 482-883 (6th Cir. 2020)* ("[F]or pretrial detainees...this right to adequate medical treatment attaches through the Due Process Clause of the Fourteenth Amendment, which affords pretrial detainees rights analogous to those of prisoners. A prison official violates that right to adequate medical treatment when he or she acts with deliberate indifference to a pretrial detainee's serious medical needs.") (internal citations omitted).

The deliberate indifference standard has both an objective and a subjective component. "For the objective component, the detainee must demonstrate the

existence of a sufficiently serious medical need." Spears v. Ruth, 589 F.3d 249, 254 (6th Cir. 2009). "To show that the medical need was sufficiently serious, **[*10]** the plaintiff must show that the conditions of incarceration imposed a 'substantial risk of serious harm.'" Troutman, 979 F.3d at 482 (quoting Miller v. Calhoun County, 408 F. 3d 803, 812 (6th Cir. 2005)). Under the subjective standard, "an inmate must show both that an official knew of her serious medical need and that, despite this knowledge, the official disregarded or responded unreasonably to that need." Downard for Est. of Downard v. Martin, 968 F.3d 594, 600 (6th Cir. 2020). "The failure to alleviate a significant risk that an officer 'should have perceived but did not' is insufficient for a claim of deliberate indifference." Troutman, 979 F.3d at 483 (quoting Farmer v Brennan, 511 U.S. 825, 838, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)).

know to take away the cigarette because of risk but not to wish himself off ??

Officers Orr and Rogers responded to a dispatch reporting that someone was trying to set himself on fire. When they arrived on the scene, they observed Plaintiff, who smelled of lighter fluid, holding a cigarette. The most obvious and most serious risk of substantial harm to the Plaintiff was the risk that he would commit suicide by setting himself on fire. Indeed, according to Orr's report, which is appended to the complaint as Exhibit B, the Plaintiff, who was agitated and verbally aggressive, "made several statements that he wanted to light himself on fire and wanted to kill himself." (ECF No. 1, PageID.14.) In addition, Plaintiff was smoking a cigarette, and failed to comply with the officers' **[*11]** orders to put it out. (*Id.*) The officers responded appropriately and reasonably to the risk by removing the cigarette, handcuffing the Plaintiff, and detaining him "for safety reasons" in the back of the patrol vehicle (*Id.* at PageID.14, 16.) They also secured the bottle of lighter fluid and the lighter. (*Id.* at PageID.14.) Following a short investigation at the scene, Plaintiff was taken to the hospital. (*Id.* at PageID.16.) At the hospital, Orr took the additional step of completing an Involuntary Petition for a Psychological Evaluation and releasing Plaintiff into the hospital's custody. (*Id.* at PageID.16, 18.)

Given the overriding concern that Plaintiff would commit suicide by setting himself on fire, it would not have been objectively obvious to these officers that there was a medical need to wash off the lighter fluid, or that failure to do so immediately posed a "substantial risk of serious harm." Troutman, 979 F3d at 482. It should be noted that Plaintiff does not allege that he told the officers he was suffering any discomfort from the lighter fluid. Plaintiff has therefore not met the objective test for deliberate indifference.

Nor has he met the subjective test. While Orr noted that Plaintiff smelled **[*12]** of lighter fluid, neither he nor Rogers disregarded that fact. After a short investigation, they restrained Plaintiff for his safety and took him to the hospital. The longer delay in providing Plaintiff with a shower to wash off the lighter fluid occurred at the hospital, where he alleges, it was not until 3:43 a.m. that a nurse asked him if anyone had cleaned up is chemical burns. (*Id.* at PageID.8.) This was over five hours after he arrived at the hospital before 10:22 p.m.[2] Even if the officers had called paramedics to the scene, as Plaintiff contends they should have done, at best Plaintiff would have arrived at the hospital somewhat sooner—but once he was released to the hospital's custody, he would still have had a five-hour delay in getting a shower. The Defendant officers are not vicariously liable for the hospital's or Dr. Zarski's actions after Plaintiff was no longer in their custody.

Qualified immunity "'provides ample support to all but the plainly incompetent or those who knowingly violate the law.'" Burns v. Reed, 500 U.S. 478, 494-95, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)). Here, Orr and Rogers responded reasonably to Plaintiff's medical/psychological needs. Even if we assume that they failed to draw an inference that Plaintiff **[*13]** might suffer chemical burns from the lighter fluid, that would amount to negligence at most, and negligence will not support a finding of deliberate indifference. *See* Farmer, 511 U.S. at 835 (holding that an Eighth Amendment violation requires a "state of mind more blameworthy than negligence").

