Selected docket entries for case 18−3029

Generated: 06/12/2022 17:57:49

Filed	Document Description	Page	Docket Text
02/25/2019	29 Brief filed	2	Appellee's brief filed by Appellees Denise Bonnett, Scott Hofteizer, James Parish and Mark Rice. Paper copies due on 03/04/2019 Electronically Transmitted. [29] [6986772] [18−3029] (CAH)
02/25/2019	31 Brief filed	47	Appellee's brief filed by Appellee James Richter. Paper copies due on 03/04/2019 Electronically Transmitted. [31] [6986827] [18−3029] (DRS)

No. 18-3029

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

JAMES VERN PENNEWELL,

Plaintiff-Appellant,

v.

JAMES PARISH, et al.,

Defendants-Appellees.

APPEAL FROM A FINAL JUDGMENT OF THE EASTERN DISTRICT OF WISCONSIN, THE HONORABLE LYNN ADELMAN, PRESIDING

STATE DEFENDANTS-APPELLEES' RESPONSE BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

Attorneys for Defendants-Appellees

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6219
(608) 267-2223 (Fax)
rothct@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The plaintiff-appellant's jurisdictional statement is complete and correct. As for the timeliness of plaintiff-appellant's notice of appeal, the State Appellees[1] agree that the document filed at district court docket no. 54 qualifies as a timely notice of appeal under *Smith v. Barry*, 502 U.S. 244, 248–49 (1992) and *Listenbee v. City of Milwaukee*, 976 F.2d 348, 350–51 (7th Cir. 1992).

INTRODUCTION

The district court properly declined Plaintiff-Appellant James Pennewell's request for court-appointed counsel at the pleading stage of this Eighth Amendment deliberate indifference case. This Court has recognized that "[r]equests for counsel typically are made by plaintiffs . . . at the outset of litigation, and at that stage district judges frequently, and with good reason, will deny those requests." *James v. Eli*, 889 F.3d 320, 329 n.3 (7th Cir. 2018). The district court here had "good reason" for denying Pennewell's run-of-the-mill request for court-appointed counsel at the pleading stage: so far, he appeared capable of litigating the case on his own, and nothing set his claims apart from the many other pro se inmate complaints filed in this circuit alleging deliberate indifference based on medical treatment. Finding an abuse

[1] The "State Appellees" are all appellees except for Dr. James Richter, a private doctor contracted to perform medical care for the Wisconsin Department of Corrections, who is represented by his own counsel.

of discretion here would effectively impose a per se rule that requires district courts to appoint counsel at the pleading stage of every single Eighth Amendment pro se inmate case alleging inadequate medical treatment. This Court has never adopted this impractical blanket rule and it should decline to do so now.

The district court also properly granted summary judgment to the State Appellees on Pennewell's Eighth Amendment claims because he offered no evidence of deliberate indifference. During 2015 and 2016, Pennewell received consistent care for his right eye issues, including three surgeries, many appointments at the University of Wisconsin Eye Clinic, and many appointments with Wisconsin Department of Corrections (DOC) clinicians. Pennewell primarily offers vague contrary arguments that fail to identify any particular defendants-appellees or incidents that supposedly violated his Eighth Amendment rights. When Pennewell does offer specifics, a close examination of the record—rather than his summary judgment brief, which he cites almost exclusively—reveals evidence of attentive care, not deliberate indifference.

The district court's summary judgment decision should be affirmed.

STATEMENT OF THE ISSUES

1. Did the district court properly exercise its discretion by denying Pennewell's two requests for court-appointed counsel at the pleading stage,

even though his complaint alleged that the medical treatment he received while in DOC custody violated the Eighth Amendment?

The district court answered yes, as should this Court.

2. Was summary judgment proper on Pennewell's Eighth Amendment claims, where the State Appellees provided Pennewell with substantial care for his right eye issues and no evidence existed of deliberate indifference?

The district court answered yes, as should this Court.

STATEMENT OF THE CASE

I. Factual background.

A. The parties.

From 2015 to 2017, Pennewell was an inmate in DOC custody. During February and March 2015, he was incarcerated at the Dodge Correctional Institution ("Dodge"), after which he was moved to the John Burke Correctional Center ("John Burke") and resided there at all relevant times. The State Appellees are all employed by DOC: Parish as a physician's assistant at Dodge, and Bruns and Jackson as nurse clinicians at John Burke. (Dkt. 29:2 ¶¶ 3–5.)[2]

[2] Pennewell's appellate brief only offers argument specific to P.A. Parish, Nurse Jackson, and Nurse Bruns—the so-called "Treating Physicians" (Appellant's Br. 36). He argues that he could have developed the record more fully against the other State Appellees with the assistance of counsel (Appellant's Br. 36 n.5), but that is not an independent basis on which to reverse the district court's judgment.

B. Pennewell received medical care for his eye issues from Parish while at Dodge.

On February 11, 2015, about a week after Pennewell arrived at Dodge, P.A. Parish performed an intake physical examination on him. (Dkt. 29:3 ¶¶ 6–7.) P.A. Parish learned that Pennewell had seen a DOC-contracted optometrist earlier that day, Dr. James Richter, and that Penewell had reported chronic vision issues in his right eye. (Dkt. 29:3 ¶ 9.) P.A. Parish also noted that Dr. Richter had already scheduled Pennewell for an eye exam at the University of Wisconsin Eye Clinic ("UW Eye Clinic"). (Dkt. 29:3 ¶ 10.) Because Pennewell had already been seen by a specialist, was scheduled for a follow-up eye exam, and did not report any symptoms that required immediate attention, P.A. Parish deferred to the existing course of treatment and did not recommend additional measures specific to Pennewell's right eye. (Dkt. 29:4 ¶ 13.) P.A. Parish did, however, recommend treatments for other medical issues that Pennewell reported during that appointment. (Dkt. 29:3–4 ¶¶ 11–12.)

C. Pennewell received emergency medical care immediately after reporting acute symptoms at John Burke.

Pennewell was transferred to John Burke on March 17, 2015, upon which Nurse Bruns met with him to discuss his ongoing medical issues and needs. (Dkt. 29:4–5 ¶ 16.) Like P.A. Parish, Nurse Bruns learned that Pennewell had chronic eye problems and was scheduled for an appointment at the UW Eye Clinic on April 14, 2015. (Dkt. 29:5 ¶¶ 17–18, 20.) Again, like P.A. Parish,

Pennewell did not report any acute eye symptoms to Nurse Bruns that led her to believe that Pennewell required emergency or other immediate medical attention. (Dkt. 29:6 ¶ 23.) He did not mention flashing lights, floaters, shadows, or any concerns regarding a retinal detachment, issues that otherwise would have prompted Nurse Bruns to refer Pennewell to another clinician. (Dkt. 29:5 ¶¶ 19, 21.)

About two weeks later, on March 30, 2015, Pennewell submitted a Health Services Request complaining of right eye pain and discomfort. (Dkt. 29:6 ¶¶ 24–25.) Nurse Jackson received the request and saw Pennewell that same day. (Dkt. 29:6 ¶ 26.) During the examination, she noted that Pennewell's reported symptoms had not changed since his March 17 appointment with Nurse Bruns; she explained to him that he was still scheduled for the UW Eye Clinic exam in April. (Dkt. 29:7 ¶ 31.)

Nurse Jackson concluded that Pennewell's reported symptoms were consistent with a diagnosis of conjunctivitis ("pink eye"), and so she recommended that he keep his hands clean and avoid touching his eyes. (Dkt. 29:7 ¶ 29.) She did not believe that these issues presented an emergency, nor did Pennewell report any other symptoms requiring urgent care. (Dkt. 29:7–8 ¶¶ 28, 32–33.) He was primarily concerned about his upcoming appointment with the UW Eye Clinic; Nurse Jackson could not tell him the

date for security reasons, but he was satisfied when she told him the appointment had been scheduled. (Dkt. 32:3, 5 ¶¶ 10, 14.)

Nurse Bruns saw Pennewell again on April 7, 2015, the day after he submitted another Health Services Request complaining of increased right eye pain and vision problems. (Dkt. 29:8 ¶¶ 35–36.) This time, Pennewell told Nurse Bruns that vision in his right eye had substantially decreased over the past 24 hours, which led Nurse Bruns to alert a nurse practitioner of Pennewell's worsening symptoms. (Dkt. 29:8–9 ¶¶ 38–39.) Due to this sudden change and the lack of an onsite optometrist at John Burke, the nurse practitioner obtained approval to send Pennewell to the emergency room. (Dkt. 29:9 ¶¶ 39–40.)

Pennewell was transported to the emergency room less a few hours after Nurse Bruns' report to the nurse practitioner. (Dkt. 29:9 ¶ 42.) He received surgery that day at UW Hospital for an uncomplicated retinal detachment. (Dkt. 29:9 ¶¶ 43–44.) He returned to UW Hospital twice for post-operative appointments, once on April 14, 2015, and again on May 1, 2015. (Dkt. 30:5 ¶¶ 18–19.) Nurse Jackson also saw him on April 15, 2015; Pennewell reported improving symptoms, and she noted that he was receiving assistance to ambulate to the Health Services Unit and meals in his room. (Dkt. 34:5 ¶ 16.)

D. After Pennewell's first surgery, he continued to receive medical treatment for his right eye while at John Burke.

Pennewell reported further right eye vision problems in a June 29, 2015, Health Services Unit request. (Dkt. 31-1:96.) Nurse Bruns received his request and saw him that morning for a check-up; she relayed his symptoms to the UW Eye Clinic, who recommended he be seen that day at UW Hospital. (Dkt. 33:8 ¶¶ 30–32.) He was sent that same day to UW Hospital for an emergency appointment, diagnosed with a macular hole, and scheduled for another eye surgery. (Dkt. 30:6 ¶¶ 20–21, 26; Dkt. 31-1:51.) Pennewell's treating physician at UW Hospital did not consider the condition to be an emergency, so the surgery was scheduled for July 16, 2015, rather than that day. (Dkt. 30:7 ¶ 26.) Pennewell purportedly expressed doubts about the need for surgery,[3] but he told Nurse Jackson that he "would like to go ahead with the surgery already scheduled." (Dkt. 31-1:29.) Nurse Bruns saw Pennewell the day before his second surgery, July 15, 2015, for a pre-operative checkup. (Dkt. 33:8 ¶ 33.)

That second surgery—a macular hole repair—was successfully completed on July 16, 2015. (Dkt. 30:7 ¶ 26; Dkt. 30:59–65.) Within roughly three weeks after this surgery, Pennewell had at least five follow-up visits to the Health

[3] Appellant's brief quotes him saying he "wanted to be safe," but it cites only his summary judgment response brief, which is not evidence. That brief cites a so-called "Jp Ex. 16" which does not seem to appear anywhere in the district court record. Appellant's brief also asserts that he was told DOC "does not do second opinions," but the cited evidence contains no such statement. (*See* Dkt. 31-1:29.)

Services Unit at John Burke to examine his eye issues. (Dkt. 31-1:31–35.) Nurse Bruns saw Pennewell the day after his surgery for a checkup; she gave him post-operative care instructions and asked if he needed additional help, but he refused. (Dkt. 33:8–9 ¶ 34.) Pennewell also visited his ophthalmologist at UW Hospital another three times for post-operative care, on July 17, July 24, and August 19. (Dkt. 30:7 ¶ 27; Dkt. 30:66–89.)

Pennewell's eye treatments continued. On October 13, 2015, Pennewell reported to Nurse Bruns that his right eye was painful and causing him headaches. (Dkt. 30:7–8 ¶ 28.) Nurse Bruns contacted Pennewell's UW ophthalmologist, who advised that he should be brought to the UW Eye Clinic that day for treatment. (Dkt. 30:7–8 ¶ 28.) Pennewell visited the UW Eye Clinic that day. (Dkt. 30:7–8 ¶ 28.) Pennewell saw Nurse Jackson again on October 15, 2015, and she told him to continue his prescribed medications. (Dkt. 32:6 ¶ 18.) Multiple follow-up eye appointments at the UW Eye Clinic followed over the next six months. (Dkt. 30:99–128.)

Pennewell received another eye surgery on December 7, 2016, this time to address his continuing dry eye symptoms. (Dkt. 30:8 ¶¶ 30–31.) He again received follow-up treatment at the UW Eye Clinic after this third surgery. (Dkt. 30:138–152.)