Because Plaintiff has not plausibly pled a constitutional violation, these Defendants are entitled to qualified immunity.

D. Governmental Immunity

To the extent that Plaintiff also asserts a state law negligence claims, these Defendants are entitled to statutory immunity under Michigan's involuntary commitment law. Specifically, M.C.L. § 330.1427b(1) provides:

(1) A peace officer who acts in compliance with this

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[2] Dr. Zarski's Clinical Certificate (ECF No. 1, PageID.20) notes that his examination commenced at 10:30 p.m. Medical records appended to the complaint show that Plaintiff arrived at the hospital at 10:22 p.m. (*Id.* at PageID.22.)

act is acting in the course of official duty and is not civilly liable for the action taken.

An exception to immunity exists only where the officer "engages in behavior involving gross negligence or wilful and wanton misconduct." *M.C.L. § 330.1427b(2)*. "Gross negligence" is defined as conduct "so reckless as to demonstrate a substantial lack of concern for whether an injury results." *M.C.L. § 691.1407(8)(a)*. As discussed above, Officers Orr and Rogers secured an individual who was threatening suicide by self-immolation, took away his lit cigarette, lighter fluid, and lighter, transported him **[*14]** to the hospital, and petitioned for an involuntary psychological evaluation. This is the antithesis of gross negligence or recklessness.

E. Conclusion

For the reasons discussed above, **IT IS RECOMMENDED** that Defendants Orr and Rogers' Motion to Dismiss Pursuant to *Fed. R. Civ. P. 12(b)(6)* (ECF No. 14) be **GRANTED**.

III. REVIEW

Pursuant to *Rule 72(b)(2) of the Federal Rules of Civil Procedure*, "[w]ithin 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy." *Fed. R. Civ. P. 72(b)(2)*; *see also 28 U.S.C. § 636(b)(1)*. Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Howard v. Sec'y of Health & Human Servs., 932 F.2d 505 (6th Cir. 1991)*; *United States v. Walters, 638 F.2d 947 (6th Cir. 1981)*. The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this R&R. *Willis v. Sec'y of Health & Human Servs., 931 F.2d 390, 401 (6th Cir. 1991)*; *Dakroub v. Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987)*. Pursuant to *E.D. Mich. LR 72.1(d)(2)*, a copy of any objections is to be served upon this magistrate judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this R&R to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate **[*15]** to the objections in length and complexity. *Fed. R. Civ. P. 72(b)(2)*; *E.D. Mich. LR 72.1(d)*. The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: August 31, 2021

/s/ Patricia T. Morris

Patricia T. Morris

United States Magistrate Judge

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Kissner v. Orr

United States District Court for the Eastern District of Michigan, Southern Division

August 19, 2021, Decided; August 20, 2021, Filed

CASE NO. 2:20-CV-13445

Reporter
2021 U.S. Dist. LEXIS 252109 *; 2021 WL 6618770

DONALD LEE KISSNER, Plaintiff, v. JOSEPH MICHAEL ORR, LUKE ROGERS, CHRIS BROWN, and JEREMY ZARSKI, Defendants.

Subsequent History: Magistrate's recommendation at *Kissner v. Orr, 2021 U.S. Dist. LEXIS 244110, 2021 WL 6618768 (E.D. Mich., Aug. 31, 2021)*

Core Terms

non-moving, summary judgment motion, state actor, summary judgment, RECOMMENDATION, custody, lighter fluid, alleges

Counsel: **[*1]** Donald Lee Kissner, Plaintiff, Pro se, Corunna, MI.

For Joseph Michael Orr, officer, Luke Rogers, Oficer, Defendants: James E. Tamm, Kerr, Russell, and Weber, PLC, Detroit, MI; Kevin Andrew McQuillan, Kerr, Russell and Weber, PLC, Detroit, MI.

For Jeremy Zarski, Dr., Defendant: Marcy R. Matson, Hall Matson, PLC, East Lansing, MI.

Judges: Patricia T. Morris, United States Magistrate Judge. DISTRICT JUDGE LINDA V. PARKER.

Opinion by: Patricia T. Morris

Opinion

REPORT AND RECOMMENDATION ON DEFENDANT JEREMY ZARSKI'S MOTION FOR SUMMARY JUDGMENT (ECF No. 15)

I. RECOMMENDATION

For the reasons set forth below, **IT IS RECOMMENDED** that Defendant Jeremy Zarski's Motion for Summary Judgment (ECF No. 15) be **GRANTED**.

II. REPORT

A. Background

On December 18, 2020, Plaintiff Donald Lee Kissner filed a *pro se* civil complaint in this Court under *42 U.S.C. § 1983* (ECF No. 1.) He alleges that on August 20, 2020, he "was drugged" and attempted to set himself on fire. (ECF No. 1, PageID.6.) One Shannon Boudro called 911, and Police Officers Joseph Orr and Luke Rogers responded. (*Id.*) Plaintiff alleges that the officers placed him in their patrol car "with no medical attention via calling for EMS or anything." (*Id.*) He states that he sat in the patrol car for **[*2]** one hours and 40 minutes "covered from his head to his toes in lighter fluid." (*Id.* at PageID.6-7.) After that time, the officers took Plaintiff to the hospital. (*Id.* at PageID.7.) He alleges that the officers knew that he was covered in lighter fluid at 8:43 p.m. (*Id.* at PageID.8.) Plaintiff states that Dr. Zarski knew of his suicide attempt at 10:30 p.m., but that it was not until 3:43 a.m. that a nurse asked if anyone had cleaned up his chemical burns. (*Id.*) At that time the nurse made him take a shower. (*Id.*) Plaintiff alleges that as a result of the delay, he has "scars on his genitals, belly, head, and underarms from the chemical burns." (*Id.*)

Exhibit B to Plaintiff's complaint is a written report of Officer Orr, who writes that on August 20, 2020, he and Officer Rogers were dispatched to the scene where Plaintiff had attempted suicide, and their investigation into the call "lead (sic) to the hospitalization of the suspect for a Psych Evaluation and investigation into Felonious Assault and Attempted Arson." (*Id.* at PageID.14.) Orr stated that upon arriving at the scene, they observed Plaintiff, wearing no clothes other than a shirt tied around his waist. There was a strong odor **[*3]**

of lighter fluid emanating from the Plaintiff. The officers detained Plaintiff for safety reasons. (*Id.*)

Plaintiff's Exhibit C appears to be a continuation of Orr's report. He, along with Officer Rogers, began to transport Plaintiff to the jail, but after Plaintiff made several statements about wanting to kill himself, they instead took him to the Owosso Memorial Hospital for a psychiatric evaluation. (*Id.* at PageID.16.) Upon arriving at the hospital, the officers escorted Plaintiff to the emergency room, where Orr completed an Involuntary Petition for a Psychological Evaluation. Plaintiff was then released into the hospital's custody pending the petition. (*Id.*) If under warrantless arrest then how released. Plaintiff's Exhibit D is the Probate Court Petition for Mental Health Treatment submitted by Officer Orr. In the Petition, Orr states, "Subject was covered in lighter fluid and made several statements that he was going to kill himself and light himself on fire." (*Id.* at PageID.18.)

Plaintiff's Exhibit E is a Clinical Certificate submitted to the Probate Court by Dr. Jeremy Zarski, stating that he examined Plaintiff at 10:30 p.m. on August 20, 2020, and determined that he was mentally ill, that is, that Plaintiff "has a substantial **[*4]** disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." (*Id.* at PageID.20.) Dr. Zarski diagnosed "acute suicidal ideation, noting "multiple suicidal threats and attempts including pouring gas on himself to light himself on fire." (*Id.*)

Defendant Jeremy Zarski filed his motion for summary judgment on April 20, 2021. (ECF No. 15.) Plaintiff has not filed a response. Appended to the motion as Exhibit 1 is Dr. Zarski's affidavit. He states that on August 20, 2020, he was working as an emergency department physician at Owosso Memorial Hospital, and in that capacity he conducted a psychological evaluation of Plaintiff to determine if he was at risk of harming himself or others. (ECF No. 15-1, PageID.111.) He states, "At all times relevant to the allegations in the Complaint, I was acting as a private physician providing care through the emergency department at Owosso memorial Hospital. I was not employed by the state or a state agency." (*Id.*) He further states, "All of my interactions and determinations relating to Plaintiff were based entirely on my own professional judgment and opinion." **[*5]** (*Id.*)

B. Summary Judgment Standard

A court will grant a party's motion for summary judgment when the movant shows that "no genuine dispute as to any material fact" exists. Fed. R. Civ. P. 56(a). In reviewing the motion, the court must view all facts and inferences in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The moving party bears "the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting Celotex Corp. v. Cartrett, 477 U.S. 317, 323 (1986))(internal quotation marks omitted). In making its determination, a court may consider the plausibility of the movant's evidence. Matsushita, 475 U.S. at 587-88. Summary judgment is also proper when the moving party shows that the non-moving party cannot meet its burden of proof. Celotex, 477 U.S. at 325.