During his entire course of treatment, DOC staff—including State Appellees P.A. Parish, Nurse Jackson, and Nurse Bruns—carried out all

medical orders and treatment recommendations from Pennewell's ophthalmologist at the UW Eye Clinic. (Dkt. 30:9 ¶ 35.) In the ophthalmologist's opinion, the care Pennewell received was appropriate and met the applicable standard of care. (Dkt. 30:9 ¶ 34.)

II. Procedural history.

Pennewell filed his original federal complaint on February 15, 2017, alleging Eighth Amendment violations based on the treatment he received while in DOC custody for his right eye issues. (Dkt. 1.) The district court allowed all his Eighth Amendment claims under 42 U.S.C. § 1983 to proceed, except those against DOC, Dodge, and DOC Secretary Litscher. (Dkt. 4:4–5.) At the same time, the district court denied Pennewell's request for court-appointed counsel since he had not provided detail about his own attempt to retain counsel. (Dkt. 4:5.) He renewed his request for counsel with that detail about a week later (Dkt. 5); the district court denied his second request (Dkt. 6). He filed no further requests for counsel.

After discovery, the defendants moved for summary judgment. (Dkt. 27–28.) The district court granted that motion, reasoning that one batch of defendants lacked sufficient personal involvement in the alleged Eighth Amendment violations (Dkt. 51:8–11), and that the other batch did not act with deliberate indifference when treating Pennewell's eye issues (Dkt. 51:11–15). The district court entered a judgment in the defendants' favor the same day.

(Dkt. 52.) Pennewell timely requested to the extend the time to appeal, which can be construed as a notice of appeal, and this appeal followed. (Dkt. 54.)

STANDARDS OF REVIEW

As for Pennewell's requests for appointment of counsel, this Court "review[s] the denial of a § 1915(e)(1) motion for abuse of discretion. 'A court does not abuse its discretion unless . . . (1) the record contains no evidence upon which the court could have rationally based its decision; (2) the decision is based on an erroneous conclusion of law; (3) the decision is based on clearly erroneous factual findings; or (4) the decision clearly appears arbitrary.'" *Pruitt v. Mote*, 503 F.3d 647, 658 (7th Cir. 2007) (citations omitted). Further, "[e]ven if a district court's denial of counsel amounts to an abuse of its discretion, [this Court] will reverse only upon a showing of prejudice." *Id.* at 659.

This Court reviews a summary judgment determination de novo. *Khan v. Midwestern Univ.*, 879 F.3d 838, 843 (7th Cir. 2018).

SUMMARY OF ARGUMENT

The district court properly denied Pennewell's motions for the appointment of counsel. First, at the pleading stage of the case, the district court had no reason to doubt that Pennewell could adequately litigate this case on his own. Like many pro se inmate complaints, Pennewell alleged that the medical treatment he received violated the Eighth Amendment. But the mere presence of such allegations in a pro se complaint does not trigger an absolute right to

counsel at the start of every Eighth Amendment deliberate indifference case. Second, because a district court "has no obligation to reconsider a § 1915(e)(1) denial," *Pruitt*, 503 F.3d at 656 (emphasis omitted), Pennewell's failure to renew his request for counsel precludes any argument about how this case became more complex as it proceeded. Third, Pennewell cannot show that he was prejudiced by the lack of court-appointed counsel because the available evidence overwhelmingly shows that he received appropriate care while in DOC custody.

The district court also properly granted summary judgment to the State Appellees. First, during February and March 2015, Pennewell reported only chronic eye problems to P.A. Parish and Nurse Jackson; no evidence indicates that they ignored a situation requiring emergency treatment. When Pennewell did report acute symptoms in April 2015, he was immediately sent to UW Hospital for eye surgery. Second, Pennewell identifies no evidence that any State Appellee acted with deliberate indifference regarding his care following this first surgery. He addresses only one incident during November 2016 in which a single appointment was rescheduled, resulting in a two-week delay before he was sent to the UW Eye Clinic. That single incident does not demonstrate deliberate indifference, both because he does not identify any State Appellees that were personally involved and because an "isolated

instance[] of neglect . . . cannot support a finding of deliberate indifference." *Reed v. McBride*, 178 F.3d 849, 855 (7th Cir. 1999) (citation omitted).

The district court's summary judgment decision should be affirmed.

ARGUMENT

I. The district court acted within its discretion by declining to appoint counsel for Pennewell at the pleading stage.

The district court properly denied Pennwell's motions for the appointment of counsel. (Dkt. 4; 6.) When considering each motion, the issue presented to the district court was, "given the difficulty of the case, [did] the plaintiff appear competent to litigate it himself?" *Pruitt*, 503 F.3d at 654. Put differently, "the question [was] whether the difficulty of the case—factually and legally—exceed[ed] the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself." *Id.* at 655.

A. The district court properly concluded that Pennewell could adequately litigate this case on his own.

The district court properly denied Pennewell's first request for counsel since, as he concedes, he did not adequately demonstrate his own unsuccessful attempts to gain counsel, a threshold requirement. *Pruitt*, 503 F.3d at 654. (Dkt. 4:5.) In Pennewell's second request, filed about a week after the district court entered its screening order (Dkt. 5), State Appellees agree that Pennewell remedied this failure.

But the district court still properly denied Pennewell's second pleading-stage request, correctly reasoning that his "complaint showed that he has a good grasp of his claims and that he is able to clearly articulate why he believes he is entitled to the relief he seeks." (Dkt. 6:2.) Pennewell's complaint was cogent and legible, despite any difficulties he might have faced due to his poor eyesight or anything else. It identified his Eighth Amendment deliberate indifference claim (Dkt. 1:3), the DOC staff who allegedly ignored his medical condition (Dkt. 1:2), and gave a detailed timeline of his right eye treatment while in DOC custody, including dates of treatment requests, appointments with clinicians, and the like (Dkt. 1:4–6). Moreover, the district court order denying counsel provided a discovery roadmap for Pennewell to survive summary judgment: propound interrogatories, request documents, and submit a declaration with his version of events. (Dkt. 6:2.)

First, Pennewell argues that the district court failed to consider his personal circumstances, primarily his vision problems. (Appellant's Br. 27.) But despite his limited vision, Pennewell's handwritten filings up to that point were legible and cogent. His complaint clearly and legibly described the factual bases for his claims, and his second motion for counsel clearly and directly responded to the district court's request for information about his independent attempts to retain counsel. (*See* Dkt 1; 4; 5.) Moreover, Pennewell's second request for counsel said only he had "vision limitations" and that he "use[d] visual aids to

read & write." (Dkt. 5:1.) Nothing in that statement, especially coupled with the legible handwriting in the filing, would have led the district court to suspect that Pennewell's eyesight was too poor to advocate his position.

Even though the district court did not mention Pennewell's vision in its written order, the very fact that the court was able to issue an order to which Pennewell ably responded means that his vision had not materially compromised his ability to represent himself. Put differently, the district court reviewed Pennewell's filings and thus necessarily considered whether his vision materially impaired his ability to communicate his views to the court. Memorializing the district court's consideration of this factor in its written order would not have added anything of substance.

Second, aside from his impaired vision, Pennewell rests his argument for counsel almost entirely on the fact that his complaint mentioned medical conditions and procedures. (Appellant's Br. 28–29.) The mere fact that a pro se inmate's complaint mentions medical conditions cannot automatically entitle him to court-appointed counsel at the very start of the case—which is effectively the rule for which Pennewell argues. Vast numbers of pro se Eighth Amendment complaints are filed every year in district courts in this circuit, many of which allege inadequate medical care; many such pro se inmates request counsel when filing their complaints. It is simply not possible—let alone practical—for district courts to appoint counsel at the start of every

single Eighth Amendment case like this. Although this Court has said that cases involving medical evidence are more complicated for pro se litigants, it has—wisely—never adopted a per se rule requiring counsel to be appointed at the pleading stage of all such cases. *See, e.g.*, *Pruitt*, 503 F.3d at 655–56; *Eli*, 889 F.3d at 328; *Santiago v. Walls*, 599 F.3d 749, 761 (7th Cir. 2010); *Zarnes v. Rhodes*, 64 F.3d 285, 289 n.2 (7th Cir. 1995).

In fact, one case Pennewell cites supports the proposition that merely mentioning medical issues in a complaint does *not* entitle a pro se plaintiff to counsel. In *Eli*, the inmate-plaintiff's complaint alleged that the defendants declined to give him jaw surgery, which supposedly caused him long-term temporomandibular joint disorder and chronic migraine headaches. 889 F.3d at 325. He filed two similar amended complaints and requested counsel each time, but the district court denied each motion. *Id.* Even though the complaint focused on the adequacy of medical treatment, this Court still held that "[t]he denial of plaintiff's initial counsel requests clearly did not constitute an abuse of discretion" because "[r]equests for counsel typically are made by plaintiffs . . . at the outset of litigation, and at that stage district judges frequently, and with good reason, will deny those requests." *Id.* at 329 n.3 (citing *Pruitt*, 503 F.3d at 663). The only abuse of discretion in *Eli* occurred when the district court denied the plaintiff's later request for counsel at the summary judgment stage which, as explained below, Pennewell never did—like the initial requests

in *Eli*, Pennewell's requests for counsel came at the very start of this case. (Dkt. 1; 5.)

Pennewell may respond that he is not arguing for any such blanket rule, but it is hard to imagine what distinguishes his case from the tidal wave of similar complaints (and requests for counsel) that district courts receive. What more reason could the district court have given for denying counsel, especially at the pleading stage? It could only review Pennewell's complaint, which alleged inadequate treatment of his right eye. The district court clearly did so—again, it found Pennewell had a "good grasp of his claims" and could "clearly articulate" them (Dkt. 6:2)—and thus obviously it saw his medical treatment allegations. The district court could have said little more, aside from noting the presence of medical allegations and yet finding no reason (at least not yet) that Pennewell could not adequately litigate those claims on his own.

Pennewell's argument either elevates form over substance, or it effectively requests the blanket rule that this Court has never adopted. If the district court erred simply because it reviewed the complaint, saw medical terms, denied the counsel request, but did not say something akin to "despite the presence of medical allegations . . ." in its order, that result accomplishes nothing except forcing district courts to add that short phrase to each order denying counsel. But if the district court erred on the substance—that is, if Pennewell was in fact entitled to counsel—that effectively requires the district

court to appoint counsel simply because Pennewell's complaint used certain magic words. Neither result can be correct.

Third, Pennewell argues that his claims spanned two years and occurred at multiple correctional institutions. (Appellant's Br. 29.) Again, that is not an unusual allegation for a pro se inmate complaint. If Pennewell is entitled to counsel due to that allegation, so are many other pro se inmates. In any event, this fact did not seem to hinder Pennewell throughout this litigation. Simply glancing at his summary judgment opposition brief reveals a detailed timeline of events over the entire two-year period from multiple institutions, complete with record citations. (Dkt. 42:1–8.) Pennewell's timeline demonstrates that he had little trouble telling a complete story supported by evidence.

The other cases Pennewell cites do not require reversal here. First, in *Dewitt v. Corizon, Inc.*, 760 F.3d 654, 657 (7th Cir. 2014), the indigent pro se inmate had a "tenth-grade education and no legal experience." Pennewell made no similar allegation here—in fact, he asserts to have a college education. (Dkt. 20:2.) And although he said he had "no fund[s] available," he did not request to file his complaint in forma pauperis. (Dkt. 1:9.) Moreover, the *Dewitt* plaintiff renewed his requests for counsel as discovery progressed, which Pennewell did not do.

As for *Bracey v. Grondin*, 712 F.3d 1012, 1017 (7th Cir. 2013), that case undermines Pennewell's position—it affirmed the district court's decision to

deny counsel, even though there was a chance of complex discovery issues. Moreover, the prospect of "complex" discovery issues conceivably exists in every Eighth Amendment case involving medical treatment; if that alone sufficed to require counsel, it would amount to the blanket rule this Court has never adopted.

And in *Henderson v. Ghosh*, 755 F.3d 559, 566 (7th Cir. 2014), the plaintiff had a below-average IQ of 64 and was receiving drafting assistance from a jailhouse lawyer—again, Pennewell apparently has some college education and was competently drafting his own filings. Only the plaintiff's limited capabilities—more limited than Pennewell's here—in connection with the medical allegations resulted in an abuse of discretion in *Henderson*.

Lastly, in *Merritt v. Faulkner*, 697 F.2d 761, 764–65 (7th Cir. 1983), a now-outdated test for the appointment of counsel was used, and the plaintiff there was fully blind such that he needed help from fellow inmates. Here, Pennewell is only legally blind—he could still see well enough to draft his own filings. Moreover, the district court in *Merritt* denied the plaintiff's request just before trial began, a very different stage of the case than the district court's decisions here at the pleading stage.

B. Pennewell's arguments about how the case became more complex as it proceeded are irrelevant, since he did not renew his request for counsel.

This Court has squarely held that a district court "has no obligation to reconsider a § 1915(e)(1) denial should future events prove the plaintiff less capable than the record indicated when the motion was denied." *Pruitt*, 503 F.3d at 656 (emphasis omitted). Pennewell disregards this basic principle and argues that he should have been appointed counsel later in the case, even though he did not ask. (Appellant's Br. 30–32.)

Pennewell implicitly admits that he only made two requests for counsel, referring to "both of [his] formal motions for counsel." (Appellant's Br. 24.) But he argues that the district court "also did not appoint counsel in response to Mr. Pennewell's subsequent filings complaining of his inability to obtain needed discovery or adequately present his case at the summary judgment stage without counsel." (Appellant's Br. 24.) None of the cited documents after his last formal request at docket entry no. 5 contain a request for counsel. (Dkt. 22; 25; 45; 47.) None of them mention appointed counsel, and only one—docket 45—complains that Pennewell is "not a lawyer by profession." That bare mention of a lawyer, buried in his summary judgment opposition papers, does

not amount to another request for counsel, even construed liberally.[4] That is especially true since Pennewell obviously knew how to formally request counsel—he had done so twice already. (Dkt. 1; 5.)

Nor does *Santiago* excuse Pennewell's failure to renew his request for counsel, as he contends. (Appellant's Br. 31–32.) In *Santiago*, the district court denied a request for counsel and said the plaintiff was "competent to represent himself *throughout the pretrial phase* of this litigation." 599 F.3d at 764 n.13 (emphasis added). This Court found that statement to be a "definitive ruling" about the plaintiff's need for pretrial counsel, one that discouraged the plaintiff from renewing his request later.

The district court here made no such "definitive ruling." Instead, it couched its denial in terms of the early stage of the case. The denial order said the district court "[would] not appoint counsel *at this time*." (Dkt. 6:1 (emphasis added).) It emphasized that "[a]ll [Pennewell] must do *right now* is wait for defendants to file an answer." (Dkt. 6:1 (emphasis added).) And after suggesting upcoming discovery tactics to Pennewell, it again emphasized that "*[a]t this time*, I have no reason to believe that plaintiff cannot handle these

[4] *Hudson v. McHugh*, 148 F.3d 859, 864 (7th Cir. 1998) does not help Pennewell, as it considered whether an amended complaint should have been dismissed for failing to comply with redlining requirements and including legal argument. That says nothing about whether Pennewell's statement that "I am not a lawyer by profession" can be construed as a formal request for counsel.

tasks on his own." (Dkt. 6:1 (emphasis added).) These temporal limitations—"at this time" and "right now"—expressly limited the district court's decision to the circumstances present at the case's early stage. The decision thus could not have reasonably dissuaded Pennewell from filing another request for counsel later in the case. And those limitations aligned well with this Court's recognition that, again, "[r]equests for counsel typically are made by plaintiffs . . . at the outset of litigation, and at that stage district judges frequently, and with good reason, will deny those requests." *Eli*, 889 F.3d at 329 n.3.

C. Pennewell was not prejudiced by the denials of his requests for counsel.

Because district courts have substantial leeway at the start of a case to deny requests for counsel, the district court acted within its discretion by deciding that this case was not too complicated for Pennewell to litigate pro se, at least at the pleading stage. But even if this decision erred, Pennewell cannot show that the denial of counsel prejudiced him. To establish prejudice, he must demonstrate that "assistance of counsel could have strengthened the preparation and presentation of the case in a manner reasonably likely to alter the outcome." *Pruitt*, 503 F.3d at 660.

Nothing counsel could have done during discovery was reasonably likely to defeat summary judgment here. Pennewell largely focuses on his discovery performance (Appellant's Br. 33–34), but despite all those purported problems

he managed to file a summary judgment opposition that carefully documented, with citations to evidence, the entire timeline of his relevant care at each DOC institution. (Dkt. 42:1–8.) As for the lack of any legal argument in his summary judgment brief (Appellant's Br. 34–35), the applicable Eighth Amendment legal standard was well-known to the district court. The most important presentations by plaintiffs in these Eighth Amendment medical cases are the facts about their course of medical treatment. Pennewell adequately presented those facts, allowing the district court to evaluate whether those facts could support a jury finding of deliberate indifference.

As discussed more below, Pennewell mainly lost in the district court because he failed to show that, regarding his symptoms and course of treatment, "no minimally competent professional would have so responded under those circumstances." *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011) (citation omitted). No meaningful disputes existed about what happened when—the parties agreed on the medical treatment Pennewell received and when he received it. More discovery or better briefing would not have helped him in that regard. His main problem was failing to show that the undisputed course of treatment fell below the applicable standard of care so drastically as to amount to deliberate indifference under the Eighth Amendment.

It is sheer speculation to suppose that appointed counsel could reasonably have fixed that basic deficiency in his case. It would have required, at

minimum, retaining an expert willing to opine that the substantial, consistent care that Pennewell received while in DOC custody somehow was so inadequate that "no minimally competent professional" would have approved of it. *Arnett*, 658 F.3d at 751. There is no indication that any such experts exist. That is especially so given the opinion of Pennewell's ophthalmologist from the UW Eye Clinic—who is not a defendant here—that "the care provided by all defendants in this case was appropriate and proper." (Dkt. 30:9 ¶ 34.)

* * *

"[T]he question on appellate review is not whether [this Court] would have recruited a volunteer lawyer in the circumstances, but whether the district court applied the correct legal standard and reached a reasonable decision based on facts supported by the record." *Pruitt*, 503 F.3d at 658. At the pleading stage of this case, the district court reasonably decided that Pennewell's deliberate indifference claims were not so unusual that he was entitled to counsel, at least for the time being. Although this Court decided to appoint counsel at the appellate stage, that does not mean the district court abused its discretion by declining counsel at the start of this unexceptional Eighth Amendment case. The district court's decision should be affirmed.

II. The district court properly granted summary judgment because no genuine dispute existed that Pennewell's treatment complied with the Eighth Amendment.

A. Legal standards.

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The opposing party may not rely solely on allegations in their complaint to defeat a summary judgment motion. Rather, he must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(c); *see also Sterk v. Redbox Automated Retail*, LLC, 770 F.3d 618, 627 (7th Cir. 2014). If the opposing evidence is "merely colorable" or not "significantly probative," summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The Eighth Amendment prohibits cruel and unusual punishment, and it requires states to provide medical care to prisoners. *Williams v. Liefer*, 491 F.3d 710, 714 (7th Cir. 2007). Prison officials who are deliberately indifferent to an inmate's serious medical needs violate the Constitution. *Id.* To prove deliberate indifference to a serious medical need, the plaintiff must meet an objective standard and a subjective standard. *Dunigan ex rel. Nyman v. Winnebago Cty.*, 165 F.3d 587, 590 (7th Cir. 1999).

First, the plaintiff must prove he suffers from an objectively serious medical need. *Id*. "To be 'serious,' a medical condition must be one that a physician has diagnosed as needing treatment or 'one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Knight v. Wiseman*, 590 F.3d 458, 463 (7th Cir. 2009) (citation omitted).

Second, he must "present evidence that an individual defendant intentionally disregarded [a] known risk to inmate health or safety." *Collins v. Seeman*, 462 F.3d 757, 762 (7th Cir. 2006). That risk must be "substantial." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Moreover, "[a] defendant with knowledge of a risk need not 'take perfect action or even reasonable action[,] . . . his action must be reckless before § 1983 liability can be found.'" *Collins*, 462 F.3d at 762 (second alteration omitted) (citation omitted). Put another way, "[m]ere negligence or even gross negligence does not constitute deliberate indifference." *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996). In the context of care provided by medical professionals, "[n]either medical malpractice nor mere disagreement with a doctor's medical judgment is enough to prove deliberate indifference in violation of the Eighth Amendment." *Berry v. Peterman*, 604 F.3d 435, 441, (7th Cir. 2010).

B. No evidence indicates that any State Appellees violated the Eighth Amendment.

State Appellees do not dispute that Pennewell suffered from an objectively serious medical condition. However, he fails to identify a genuine factual dispute that any State Appellee acted with deliberate indifference. The evidence demonstrates that Pennewell received consistent, adequate medical treatment for his eye issues. (*See supra* at Statement of the Case I.B.–D.)

Critically, Pennewell's contrary arguments rarely identify any particular State Appellees who supposedly acted with deliberate indifference. Instead, Pennewell often vaguely refers to "Defendants," without identifying a specific one. (*E.g.* Appellant's Br. 39 ("Defendants' deliberate indifference"), 41 ("Defendants were deliberately indifferent"). Recognizing this sleight of hand is crucial, since Pennewell's deliberate indifference claims require evidence that a specific State Appellee knew of but ignored a serious risk to his health. *Collins*, 462 F.3d at 762. Simply mashing all "defendants" together cannot suffice to show what any specific State Appellee knew and when.

Likewise, Pennewell rarely cites any evidence in the record. Instead, he cites almost exclusively his summary judgment brief, his complaint, or the district court's order. Examining the actual evidence—the State Appellees' declarations and Pennewell's medical records—often reveals a different story than the one he tells in his brief.

Carefully examining Pennewell's arguments and the underlying record reveals no evidence of deliberate indifference by any of the State Appellees.

1. No State Appellee acted with deliberate indifference during February and March 2015.

Pennewell's care began immediately upon arriving at Dodge. Within eight days, he visited the UW Eye Clinic and saw an optometrist. (Dkt. 29:3 ¶¶ 6–8.) P.A. Parish saw Pennewell immediately after that February 11, 2015, appointment, noting that Pennewell was experiencing chronic eye issues, had just seen a specialist, and was scheduled for a follow-up appointment at the UW Eye Clinic. Again, the vision issues P.A. Parish noted in Pennewell's right eye represented a chronic condition, not something that had occurred recently or suddenly. (Dkt. 31:3 ¶ 9.)[5]

Pennewell focuses on this encounter, arguing that there is a material dispute over whether P.A. Parish knew but ignored that Pennewell required emergency medical care on February 11. (Appellant's Br. 40.) This argument fails for a few reasons. First, there would have been no reason for P.A. Parish, a non-specialist, to suspect that Pennewell was experiencing an emergency eye issue. Pennewell had just seen an eye specialist at the UW Eye Clinic earlier

[5] On this point, Pennewell's brief misleadingly quotes his own characterization of records from his summary judgment brief, not the records themselves. (*Compare* Appellant's Br. 40, *with* Dkt. 31-1:13 (Parish's record of February 11, 2015, encounter), *and* Dkt. 31-1:20 (record of March 17, 2015, encounter).)

that day, and the specialist had scheduled Pennewell for a follow-up visit in a couple months rather than for immediate emergency care. P.A. Parish reasonably relied on the specialist's course of treatment. (Dkt. 31:4 ¶ 13.) *See Shields v. Illinois Dep't of Corr.*, 746 F.3d 782, 797 (7th Cir. 2014) (holding that doctors' reliance on specialist decisions did not permit an inference of deliberate indifference).

Second, Pennwell tries to impute the professional opinions of Dr. Altaweel, Pennewell's ophthalmologist, to P.A. Parish. Dr. Altaweel explained that absent vision loss and flashes of light, "there would be no reason to send Pennewell in for an emergency medical appointment with [UW Hospital]." (Dkt. 30:4 ¶ 13.) Pennewell argues that he did report vision loss to P.A. Parish, and thus that Parish should have known it was an emergency given Dr. Altaweel's criteria. (Appellant's Br. 40.) But there is no evidence that P.A. Parish knew of Dr. Altaweel's emergency criteria. Rather, P.A. Parish believed that Pennewell "did not report any concerns to me regarding a retinal detachment or symptoms of what could be an emergent or urgent medical need for his eyes." (Dkt. 31:4 ¶ 14.) Whether Dr. Altaweel might have considered Pennewell to be experiencing an eye emergency is irrelevant to whether P.A. Parish acted with deliberate indifference.