The non-moving party cannot merely rest on the pleadings in response to a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Instead, the non-moving party has an obligation to present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." Moore v. Philip Morris Cos., 8 F.3d 335, 339-40 (6th Cir. 1993). The non-movant cannot withhold evidence until trial or rely on speculative possibilities that material issues of fact will appear later. 10B Charles Alan Wright & Arthur R. Miller, Federal Practice and **[*6]** Procedure § 2739 (3d ed. 1998). "[T]o withstand a properly supported motion for summary judgment, the non-moving party must identify specific facts and affirmative evidence that contradict those offered by the moving party." Cosmas v. Am. Express Centurion Bank, 757 F. Supp. 2d 489, 492 (D. N.J. 2010). In doing so, the non-moving party cannot simply assert that the other side's evidence lacks credibility. Id. at 493. And while a *pro se* party's arguments are entitled to liberal construction, "this liberal standard does not . . . 'relieve [the party] of his duty to meet the requirements necessary to defeat a motion for summary judgment.'" Veloz v. New York, 339 F. Supp. 2d 505, 513 (S.D. N.Y. 2004) (quoting Jorgensen v. Epic/Sony Records, 351 F.3d 46, 50 (2nd Cir. 2003)). "[A] *pro se* party's 'bald assertion,' completely unsupported by evidence, is not sufficient to overcome a motion for summary judgment." Lee v. Coughlin, 902 F. Supp. 424, 429 (S.D. N.Y. 1995) (quoting Carey v. Crescenzi, 923 F.2d 18, 21 (2d Cir. 1991)).

When the non-moving party fails to adequately respond to a summary judgment motion, a district court is not required to search the record to determine whether genuine issues of material fact exist. *Street, 886 F.2d at 1479-80*. The court will rely on the "facts presented and designated by the moving party." *Guarino v. Brookfield Twp. Trs., 980 F.2d 399, 404 (6th Cir. 1992)*. After examining the evidence designated by the parties, the court then determines "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided **[*7]** that one party must prevail as a matter of law." *Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1310 (6th Cir. 1989)* (quoting *Anderson, 477 U.S. at 251-52*). Summary judgment will not be granted "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson, 477 U.S. at 248*.

C. Plaintiff Cannot Show That Dr. Zarski Was a State Actor

Dr. Zarski argues that because he was not a state actor, he cannot have liability under *42 U.S.C. § 1983*.

To establish a claim under *§ 1983*, a plaintiff must show the deprivation of a constitutional right "by a person acting under the color of state law." *Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992)* (citing *Jones v. Duncan, 840 F.2d 359, 361-62 (6th Cir. 1988)*). "The principal inquiry in determining whether a private party's actions constitute 'state action' under the *Fourteenth Amendment* is whether the party's actions may be 'fairly attributable to the state.'" *Id.* (quoting *Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)*).

The Sixth Circuit has set forth three tests to determine whether a private party's actions are attributable to the state-the public function test, the state compulsion test, and the nexus test. Citing *Wolotsky, 960 F.2d at 1335*, the Court in *Ellison v. Garbarino, 48 F.3d 192, 195 (6th Cir. 1995)*, summarized the tests as follows:

> The public function test requires that the private entity exercise powers which are traditionally exclusively reserved to the state. The typical examples are running elections or eminent domain. The state compulsion test requires proof that the state **[*8]** significantly encouraged or somehow coerced the private party, either overtly or covertly, to take a particular action so that the choice is really that of the state. Finally, the nexus test requires a sufficiently close relationship (i.e., through state regulation or contract) between the state and the private actor so that the action taken may be attributed to the state. (Internal punctuation and citations omitted).

Here, Dr. Zarski's one-half hour emergency room examination of Plaintiff and his report to the Probate Court that Plaintiff was mentally ill are insufficient to show that he was a *de facto* state actor. In *Ellison*, the plaintiff's wife, believing that the plaintiff would become violent, obtained a court order for the Plaintiff to be transported for a psychological evaluation. Sheriff's Deputies transported the plaintiff to a private physician's office for the evaluation, and the doctor completed a certification that was necessary for the plaintiff's involuntary commitment. The Sixth Circuit held that the doctor was not a state actor under any of the three tests. The Court found that under the compulsion test, "the Tennessee statute does not compel or encourage private individuals **[*9]** to pursue involuntary commitment." *Id., 48 F.3d at 196*. The Court also cited *Janicsko v. Pellman, 774 F.Supp. 331, 338-39 (M.D. Pa. 1991)* which found it "significant that physicians retained the discretion under the Pennsylvania statute to determine when commitment is necessary." *Id.*

Like the Tennessee statute in *Ellison*, the Michigan Mental Health Code does not compel involuntary commitment, but provides that a person may be committed only upon examination and certification by an examining physician:

> If the examining physician or psychologist does not certify that the individual is a person requiring treatment, the individual shall be released immediately. If the examining physician or psychologist executes a clinical certificate, the individual may be hospitalized under [M.C.L. § 1423].[1]

M.C.L. § 330.1429.