Third, Pennewell misconstrues Dr. Altaweel's declaration. When Dr. Altaweel opined that "vision loss" presents an emergency situation (Dkt. 30:4

¶¶ 12–13), he clearly meant the sudden total loss of vision Pennewell reported on April 6, 2015, not the chronic vision impairment that Pennewell reported to P.A. Parish on February 11. Dr. Altaweel noted that on April 6 Pennewell "was now experiencing lower field vision loss." (Dkt. 30:2 ¶ 6.) Therefore, when Dr. Altaweel explained that "until April 6, there is no notation or reports from Pennewell to Department of Corrections staff that Pennewell was experiencing flashing lights or loss of vision" (Dkt. 30:3 ¶ 11), he obviously meant loss of vision like Pennewell reported on April 6. Pennewell identifies nothing in the record indicating that kind of report any time before April 6.

Lastly, although Pennewell references symptoms he reported during a visit to John Burke Health Services (Appellant's Br. 40), he does not connect that report to P.A. Parish or any other State Appellee. Pennewell's report to someone else cannot establish deliberate indifference by a State Appellee, especially absent any evidence that a State Appellee learned of the report—and Pennewell identifies none. Pennewell's citation to his complaint and summary judgment briefing fail for the same reason (Appellant's Br. 40)—none of that material connects his purported reports of vision loss to any specific State Appellee. Moreover, statements in his brief and complaint are not admissible evidence that could have defeated summary judgment. *See Estate of Perry v. Wenzel*, 872 F.3d 439, 461 (7th Cir. 2017) (to defeat summary

judgment, "a plaintiff must do more than simply point to the allegations in his complaint").

Pennewell next argues that evidence existed of Nurse Jackson's deliberate indifference during a March 30, 2015, encounter. (Appellant's Br. 40.) He focuses entirely on the fact that his written request said "[i]t feels like there is a tear in my eye." (Dkt. 31-1:93.) This argument fails for two reasons. First, no medical evidence in the record suggests that such a report should have triggered emergency care, let alone that Nurse Jackson knew as much but purposely declined to provide it. Here, Pennewell cannot even point to Dr. Altaweel's opinion about the criteria for emergency care, since those do not mention how to respond to a patient's reports of a "tear." Without any evidence that Nurse Jackson knew but ignored that a reported "tear" required emergency care, no basis exists to find deliberate indifference.

Second, Pennewell ignores that the notes of his March 30 encounter with Nurse Jackson do not indicate any reported emergency. Instead, those notes indicate that Pennewell "just wanted some information" about his upcoming appointment at the UW Eye Clinic to evaluate his reported right eye "tear." (Dkt. 31-1:20.) When told the appointment was set for April, he responded "OK, that's good. I am glad it[']s scheduled." (Dkt. 31-1:20.) Moreover, he "note[d] [that] symptoms remain the same as prior evaluation," and Nurse Jackson indicated that his "affect" was "comfortable." (Dkt. 31-1:20.) Nothing there

indicates that Pennewell reported acute symptoms that alerted Nurse Jackson to a need for emergency care.

2. No State Appellees acted with deliberate indifference regarding Pennewell's retinal detachment.

Pennewell then recycles his arguments about his encounter with P.A. Parish on February 11 and Nurse Jackson on March 30, arguing that they purposely ignored symptoms requiring emergency care. (Appellant's Br. 41–42.) Those arguments fail for the same reasons as in Section II.B.1. above. Again, Pennewell identifies no evidence that either P.A. Parish or Nurse Jackson knew but ignored that he was experiencing symptoms that required emergency care. Rather, the evidence shows that both appellees understood Pennewell to be experiencing chronic symptoms that were to be evaluated at an upcoming appointment with a specialist at the UW Eye Clinic. That conduct is not in the same universe as deliberate indifference.

As for his position that "Defendants failed to follow their own treatment protocol" (Appellant's Br. 42), he identifies no evidence of that. His lone, vague statement in his complaint that he was told to "seek medical attention immediately" for vision changes does not identify any specific State Appellee who purportedly said that or when they said it. (Dkt. 1:4.)[6] Moreover, the only

[6] And, again, to defeat summary judgment, "a plaintiff must do more than simply point to the allegations in his complaint." *Estate of Perry*, 872 F.3d at 461.

two specific encounters he mentions—February 11 with P.A. Parish and March 30 with Nurse Jackson—did not involve reported changes. The February 11 encounter was his very first with DOC clinicians, and so he could not have experienced (or reported) any vision "changes" yet. And at the March 30 encounter, he reported that "symptoms remain the same as prior evaluation"—that is, no changes. (Dkt. 31-1:20.)

Pennewell then recharacterizes the same arguments as showing that the State Appellees persisted with ineffective treatment. (Appellant's Br. 42–43.) There is nothing new here, either. Nowhere does Pennewell identify evidence that any specific State Appellee knew that his treatment was ineffective yet ignored that fact. Rather, Pennewell was consistently seen by DOC clinicians, who knew that he was scheduled for an April 2015 eye exam with specialists at the UW Eye Clinic. Without evidence that any State Appellee knew that the symptoms Pennewell reported before April 6, 2015, presented an emergency, Pennewell could not sustain his deliberate indifference claims.

The same is true for Pennewell's restated position that certain State Appellees—it is unclear who—unjustifiably delayed his treatment. (Appellant's Br. 43–44.) At best, his position again seems to be that Nurse Jackson should have scheduled him for an earlier surgery after seeing Pennewell on March 30. Once again, nothing in that March 30 encounter indicated that he was experiencing emergency symptoms. (Dkt. 31-1:20.) And

he has no evidence that Nurse Jackson knew Pennewell needed more prompt treatment but purposely declined to supply it. In any event, he offers no case law or explanation for why the one-week span between his March 30 appointment and April 7 surgery was unjustifiable.

3. No State Appellees acted with deliberate indifference after Pennewell's retinal detachment surgery.

After Pennewell's retinal detachment surgery in April 2015, DOC staff consistently provided him with appropriate medical care for his eye issues. Pennewell's position that this course of treatment violated the Eighth Amendment relies almost entirely on vague generalities; he mentions only one specific incident and zero specific State Appellees. (Appellant's Br. 45–46.) To show district court error, Pennewell must show a genuine dispute over whether a specific State Appellee violated his Eighth Amendment rights on a specific occasion. By failing to identify any specifics he has forfeited any such argument. *Dalton v. Teva N. Am.*, 891 F.3d 687, 692 (7th Cir. 2018) ("[I]nadequately briefed arguments are forfeited.").

In any event, no evidence exists of deliberate indifference here, contrary to Pennewell's vague arguments otherwise. To recap the substantial eye treatment he received after his April 7, 2015, surgery:

- He was sent back to UW Hospital twice within three weeks for post-operative appointments. (Dkt. 30:5 ¶¶ 18–19.)

- He reported improving symptoms to Nurse Jackson during an April 15, 2015, Health Services Unit visit. (Dkt. 34:5 ¶ 16.)
- Nurse Bruns saw Pennewell the same day as his June 29, 2015, Health Services Request; he was sent to UW Hospital that same day, diagnosed with a new eye disorder and scheduled for another surgery. (Dkt. 30:6 ¶¶ 20–21, 26; Dkt. 31-1:51; Dkt. 33:8 ¶¶ 30–32.)
- Pennewell's second surgery was successfully completed on July 16, 2015. (Dkt. 30:7 ¶ 26; Dkt. 30:59–65.)
- Pennewell had at least five follow-up visits over the next three weeks to the Health Services Unit at John Burke about his eyes. (Dkt. 31-1:31–35.)
- Pennewell visited his ophthalmologist at the UW Eye Clinic another three times over the next month. (Dkt. 30:7 ¶ 27; Dkt. 30:66–89.)
- Nurse Bruns saw Pennewell on October 13, 2015; she arranged for him to be sent to the UW Eye Clinic that same day for treatment. (Dkt. 30:7–8 ¶ 28.)
- Multiple follow-up eye appointments at the UW Eye Clinic followed over the next six months. (Dkt. 30:99-128.)
- Pennewell received another eye surgery on December 7, 2016, to address dry eye symptoms. (Dkt. 30:8 ¶¶ 30–31.)

- He received follow-up treatment at UW after this surgery. (Dkt. 30:138–152.)

In the face of this substantial record of care, Pennewell argues that unidentified "prison staff" "denied several requests" for treatment and "delayed his follow-up appointments." (Appellant's Br. 45.) But he does not identify a single specific instance of this or any State Appellees who were responsible. He has forfeited any such argument now.

As for purported delays, Pennewell mentions only one specific incident in November 2016, when an appointment was purportedly cancelled because unidentified "prison staff" told him there was "no staff for transportation." (Appellant's Br. 45.) First, he does not explain how any State Appellees were responsible for that decision, and thus he cannot establish the personal involvement necessary for an Eighth Amendment claim. *Mitchell v. Kallas*, 895 F.3d 492, 498 (7th Cir. 2018) ("For a defendant to be liable under section 1983, she must be personally responsible for the alleged deprivation of the plaintiff's constitutional rights.").[7] Second, his appeal brief cites only the district court's order and his summary judgment brief, which in turn cites only a single exhibit that says nothing about unavailable transportation staff. (Dkt. 42-5:2.) No evidence in the record supports this version of events. Third,

[7] Any such argument is now forfeited.

even though his November 25, 2016, eye appointment was cancelled, he visited the clinic in under two weeks for yet another right eye surgery. (Dkt. 30:8 ¶¶ 30–31.)

Leaving aside how Pennewell's delay theory fails because it is not directed at any State Appellee, a single short-term delay is nothing like *Reed*, the case on which Pennewell relies. (Appellant's Br. 45.) There, the defendants allegedly "knew about periodic substantial deprivations of food and medicine and did nothing for almost two years to remedy the situation." *Reed,* 178 F.3d at 855. Those multiple late responses distinguished *Reed* from cases like this one where inmates "at most experienced an 'isolated occasion or two where he did not receive prompt treatment.'" *Id.* (citing *Winnebago Cty.*, 165 F.3d at 591; *Gutierrez v. Peters*, 111 F.3d 1364, 1375 (7th Cir. 1996)). By only identifying a single delay of two weeks within a year-and-a-half of otherwise consistent, prompt treatment, Pennewell at most identifies an "isolated instance[] of neglect, which taken alone . . . cannot support a finding of deliberate indifference." *Id.* (citation omitted).

And it is impossible to respond to Pennewell's vague reference to a "broader context of indifference." (Appellant's Br. 46.) His brief identifies no specific incidents and no specific State Appellees. Which State Appellees supposedly "refused to assist him" and when? (Appellant's Br. 46.) He does not say—nor could he reasonably do so, given the consistent course of treatment outlined

above. This half-hearted effort (or perhaps failure to understand that Pennewell's constitutional claims cannot be directed against the entire Department of Corrections), comes nowhere near demonstrating district court error.[8] Any more concerted attempt to do so now is forfeited.

The same is true for Pennewell's off-hand reference to supposed retaliation. (Appellant's Br. 46.) Here he continues his pattern of declining to identify any specific episodes or State Appellees, making it impossible to respond to his argument in any detail. It suffices to say that he identifies no evidence that any State Appellees retaliated against him.

4. Because Pennewell lacks any evidence that the State Appellees acted with deliberate indifference, evidence of causation is irrelevant.

Although Pennewell is wrong that he offered adequate evidence that the purported Eighth Amendment violations here caused his blindness (Appellant's Br. 47–48), that was irrelevant to the district court's decision. The holding below rested on a finding that "no reasonable jury could conclude that Richter, Parish, Jackson, or Bruns were deliberately indifferent towards plaintiff's eye problems." (Dkt. 51:15.) Pennewell fails to demonstrate error

[8] Pennewell's complete lack of detail on this point distinguishes this case from the ones he cites. (Appellant's Br. 46 (citing *Kelley v. McGinnis*, 899 F.2d 612, 616–17 (7th Cir. 1990); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983)).)

regarding that necessary element of his Eighth Amendment claim, and so any consideration of causation is unneeded.

CONCLUSION

The district court's summary judgment decision in State Appellees' favor should be affirmed.

Dated this 25th day of February, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Colin T. Roth
COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

Attorneys for Defendants-Appellees

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6219
(608) 267-2223 (Fax)
rothct@doj.state.wi.us

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), typeface requirements of Fed. R. App. P. 32(a)(5), and type style requirements of Fed. R. App. P. 32(a)(6).

> This brief contains 8576 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13 point Century Schoolbook.

Dated this 25th day of February, 2019.

s/ Colin T. Roth
COLIN T. ROTH
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on February 25, 2019, I electronically filed the foregoing *State Defendants-Appellees' Response Brief* with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 25th day of February, 2019.

s/ Colin T. Roth
COLIN T. ROTH
Assistant Attorney General

Case No. 18-3029

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JAMES VERN PENNEWELL,

Plaintiff-Appellant,

vs.

JAMES PARISH, *et al.*,

Defendants-Appellees

On Appeal from the United States District Court
for the Eastern District of Wisconsin (Milwaukee)
No. 2:17-cv-00213-LA
Judge Lynn Adelman, Presiding

BRIEF OF APPELLEE DR. JAMES RICHTER

LEIB KNOTT GAYNOR, LLC
By: Douglas S. Knott, Esquire
WI Attorney I.D. #1001600
219 N. Milwaukee Street, Suite 710
Milwaukee, WI 53202
(414) 276-2102
Attorney for Appellee Dr. James Richter

Dated: February 25, 2019

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 18-3029

Short Caption: James Vern Pennewell v. James Parish, M.D., *et al.*

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

James Richter D.O.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear for the party in this court:

Leib Knott Gaynor LLC

(3) If the party or amicus is a corporation:

i) Identify all of its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Douglas S. Knott Date: February 25, 2019

Attorney's Printed Name: Douglas S. Knott

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No _____

Address: Leib Knott Gaynor LLC, 219 No. Milwaukee Street, Suite 710, Milwaukee, WI 53202

Phone Number: 414-276-2102 Fax Number: 414-2762140

E-Mail Address: dknott@lkglaw.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF JURISDICTION

The jurisdictional statement of Plaintiff-Appellant James Vern Pennewell (hereinafter "Appellant") is complete and correct.

STATEMENT OF THE ISSUES

1. Does Appellant's deliberate indifference claim against Dr. James Richter fail as it is undisputed that he was not experiencing symptoms of a retinal detachment when examined by Dr. Richter on February 11, 2015 and Dr. Richter provided appropriate treatment for his complaints?

2. Does Appellant's deliberate indifference claim against Dr. James Richter fail as he was not prejudiced by the denial of his requests for appointment of counsel?

STATEMENT OF THE CASE

Appellant filed his *pro se* Complaint on May 10, 2017, asserting a claim of deliberate indifference in violation of the Eighth Amendment against Dr. James Richter for failure to treat an alleged detached retina in his right eye and generally ignoring his medical needs. See Pl.'s Compl. (Doc. No. 1) at 3-6, Supp. App. 31-34; Pl.'s Resp. (Doc. No. 42) at 8-10, Supp. App. 45-47.[1] Dr. Richter is an optometrist employed by Richter Professional Services, Inc., which has a contract with the Wisconsin Department of Corrections (hereinafter "DOC") to provide optometry services. See Richter Decl. (Doc. No. 39), ¶ 1, Supp. App. 48. Appellant also named Appellees Physician's Assistant James Parish, Superintendent Mark Rice, Dr. Scott Hofteizer, and Nurse Practitioner Denise Bonnett (hereinafter "DOC Appellees") as Defendants. See Pl.'s Compl. (Doc. No. 1) at 1-2, Supp. App. 29-30.

In his Complaint, Appellant requested appointment of counsel due to lack of funds, vision limitations, fear of retaliation by the Wisconsin Department of Corrections (hereinafter "DOC"), and an alleged lack of cooperation on the part of the DOC in providing records and the identities of certain medical providers. Id. at 7, Supp. App. 35. In its screening order, the District Court denied Appellant's request for appointment of counsel as he had not demonstrated

[1] For the sake of clarity, Dr. Richter will mirror the citations used by Appellant in his Brief. References to Doc. No. _____ are to the District Count docket, Pennewell v. Parish, *et al.*, E.D. Wis. No. 17-cv-00213. Reference to 7th Cir. Doc. No. _____ are to this Court's docket, No. 18-3029. References to App. _____ are to the Appendix attached to Appellant's Brief and to Supp. App. _____ are to the Supplemental Appendix filed by Dr. Richter.

reasonable attempts to secure an attorney. See Order of March 20, 2017 (Doc. No. 4), App. 22-28. Plaintiff filed a second Motion to Appoint Counsel on March 29, 2017. See Mot. to Appoint Counsel (Doc. No. 5), Supp. App. 54-55. The District Court denied this renewed motion without prejudice as there was nothing for Appellant to do at that time but wait for the Appellees to file their respective Answers. See Order of March 31, 2017 (Doc. No. 6), App. 20-21.

Dr. Richter and the DOC Appellees filed their respective Motions for Summary Judgment on October 24, 2017. See Mot. Summ. J. of Patricia Beyer, Denise Bonnett, Victoria Bruns, Heather Bunker, Scott Hofteizer, Sandra Jackson, Paula Lampe, Brian Lange, Julie Nickel, James Parish, Nicholas Redeker, Mark Rice, Jeffrey Rollins (Doc. Nos. 27-36); Mot. Summ. J. of Dr. James Richter (Doc. Nos. 37-41). On July 20, 2018, the District Court filed an Order granting Appellees' respective Motions for Summary Judgment. See Order of July 20, 2018 (Doc. No. 51), App. 3-18. This appeal followed.

The District Court held Appellant's claim of deliberate indifference against Dr. Richter failed as there was no evidence Appellant suffered a detached retina at the time he was examined on February 11, 2015 and Appellant did not report experiencing any loss of vision – a necessary symptom of retinal detachment – until April 6, 2015 at the earliest. See Order of July 20, 2018 (Doc. No. 51) at 12-13, App. 14-15. Upon reporting his loss of vision, Appellant was immediately transferred by DOC employees to an outside hospital for treatment. Id. at 13, App. 15. Further, Appellant failed to support his allegations that Dr. Richter ignored his medical problems. In response to complaints of decreased vision,

the District Court noted that Dr. Richter corrected Appellant's eyeglasses prescription both times he saw him, referred Appellant to an outside provider for evaluation of a cataract, and recommended follow-ups if Appellant's vision did not improve. Id.

In his Brief, Appellant misstates the record including the contents of his medical documents. He made similar misstatements before the court below when opposing summary judgment. Appellant relies on "facts" as stated in his Response to Appellees' Motions for Summary Judgment (Doc. No. 42), Supp. App. 38-47, and the District Court's Order of July 20, 2018 granting Appellees' Motions for Summary Judgment (Doc. No. 51), App. 3-18. This is problematic. Appellant's Response (Doc. No. 42) made assertions of fact about his treatment and cited medical records in support of these claims. However, the documents relied upon do not support the assertions made. Appellant may not manufacture a dispute of material fact by misstating the contents of his medical records. Further, Appellant has admitted he did not begin experiencing the requisite symptom of retinal detachment – flashes and vision loss – until after his examination by Dr. Richter in conversations with his treating physicians.

The District Court correctly concluded that Appellant had failed to support his claims. Specifically, the undisputed record in the court below demonstrated that Appellant did not sustain a retinal detachment in his right eye until more than seven (7) weeks **after** his appointment with Dr. Richter.

I. Appellant Receives Appropriate Treatment on February 11, 2015

Appellant was incarcerated in various DOC facilities following a conviction for operating a motor vehicle while intoxicated beginning on or about February 3, 2015. See Appellant's Brief (7th Cir. Doc. No. 25) at 7. He was initially seen by Dr. Richter on February 11, 2015 at the request of DOC staff. See 02/11/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-082-83 (Doc. No. 31-1), Supp. App. 56-57[2]; Richter Decl. (Doc. No. 39), ¶ 3, Supp. App. 49. It was noted that Appellant was blind and had no light perception in his left eye. See id.; Richter Decl. (Doc. No. 39), ¶ 3, Supp. App. 49. As to his right eye, Appellant reported "R eye – floaters + foggy" and "can't see w/glasses." See id.; Richter Decl. (Doc. No. 39), ¶ 3, Supp. App. 49.

Dr. Richter performed a dilated fundus evaluation and found evidence of scarring created by prior laser procedures. See id.; Richter Decl. (Doc. No. 39), ¶ 4, Supp. App. 49. After this assessment, Dr. Richter concluded Appellant's eyeglasses did not provide appropriate correction and requested that he be given new glasses with an appropriate refraction. See id.; Richter Decl. (Doc. No. 39), ¶ 5, Supp. App. 49. Dr. Richter also noted Appellant had a right eye cataract, which he determined was causing floaters and foggy vision consistent with Appellant's report. See id.; Richter Decl. (Doc. No. 39), ¶ 5, Supp. App. 49.

[2] The document referred to here as "02/11/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-082-83" and filed in the District Court as Doc. No. 31-1 was described by Appellant as "2/11/15 DCI Doc-3054." In referring to this document, he referenced Bates-stamps "DOJ Ex. 1001-082-083." See Pl.'s Resp. (Doc. No. 42) at 3, Supp. App. 40.

Appellant also complained of pain in his left eye, which Dr. Richter determined was consistent with being blind and having no light perception in that eye. See id.; Richter Decl. (Doc. No. 39), ¶ 6, Supp. App. 49. Nothing in Dr. Richter's examination or Appellant's reports of symptoms suggested he was experiencing a retinal detachment. See id.; Richter Decl. (Doc. No. 39), ¶ 8, Supp. App. 50; Altaweel Decl. (Doc. No. 30), ¶¶ 11-13, Supp. App. 60-61. Dr. Richter referred Appellant to the University of Wisconsin Eye Clinic (hereinafter "UW Eye Clinic") for evaluation and possible extraction of a right eye cataract and evaluation of the left eye, which was experiencing occasional pain. See id.; Richter Decl. (Doc. No. 39), ¶¶ 5, 9, Supp. App. 49-50. Appellant was scheduled for an appointment at the UW Eye Clinic on April 14, 2015. See Richter Decl. (Doc. No. 39), ¶ 10, Supp. App. 50; March 17, 2015 Progress Note (Doc. No. 31-1), Supp. App. 68.

After Dr. Richter writes an order for an appointment at the UW Eye Clinic, the Clinic is provided a written request and a copy of the patient's examination form, which is reviewed by Clinic staff to determine when to schedule the appointment. See id., ¶ 9. Dr. Richter has no control over when the UW Eye Clinic elects to see a patient and does not participate in scheduling appointments. See id., ¶ 10.

Appellant claims on appeal that he "told Dr. Richter … the vision in his right eye was 'decreasing, foggy, floaters, spots, ghosts, shadows, and flashes but not as bad as 2008 left detachment'" and cites the District Court's Order of July 20, 2018. See Appellant's Brief (7th Cir. Doc. No. 25) at 7 (quoting Order of

July 20, 2018 (Doc. No. 51) at 3, App. 5). The District Court's Order, in turn, lifted the "decreasing, foggy, floaters, spots, ghosts, shadows, and flashes" language directly from Appellant's Response to Appellees' Motions for Summary Judgment. See Order of July 20, 2018 (Doc. No. 51) at 3, App. 5 (quoting Pl.'s Resp. (Doc No. 42) at 3, Supp. App. 40). In his Response, Appellant stated: "2/11/15 DCI Doc-3054 eyecare exam informed Dr. Richter blind left and right eye vision was decreasing foggy, floaters, spots, ghosts, shadows, and flashes but not near as bad as 2008 left detachment." See Pl.'s Resp. (Doc. No. 42) at 3, Supp. App. 40. However, the exam form cited by Appellant states only "R eye – floaters + foggy" and "can't see w/glasses." See 02/11/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-082-83 (Doc. No. 31-1), Supp. App. 56-57. It contains no reference to decreasing vision, spots, ghosts, shadows, or flashes. Dr. Richter noted this discrepancy in his Reply Brief in Support of Summary Judgment. See Richter Reply Brief (Doc. No. 44) at 3-4, Supp. App. 71-72 ("Mr. Pennewell asserts … that he also reported 'spots, ghosts, shadows, and flashes,' but that is unsupported by the record … Neither Dr. Richter's examination nor Mr. Pennewell's reports of symptoms during the February 11 examination suggested he was experiencing symptoms of retinal detachment.").