As in *Janicsko*, under the Michigan statute the examining physician retains the discretion to determine whether or not commitment is necessary. In this case, Dr. Zarski affirms in his affidavit that all of his interactions and determinations regarding the Plaintiff were based on his own professional judgment.[2]

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[1] Section 1423 sets forth requirements for mental health hospitalizations.

[2] Because Plaintiff has not responded to this motion, the Court

The *Ellison* Court also found that the plaintiff made "no attempt to establish a sufficient 'nexus' between defendants," and therefore the nexus test was inapplicable. *48 F.3d at 196*. Likewise, the Court found that the plaintiff **[*10]** had offered no analysis, historical or otherwise, supporting the public function test, adding, "Considering that plaintiff bears the burden on this issue, this failure alone renders the test inapplicable." *Id.* So too in the present case, the Plaintiff has not shown that Dr. Zarski was a state actor under any of the three tests.

In this case, Dr. Zarski's role was to evaluate Plaintiff's mental status, and in carrying out that role, he was not a state actor. Nevertheless, Plaintiff is not challenging his commitment for mental health evaluation or treatment, but rather the alleged delay in obtaining medical attention necessitated by being covered in lighter fluid. And it is true that the state has an obligation to provide medical care to those who are in custody. *See West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)*.

In *Carl v. Muskegon County, 763 F.3d 592 (6th Cir. 2014)*, the Sixth Circuit found that a private doctor who performed a psychological evaluation of the plaintiff was a state actor. The plaintiff in *Carl* was a pretrial detainee. Distinguishing *Ellison*, and finding that the doctor met the public function test, the Court centered its conclusion on the fact that the plaintiff was in state custody:

> More importantly, the plaintiff in *Ellison* was not a ward of the state. *Ellison, 48 F.3d at 194*. This distinction is key. **[*11]** Because *Ellison* did not arise in the context of providing mental health care to those in the state's custody, the district court should not have relied on that case.

Id. at 597.

In the present case, the Plaintiff was not in state custody when Dr. Zarski examined him. At that point, he was not under arrest and he was not a pretrial detainee. Indeed, Officer Orr's report, appended to Plaintiff's complaint as Exhibit C, affirmatively states that Plaintiff was released to the custody of the hospital. (ECF No. 1, PageID.16.) Accordingly, the controlling case is *Ellison*, not *Carl*.

Summary judgment should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Daniels v. Woodide, 396 F.3d 730, 735 (6th Cir. 2005)*. Again, Plaintiff has not responded to the present motion, and has failed to establish any genuine factual dispute as to whether Dr. Zarski was a state actor, an essential element of a *§ 1983* claim.

D. Conclusion

For the reasons discussed above, **IT IS RECOMMENDED** that Defendant Jeremy Zarski's Motion for Summary Judgement be **GRANTED**.

III. REVIEW

Pursuant to *Rule 72(b)(2) of the Federal Rules of Civil Procedure*, "[w]ithin 14 days after being served with a copy of the recommended **[*12]** disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy." *Fed. R. Civ. P. 72(b)(2)*; *see also 28 U.S.C. § 636(b)(1)*. Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Howard v. Sec'y of Health & Human Servs., 932 F.2d 505 (6th Cir. 1991)*; *United States v. Walters, 638 F.2d 947 (6th Cir. 1981)*. The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this R&R. *Willis v. Sec'y of Health & Human Servs., 931 F.2d 390, 401 (6th Cir. 1991)*; *Dakroub v. Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987)*. Pursuant to *E.D. Mich. LR 72.1(d)(2)*, a copy of any objections is to be served upon this magistrate judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this R&R to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. *Fed. R. Civ. P. 72(b)(2)*; *E.D. Mich. LR 72.1(d)*. The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

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will rely on Dr. Zarski's submission. *Guarino, 980 F.2d at 404*.

Date: August 19, 2021

/s/ PATRICIA T. MORRIS **[*13]**

Patricia T. Morris

United States Magistrate Judge

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