As in a children's game of "Telephone", Appellant's initial misstatement has passed from his Response, to the District Court's Order, to his instant appellate Brief without correction. However, it is undisputed the eyecare exam form ultimately relied on by Appellant shows none of the necessary symptoms of a retinal detachment – flashes and loss of vision – as claimed. As such, Appellant

cannot demonstrate he was experiencing a retinal detachment on February 11, 2015 or that Dr. Richter could have been aware of any symptoms of a detachment during his examination that day.

II. Appellant Subsequently Experiences a Retinal Detachment

On March 30, 2015, Appellant submitted a Health Service Request complaining his eye hurt, was red, drained and then dried up, and he had to use warm water to allow it to open. See March 30, 2015 Health Service Request (Doc. No. 31-1), Supp. App. 76. Appellant was seen in the Health Services Unit by a DOC staff member, Nurse Sandra Jackson, that day and did not report any vision loss or flashes of light. See id.; March 30, 2015 Progress Note (Doc. No. 31-1), Supp. 77. Eye pain, redness, drainage, and dryness are not symptoms of a detached retina or of a need for emergency treatment. See Altaweel Decl. (Doc. No. 30), ¶ 11, Supp. App. 60-61. Absent flashes of light and/or loss of vision, there was no reason to send Appellant for any emergency treatment for a detached retina. See id., ¶¶ 11, 13, Supp. App. 60-61.

On April 7, 2015, Appellant saw Dr. Michael M. Altaweel, a board-certified ophthalmologist employed by the University of Wisconsin Hospital and Clinics. See id., ¶¶ 2, 5, Supp. App. 58-59. Appellant was brought to Dr. Altaweel after complaints of shadows with white chasing lights in his right eye. See id., ¶ 6, Supp. App. 59. He reported that the shadows in his right eye had been ongoing **for approximately 10 days**. Appellant also stated the shadows worsened the day prior, he was **now experiencing lower field vision loss**, and he had experienced a headache for approximately three days with nausea. See id. Dr.

Altaweel diagnosed Appellant with an uncomplicated retinal detachment, which he surgically repaired on April 7, 2015. See id., ¶ 7, Supp. App. 59.

Based on Appellant's statements to Dr. Atlaweel, he only began experiencing vision loss on April 6, 2015 and shadows in his vision on approximately March 28, 2015. He did not dispute making such statements to Dr. Atlaweel either in his Response (Doc. No. 42) or his appellate Brief (7th Cir. Doc. No. 25). As such, Appellant has admitted that he did not begin experiencing the requisite symptoms of retinal detachment – vision loss – until over seven weeks after his February 11, 2015 examination by Dr. Richter.

III. Appellant's September 22, 2015 Appointment with Dr. Richter

Dr. Richter's second and final interaction with Appellant occurred after his retinal detachment was repaired. Dr. Richter examined Appellant again on September 22, 2015. See 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. This visit was pursuant to a request by the UW Eye Clinic to determine Appellant's best corrected visual acuity. See Richter Decl. (Doc. No. 39), ¶ 21, Supp. App. 52. Appellant informed Dr. Richter that, on April 6, 2015, he was watching a basketball game on television and he noticed a ghost-like image. See id., ¶ 22, Supp. App. 52; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. Appellant stated that he **did not** have any symptoms of flashes, either on April 6 or the day before, as he had in the past with his left eye retinal detachment. See id.; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No.

31-1), Supp. App. 78-79. He also informed Dr. Richter he was happy with his vision until April 6, 2015 and that the only symptom he had experienced prior to April 6, 2015 was continued blurred vision in the right eye from his cataract. See id.; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79.

Dr. Richter then performed a refraction, which revealed the need for new eyeglasses and best corrected visual acuity of 20/200 for Appellant. See id., ¶ 23, Supp. App. 52; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. Dr. Richter ordered a new right lens for Appellant's glasses, provided him with a sheet magnifier to assist with reading, and recommended a follow up-appointment in six months to check his progress. See id.; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79.[3] Finally, Dr. Richter recommended Appellant be scheduled for an appointment with the UW Eye Clinic if his visual acuity did not improve. See id., ¶ 24, Supp. App. 52; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. As stated above, Dr. Richter plays no role in scheduling appointments at the UW Eye Clinic. This was the final time he saw Appellant.

[3] Appellant incorrectly states Dr. Richter recommended a follow-up in six weeks. See Appellant's Brief (7th Cir. Doc. No. 25) at 13. However, Dr. Richter recommended a follow-up in six months, not six weeks. See Richter Decl. (Doc. No. 39), ¶ 23, Supp. App. 52; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79.

As with his statements to Dr. Atlaweel, Appellant did not attempt to contradict – at any point – the statements he made to Dr. Richter on September 22, 2015. Thus, he has admitted that he never experienced flashes as alleged. He has further admitted that the only symptom he experienced prior to April 6, 2015 was continued blurred vision. Appellant has again acknowledged he did not begin experiencing symptoms of retinal detachment until over seven weeks after his February 11, 2015 examination by Dr. Richter.

The District Court found, on the record before it, that Appellant had failed to support his allegations with credible evidence sufficiently to withstand Dr. Richter's Rule 56 motion.

STATEMENT OF THE STANDARD OF REVIEW

A Court of Appeals "review[s] a district court's decision to grant summary judgment *de novo*, making all reasonable inferences in favor of the nonmoving party." Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 849 (7th Cir. 2012). Summary judgment should be entered "if 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." Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue of material fact exists when the evidence requires a fact finder to resolve the parties' differing versions of the truth at trial. Id. at 249. Accordingly, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no **genuine** issue of **material** fact." Id. at 247-48 (emphasis in original).

In opposing summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"; it must present "specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for [Appellant], there is no genuine issue for trial." Ricci v. DeStefano, 557 U.S. 557, 585 (2009) (quoting Matsushita, 475 U.S. at 587). The burden on the party moving for summary judgment is not to show the "absence of a genuine issue of

material fact," but rather to show "that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

In short, Appellant may not rest upon the mere allegations set forth in his Complaint, but rather must come forward with **competent** evidence to establish that there is a genuine issue of *material* fact remaining for trial.

SUMMARY OF THE ARGUMENT

The District Court properly granted Dr. Richter's Motion for Summary Judgment. Appellant failed to support his medical claims with competent evidence showing that he was experiencing any symptom of a retinal detachment when examined by Dr. Richter on February 11, 2015. Rather, he reported foggy vision, floaters, and that he could not see with his current eyeglasses. Dr. Richter discovered a cataract, which he determined was the cause of Appellant's floaters and foggy vision. Dr. Richter provided Appellant with a new prescription for eyeglasses and referred him for further examination and treatment of the cataract at the UW Eye Clinic. Appellant was scheduled for an appointment with the UW Eye Clinic. Dr. Richter played no role in the scheduling process.

Appellant began experiencing shadows with white chasing lights in late March 2015 and was seen by Dr. Altaweel on April 7, 2015. Appellant told Dr. Altaweel the shadows worsened the day prior and he was then experiencing lower field vision loss. Dr. Altaweel diagnosed Appellant with an uncomplicated retinal detachment, which he surgically repaired on April 7, 2015. See Altaweel Decl. (Doc. No. 30), ¶ 7, Supp. App. 59. Dr. Richter did not see Appellant again until September 22, 2015 when he examined him at the request of the UW Eye Clinic. At that time, Dr. Richter prescribed a new right lens for Appellant's eyeglasses, provided him with a sheet magnifier, and recommended a follow up-appointment in six months to check his progress. Dr. Richter recommended Appellant be scheduled for an appointment with the UW Eye Clinic if his visual acuity did not

improve. At the close of discovery, Dr. Richter filed for summary judgment, which was granted by the District Court.

As more fully discussed below, the District Court properly granted summary judgment as it correctly found Appellant had failed to present credible evidence Dr. Richter was deliberately indifferent to any then-existing condition. Nothing in Appellant's medical records disputed the facts of his treatment by Dr. Richter. Appellant was not experiencing flashes of light or loss of vision – symptoms of a retinal detachment – when he was examined by Dr. Richter on February 11, 2015. In addition, the court below correctly found that Dr. Richter did not ignore the medical needs of Appellant but instead responded to his then-existing problems.

ARGUMENT

As against Dr. Richter, Appellant asserts a claim of deliberate indifference in violation of the Eighth Amendment based on two theories: (1) that Dr. Richter failed to diagnose his right eye retinal detachment on February 11, 2015 and (2) that Dr. Richter generally ignored his eye problems. See Pl.'s Compl. (Doc. No. 1) at 3-6, Supp. App. 31-34; Pl.'s Resp. (Doc. No. 42) at 8-10, Supp. App. 45-47. However, he was not experiencing symptoms of a retinal detachment at the time he was first examined by Dr. Richter and received treatment for those problems he did have. Appellant also claims Dr. Richter was somehow deliberately indifferent as unnamed "prison staff denied several requests Mr. Pennewell made for medical treatment and delayed his follow-up appointments" and "refused to assist him…" See Appellant's Brief (7th Cir. Doc. No. 36) at 45, 46. However, it is well-settled that liability under 42 U.S.C. § 1983 must rest on the personal involvement of an individual defendant. Appellant's failure to show Dr. Richter had any personal involvement in acts unrelated to the treatment he provided is fatal to his claim.

Appellant also challenges the denial of his requests to appoint counsel. He asserts that the District Court abused its discretion when denying his requests and that the lack of counsel prejudiced him throughout his case before the court below. However, based on the facts of this case, Appellant was not prejudiced by his lack of counsel in pursuing his claim against Dr. Richter. Counsel could not have changed the contents of Appellant's medical records or the uncontested admissions he made to Dr. Richter and Dr. Atlaweel about his symptoms.

Further, no expert testimony was needed as to the standard of care based on these facts. As such, Appellant was not prejudiced by the lack of counsel and the District Court properly granted Dr. Richter's motion for summary judgment.

I. Appellant's Deliberate Indifference Claim was Properly Dismissed

"[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." Whiting v. Wexford Health Sources, Inc., 839 F.3d 658, 661-62 (7th Cir. 2016) (alteration in original) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). "To determine if the Eighth Amendment has been violated in the prison medical context, [courts] perform a two-step analysis, first examining whether a plaintiff suffered from an objectively serious medical condition, and then determining whether the individual defendant was deliberately indifferent to that condition." Petties v. Carter, 836 F.3d 722, 728-29 (7th Cir. 2016).

A. Appellant was not Experiencing a Retinal Detachment or Macular Hole when Examined by Dr. Richter

Summary judgment was appropriately granted as Appellant was not experiencing either a retinal detachment or a macular hole on the dates he was examined by Dr. Richter. "Objectively serious medical needs are those that have either been diagnosed by a physician and demand treatment, or are 'so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Cesal v. Moats, 851 F.3d 714, 721 (7th Cir. 2017) (quoting King v. Kramer, 680 F.3d 1013, 1018 (7th Cir. 2012)). Appellant claims he suffered from objectively serious medical needs in the form of a retinal detachment and

macular hole. However, the undisputed record demonstrates that he did not suffer from either condition **at the time he was seen by Dr. Richter**.

1. No Retinal Detachment on February 11, 2015

Appellant was first seen by Dr. Richter on February 11, 2015. See 02/11/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-082-83 (Doc. No. 31-1), Supp. App. 56-57; Richter Decl. (Doc. No. 39), ¶ 3, Supp. App. 49. Appellant claims he "told Dr. Richter … the vision in his right eye was 'decreasing, foggy, floaters, spots, ghosts, shadows, and flashes but not as bad as 2008 left detachment.'" See Appellant's Brief (7th Cir. Doc. No. 25) at 7 (quoting Order of July 20, 2018 (Doc. No. 51) at 3, App. 5). However, as discussed above, this assertion relies on a misstatement of Appellant's medical records that passed from his Response (Doc. No. 42), to the District Court's Order of July 20, 2018 (Doc. No. 51), to Appellant's appellate Brief (7th Cir. Doc. No. 25) without correction. The document cited by Appellant for the claim that he informed Dr. Richter of these alleged symptoms states only "R eye – floaters + foggy" and "can't see w/glasses." See 02/11/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-082-83 (Doc. No. 31-1), Supp. App. 56-57. It contains no reference to decreasing vision, spots, ghosts, shadows, or flashes. Appellant's attempt to interject those symptoms into the record is both procedurally improper and an unreasonable interpretation of the only evidence cited in support – Dr. Richter's written record of the examination.

Dr. Richter performed a dilated fundus evaluation and found evidence of scarring created by prior laser procedures. See id.; Richter Decl. (Doc. No. 39),

¶ 4, Supp. App. 49. After this assessment, Dr. Richter concluded that Appellant's eyeglasses did not provide appropriate correction and requested that Appellant be given new glasses with an appropriate refraction. See id.; Richter Decl. (Doc. No. 39), ¶ 5, Supp. App. 49. Dr. Richter also noted Appellant had a right eye cataract, which he determined was causing floaters and foggy vision consistent with Appellant's report. See id.; Richter Decl. (Doc. No. 39), ¶ 5, Supp. App. 49. As stated by his treating physician, Dr. Altaweel, Appellant could not have experienced a retinal detachment when seen by Dr. Richter on February 11, 2015 as he did not have the symptoms of a detachment, flashes of light and/or loss of vision. See Altaweel Decl. (Doc. No. 30), ¶ 11-13, Supp. App. 60-61. Notably, Appellant has not disputed that flashes of light and loss of vision are requisite signs of a retinal detachment.

On April 7, 2015, Appellant saw Dr. Altaweel. See id., ¶ 5, Supp. App. 59. Appellant was brought to Dr. Altaweel after complaints of shadows with white chasing lights in his right eye. See id., ¶ 6, Supp. App. 59. He reported that the shadows in his right eye had been ongoing for approximately 10 days, not since February as asserted. Appellant also stated the shadows worsened the day prior, he was now experiencing lower field vision loss, and he had experienced a headache for approximately three days with nausea. See id. Dr. Altaweel diagnosed him with an uncomplicated retinal detachment, which Dr. Atlaweel surgically repaired on April 7, 2015. See id., ¶ 7, Supp. App. 59.

Appellant has never contradicted the events described by Dr. Altaweel and does not do so in his appellate Brief (7th Cir. Doc. No. 25). Appellant has

therefore admitted telling Dr. Altaweel that he only began experiencing shadows and flashes of light ten days prior to April 7, 2015, *i.e.*, late March 2015. Thus, the telltale symptoms of a retinal detachment did not arise until more than one-and-a-half months after Dr. Richter's February 11, 2015 examination.

Appellant was again seen by Dr. Richter on September 22, 2015. See 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. He described for Dr. Richter what had occurred approximately ten (10) days prior to his appointment with Dr. Altaweel on April 7, 2015. Appellant reported that, at that time, he began experiencing symptoms suggestive of a retinal detachment. He informed Dr. Richter that, on April 6, 2015, he was watching a basketball game on television and he noticed a ghost-like image. See Richter Decl. (Doc. No. 39), ¶ 22, Supp. App. 52; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. Appellant stated that he did not have any symptoms of flashes, either on April 6 or the day before, as he had in the past with his left eye retinal detachment. See id.; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. He also informed Dr. Richter he was happy with his vision until that day and that the only symptom he had experienced prior to April 6, 2015 was continued blurred vision in the right eye from his cataract. See id.; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79.

As with his statements to Dr. Atlaweel, Appellant has not attempted to contradict the admissions he made to Dr. Richter on September 22, 2015. He admitted he never experienced flashes and that the only symptom he experienced prior to April 6, 2017 was continued blurred vision from his cataract. As such, Appellant has admitted that he did not begin experiencing symptoms of retinal detachment until over one-and-a-half months after his February 11, 2015 examination by Dr. Richter. Based on these admissions, Appellant was not experiencing the symptoms of a retinal detachment on February 11, 2015 and did not have an objectively serious medical need at that time. Therefore, Appellant's claim against Dr. Richter fails as a matter of law and was properly dismissed.

2. No Macular Hole on February 11, 2015 or September 22, 2015

Appellant also claims he suffered from an objectively serious medical need in the form of a macular hole. However, even as stated by Appellant in his Brief, he only complained that his "vision is starting to get worse" on June 29, 2015 and was diagnosed with a macular hole that day. See Appellant's Brief (7th Cir. Doc. No. 25) at 11 (quoting Pl.'s Resp. (Doc. No. 42) at 4, Supp. App. 41). The hole was surgically repaired by Dr. Altaweel on July 16, 2015 and Appellant had no sight for eight to ten weeks. Id. at 11-12, Supp. App. 41-42.

Appellant has admitted that he vision was beginning to deteriorate shortly before June 29, 2015. This was over **four months** after Dr. Richter's February 11, 2015 examination. Appellant was seen by Dr. Richter for a second and final time on September 22, 2015, ten weeks after his macular hole surgery. See

09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. This visit was pursuant to a request by the UW Eye Clinic to determine Appellant's best corrected visual acuity. See Richter Decl. (Doc. No. 39), ¶ 21, Supp. App. 52.

Dr. Richter performed a refraction, which revealed the need for new eyeglasses and best corrected visual acuity of 20/200 for Appellant. See id., ¶ 23, Supp. App. 52; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. Dr. Richter ordered a new right lens for Appellant's glasses, provided him with a sheet magnifier to help with reading, and recommended a follow up-appointment in six months to check his progress. See id.; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. Finally, Dr. Richter recommended Appellant be scheduled for an appointment with the UW Eye Clinic if his visual acuity did not improve. See id., ¶ 24, Supp. App. 52-53; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79.

In his Brief (7th Cir. Doc. No. 25), Appellant does not claim he was experiencing a macular hole when he was examined by Dr. Richter on September 22, 2015. Rather, he complains only that he received new eyeglasses with the wrong prescription which had to be sent back for correction and that he was not scheduled for a follow-up appointment in six months as recommended. See Appellant's Brief (7th Cir. Doc. No. 25) at 13. As noted above, Dr. Richter plays no role in the scheduling of appointments. Appellant's complaint that the

eyeglasses he was provided required correction does not implicate Dr. Richter's examination or treatment, only the actions of the unknown supplier who did not send a lens in accordance with the prescription provided by Dr. Richter. As such, it is undisputed that Appellant did not experience an objectively serious medical need on September 22, 2015 and his claim of deliberate indifference against Dr. Richter fails as a matter of law.

B. Dr. Richter was not Deliberately Indifferent

Dr. Richter was not deliberately indifferent but provided appropriate treatment in response to Appellant's then-existing symptoms. To prove "deliberate indifference," Appellant must show Dr. Richter "acted with a 'sufficiently culpable state of mind,' – *i.e.*, that [he] both knew of and disregarded an excessive risk to inmate health." Lewis v. McLean, 864 F.3d 556, 563 (7th Cir. 2017) (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)) (internal citations omitted). "[T]he Supreme Court has instructed us that a plaintiff must provide evidence that an official **actually** knew of and disregarded a substantial risk of harm." Petties, 836 F.3d at 728 (emphasis in original). Negligence is not sufficient for deliberate indifference. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996) ("Inadvertent error, negligence, gross negligence and ordinary malpractice" do not constitute deliberate indifference). "Even objective recklessness—failing to act in the face of an unjustifiably high risk that is so obvious that it should be known—is insufficient to make out a claim." Petties, 836 F.3d at 728. As such, "[o]fficials can avoid liability by proving they were unaware even of an obvious risk to inmate health or safety." Id.

Initially, Appellant repeatedly describes the actions of the "Defendants" and seeks to hold them collectively accountable for the alleged actions of others. However, Dr. Richter may only be held liable for his own actions or inactions. See, *e.g.*, Estate of Perry v. Wenzel, 872 F.3d 439, 459 (7th Cir. 2017) ("Individual liability pursuant to § 1983 requires personal involvement in the alleged constitutional deprivation.") (internal quotation marks omitted). As such, any alleged acts other persons such as PA Parish, unnamed staff at the John Burke Correctional Center, or Nurse Jackson, are irrelevant to Appellant's claim against Dr. Richter.

Appellant argues Dr. Richter was deliberately indifferent as he: (1) was aware Appellate required emergency medical care in February-March 2015, (2) ignored symptoms requiring emergency care, (3) persisted in ineffectual treatment, (4) caused unjustified delays in care, and (5) failed to provide care to and protect Appellant after his surgeries. The first four theories of liability – which are based solely on the retinal detachment – fail as Appellant cannot show he experienced symptoms requiring additional care at the time of his two examinations by Dr. Richter. The final theory fails as Appellant cannot show any personal involvement by Dr. Richter in the harms that allegedly occurred following both the retinal detachment and macular hole surgeries.

1. No Denial of Medical Care

As to emergency care, ignoring symptoms requiring emergency care, persisting with ineffective treatment, and delaying treatment, Appellant cannot demonstrate that he experienced the symptoms of a retinal detachment when he

was seen by Dr. Richter on February 11, 2015. He continues to misstate the contents of his treatment records by claiming he informed Dr. Richter of flashes and decreasing vision during their first interaction. See Appellant's Brief (7th Cir. Doc. No. 25) at 39-40. However, the exam form cited by Appellant states only "R eye – floaters + foggy" and "can't see w/glasses." See 02/11/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-082-83 (Doc. No. 31-1), Supp. App. 56-57. It contains no reference to decreasing vision or flashes. Further, Appellant has admitted informing both Dr. Altaweel and Dr. Richter that he did not begin experiencing symptoms of a retinal detachment until late March 2015 at the earliest. See id.; Richter Decl. (Doc. No. 39), ¶ 22, Supp. App. 52; Altaweel Decl. (Doc. No. 30), ¶¶ 5-7, 11-13, Supp. App. 59-61. As Appellant was not experiencing symptoms of a retinal detachment on February 11, 2015, it cannot be said that Dr. Richter was deliberately indifferent in failing to send him for emergency care, persisted with ineffective treatment for a condition that was yet to occur, or delayed treatment for an injury that would not arise for weeks. Further, Dr. Richter cannot be said to have persisted with ineffective treatment for Appellant's retinal detachment since he only saw Appellant once prior to the retinal repair surgery by Dr. Altaweel on April 7, 2015.

Appellant also seeks to recover against Dr. Richter by arguing "in the months that followed his retinal surgery, Defendants and other prison staff denied and delayed needed follow-up appointments, ignored requests for assistance in light of his blindness, and subjected him to additional risks of

harm." See Appellate Brief (7th Cir. Doc. No. 25) at 45. However, Dr. Richter had no personal involvement in these alleged acts. Regarding the denial of requests for medical treatment and follow-up appointments, Appellant refers to examples in the District Court's Order of July 20, 2018 and mentions one incident in November 2016 where a follow-up appointment was cancelled by unidentified "prison staff" for lack of transporting officers as they allegedly wanted a longer holiday weekend. See id. The portion of the District Court's Order cited in Appellant's Brief mentions only the November 2016 incident a denial of a second opinion for the macular hole surgery by Nurse Jackson on approximately June 30, 2015. See Order of July 20, 2018 (Doc. No. 51) at 6-8, App. 8-10. Neither of these incidents involved Dr. Richter.

2. No Failure to Protect or Retaliation

Appellant claims "Defendants and other prison staff refused to assist him" and complains of "being at the mercy of other inmates" and "fear[ing] for his safety and repeatedly injur[ing] himself because he could not see" following his macular hole repair surgery on July 16, 2015. See Appellate Brief (7th Cir. Doc. No. 25) at 46. Appellant appears to advance, for the first time, a "failure to protect" against Dr. Richter. This claim was made only against "the security staff named as defendants" in the court below. See Pl.'s Resp. (Doc. No. 42) at 9, Supp. App. 46. Having failed to argue this theory of liability against Dr. Richter before the District Court, Appellant has waived it on appeal. See, *e.g.*, Libertyville Datsun Sales, Inc. v. Nissan Motor Corp., 776 F.2d 735, 737 (7th Cir. 1985)

(holding "it is axiomatic that arguments not raised below are waived on appeal."); Puffer v. Allstate Ins. Co., 675 F.3d 709, 718 (7th Cir. 2012).

Even if Appellant had not waived his failure to protect claim, Dr. Richter was not involved in the alleged incidents. "A prison official is liable for failing to protect an inmate [] only if the official 'knows of and disregards an excessive risk to inmate health or safety[.]'" Gevas v. McLaughlin, 798 F.3d 475, 480 (7th Cir. 2015) (quoting Farmer, 511 U.S. at 837). The alleged harm faced by the inmate must be objectively serious and the defendant official must have actual knowledge of the risk for liability to follow. Id. Appellant has failed to allege an objectively serious harm but instead complains only of a vague fear of other inmates and of burning his hands on hot water dispensers. See Pl.'s Resp. (Doc. No. 42) at 9, Supp. App. 46.

Dr. Richter cannot have been deliberately indifferent to the risks of harm alleged by Appellant as he had no involvement in the treatment of Appellant's macular hole, which was repaired by Dr. Altaweel on July 16, 2015. He would not see Appellant until the September 22, 2015 examination when he was asked by the UW Eye Clinic to determine Appellant's best corrected visual acuity. See Richter Decl. (Doc. No. 39), ¶ 21, Supp. App. 52. Dr. Richter then performed a refraction, which revealed the need for new eyeglasses and best corrected visual acuity of 20/200 for Appellant. See id., ¶ 23, Supp. App. 52; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. Dr. Richter ordered a new right lens for Appellant's glasses, provided him with a sheet magnifier to help with reading, and recommended a

follow up-appointment in six months to check his progress. See id.; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. Finally, Dr. Richter recommended Appellant be scheduled for an appointment with the UW Eye Clinic if his visual acuity did not improve. See id., ¶ 24, Supp. App. 52; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. Based on Appellant's vision at this time, Dr. Richter provided appropriate care in ordering new eyeglasses, providing a sheet reader, and ordering follow-ups. Appellant cannot demonstrate deliberate indifference as a matter of law.

In addition, the cases cited by Appellant do not support a claim against Dr. Richter. In Kelley v. McGinnis, this Court held that "'**repeated** examples of negligent acts which disclose a pattern of conduct by the prison medical staff' can sufficiently evidence deliberate indifference." 899 F.2d 612, 617 (7th Cir. 1990) (quoting Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983)) (emphasis added). The plaintiff inmate in Kelley had allegedly experienced **three years** of negligent medical care. Id. As stated by This Court, "[a] second potential theory of recovery is that the prison clinic's **repeated, long-term negligent treatment** of his medical condition, rather than its intentional actions, amounts to deliberate indifference to Kelley's serious medical needs." Id. at 616 (emphasis added).

Although Appellant mentions the alleged wrongful acts of the "Defendants", "[e]ach individual defendant can be liable only for what he or she did personally, not for any recklessness on the part of any other defendants,

singly or as a group." Eades v. Thompson, 823 F.2d 1055, 1063 (7th Cir. 1987). Dr. Richter cannot have engaged in "repeated, long-term negligent treatment" as a matter of law. Unlike the defendants in Kelley who provided negligent treatment over three years, he examined Appellant on two occasions mere months apart, February 11, 2015 and September 22, 2015. Further, there are no allegations that Dr. Richter provided negligent treatment on either occasion. Regarding the February 11, 2015 examination, Appellant claims Dr. Richter ignored his complaints and symptoms requiring emergency care. See Appellant's Brief (7th Cir. Doc. No. 25) at 39-42. These acts, if true, would be intentional and not negligent. Appellant's complaints regarding the September 22, 2015 are limited to receiving eyeglasses with the wrong prescription and not being scheduled for a follow-up appointment in six months as recommended. See id. at 13. Dr. Richter plays no role in the scheduling of appointments and he cannot be negligent for a vendor's failure to provide the correct eyeglasses. As such, there is no evidence Dr. Richter engaged in repeated, long-term instances of negligent care required for liability under Kelley.

Appellant also states that Dr. Richter may also be found deliberately indifferent based on alleged retaliation in the form of denied care and cancelled appointments. The impetus for this alleged retaliation was the filing of an inmate complaint on May 31, 2016. See Appellate Brief (7th Cir. Doc. No. 25) at 46. However, it is undisputed that the last time Dr. Richter interacted with Appellant was September 22, 2015, more than eight months before the inmate complaint was filed. Further, there is no evidence Dr. Richter had any role in either making

or cancelling the appointments mentioned by Appellant. See id.; Pl.'s Resp. (Doc. No. 42) at 6, Supp. App. 43.

As discussed above, Appellant has failed to demonstrate Dr. Richter denied him medical treatment. Appellant was not experiencing a serious medical need during the two examinations performed by Dr. Richter. Further, Dr. Richter engaged in appropriate treatment responsive to the medical issues Appellant had at the time and no involvement in his post-surgery care or alleged retaliation. As such, Appellant's deliberate indifference claim fails as matter and summary judgment was properly granted by the District Court.

II. Appellant was not Prejudiced by the Failure to Appoint Counsel

The District Court did not abuse its discretion in denying Appellant's requests for the appointment of counsel. Further, Appellant was not prejudiced by the denial of his requests for the appointment of counsel as neither counsel nor expert testimony was required based on the facts of his claim against Dr. Richter. Plaintiffs in civil rights cases have no right to court-appointed counsel. Pruitt v. Mote, 503 F.3d 647, 649 (7th Cir. 2007). However, a district court "may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). "[T]he decision whether to recruit pro bono counsel is left to the district court's discretion." Pruitt, 503 F.3d at 649. This Court has explained that

> [w]hen confronted with a request under § 1915(e)(1) for pro bono counsel, the district court is to make the following inquiries: (1) has the indigent plaintiff made a reasonable attempt to obtain counsel or been effectively precluded from doing so; and if so, (2) given the difficulty of the case, does the plaintiff appear competent to litigate it himself?

Id. "The second step is itself 'grounded in a two-fold inquiry into both the difficulty of the plaintiff's claims and the plaintiff's competence to litigate those claims himself.'" James v. Eli, 889 F.3d 320, 326 (7th Cir. 2018) (quoting Pruitt, 503 F.3d at 655). "The inquiries are necessarily intertwined; the difficulty of the case is considered against the plaintiff's litigation capabilities, and those capabilities are examined in light of the challenges specific to the case at hand." Pruitt, 503 F.3d at 655. "[T]he question is whether the difficulty of the case—factually and legally—exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself." Id. "The inquiry into plaintiff competence and case difficulty is particularized to the person and case before the court." Id. at 656.

When examining a plaintiff's competence to litigate their claims, district courts are counseled to consider the "plaintiff's literacy, communication skills, educational level, and litigation experience. To the extent there is any evidence in the record bearing on the plaintiff's intellectual capacity and psychological history, this, too, would be relevant." Id. at 655. While "there are no hard and fast rules for evaluating the factual and legal difficulty of the plaintiff's claims", cases "involving complex medical evidence, for example--are typically more difficult for pro se plaintiffs." Id. at 655-56.

"Even if a district court's denial of counsel amounts to an abuse of its discretion, we will reverse only upon a showing of prejudice." Id. at 659. "[A]n erroneous denial of pro bono counsel will be prejudicial if there is a *reasonable likelihood* that the presence of counsel would have made a difference in the

outcome of the litigation." Id. (emphasis in original). "This is not to say every mistake along the way will establish prejudice; some erroneous denials of pro bono counsel will turn out to be harmless." Id. at 660; see also Jackson v. Kotter, 541 F.3d 688, 700 (7th Cir. 2008) ("Jackson simply did not have a claim against Williams because none of the facts he alleged demonstrated deliberate indifference on Williams's part--an attorney could not have refashioned his meritless claim into a meritorious one.").

The District Court did not abuse its discretion in denying Plaintiff's motions to appoint counsel. The court below did not find against Appellant in default. To the contrary, the District Court generously interpreted Appellant's submissions. His theory was fully articulated, Appellant was fully capable of reviewing Appellees' submissions, and he prepared thoughtful responses. Moreover, the District Court heavily cited Appellant's version of events in deciding whether to grant summary judgment to Dr. Richter. The court found, however, that the evidence he relied upon did not support his arguments.

As to his claims against Dr. Richter, Appellant was not prejudiced by the failure to appoint counsel. No lawyer could have changed the contents of Appellant's treatment records. The record of his February 11, 2015 examination by Dr. Richter simply does not list the necessary symptoms of a detached retinal as claimed by Appellant. Appellant asserts he "told Dr. Richter … the vision in his right eye was 'decreasing, foggy, floaters, spots, ghosts, shadows, and flashes but not as bad as 2008 left detachment.'" See Appellant's Brief (7th Cir. Doc. No. 25) at 7 (quoting Order of July 20, 2018 (Doc. No. 51) at 3, App. 5); Pl.'s Resp.

(Doc. No. 42) at 3, Supp. App. 40. ("2/11/15 DCI Doc-3054 eyecare exam informed Dr. Richter blind left and right eye vision was decreasing foggy, floaters, spots, ghosts, shadows, and flashes but not near as bad as 2008 left detachment."). However, the exam form states only "R eye – floaters + foggy" and "can't see w/glasses." See 02/11/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-082-83 (Doc. No. 31-1), Supp. App. 56-57. It contains no reference to decreasing vision, spots, ghosts, shadows, or flashes.

Further, counsel could not change Appellant's admissions to both Dr. Altaweel and Dr. Richter that he did not experience symptoms of retinal detachment until late March 2015 at the earliest. Appellant reported to Dr. Altaweel on April 7, 2015 that the reported shadows in his right eye had been ongoing for approximately 10 days, the shadows worsened the day prior, he was now experiencing lower field vision loss, and he had experienced a headache for approximately three days with nausea. See Altaweel Decl. (Doc. No. 30), ¶¶ 5, 6, Supp. App. 59. On September 22, 2015, Appellant also told Dr. Richter that, on April 6, 2015, he was watching a basketball game on television and he noticed a ghost-like image. See Richter Decl. (Doc. No. 39), ¶ 22, Supp. App. 52; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. Appellant stated that he did not have any symptoms of flashes, either on April 6 or the day before, as he had in the past with his left eye retinal detachment. See id.; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79. He also informed Dr. Richter he was happy with his vision until April 6,

2015 and that the only symptom he had experienced prior to April 6, 2015 was continued blurred vision in the right eye from his cataract. See id.; 09/22/15 Eyecare Examination Form DOC-3054, Bates-stamped 1001-084-85 (Doc. No. 31-1), Supp. App. 78-79.

While demonstrating his capacity to understand the records and disputing some factual assertions, Appellant did dispute certain crucial portions of the declarations of both Dr. Richter and Dr. Altaweel. Rather than citing evidence to contradict Dr. Richter's declaration, Appellant made the ridiculous claim that Dr. Richter did not write his declaration, as the laser scars described by Dr. Richter in his declaration were purportedly not mentioned in the eyecare examination forms for the February 11, 2015 exam. See Pl.'s Resp. (Doc. No. 42) at 3, Supp. App. 40. Appellant did not contradict Dr. Richter's statement that Appellant reported that symptoms of his retinal detachment did not develop until April 6, 2015.

Similarly, Appellant argued Dr. Altaweel did not review the entire medical history as his declaration stated Appellant did not report loss of vision or flashes. See. id. at 10, Supp. App. 47. Appellant claimed that he reported these symptoms numerous times, including during his February 11, 2015 examination by Dr. Richter. Notably, he also admitted that the February 11, 2015 examination form states only "right eye floaters foggy (blurry) can't see with glasses" rather than the multitude of symptoms he elsewhere claimed are listed on the document. See id. Although disputing without evidence that Dr. Altaweel did not review the relevant records, Appellant never denied stating to his treating

physician that had he began experiencing symptoms of a retinal detachment in late March 2015.

As discussed above, Appellant's claim against Dr. Richter was deficient from the outset as he erroneously believed that his treatment records contained statements that they do not. Counsel could only have advised him to dismiss his claims against Dr. Richter. Further, Appellant admitted to Dr. Altaweel and Dr. Richter that his symptoms did not develop until late March 2015 at the earliest. Although attacking other statements made in their declarations, Appellant did not refute their reports of his discussions. As his claims against Dr. Richter fail solely based on the undisputed facts, the presence of counsel would not have changed the outcome of this litigation and the District Court's denial of Appellant's requests to appoint counsel were not prejudicial. The District Court's grant of summary judgment to Dr. Richter should therefore not be disturbed.

CONCLUSION

Based on the foregoing, Defendant/Appellee Dr. James Richter respectfully requests that This Court enter an Order affirming the District Court's grant of summary judgment.

Dated: February 25, 2019

/s/ Douglas S. Knott

Douglas S. Knott
Attorney I.D. #1001600
Leib Knott Gaynor, LLC
219 N. Milwaukee Street, Suite 710
Milwaukee, WI 53202
Attorney for Appellee Dr. James Richter

CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. 32(a)(7)

1. This Brief complies with type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 9,013 words excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Bookman Old Style font.

Dated: February 25, 2019

/s/ Douglas S. Knott

Douglas S. Knott
Attorney I.D. #1001600
Leib Knott Gaynor, LLC
219 N. Milwaukee Street, Suite 710
Milwaukee, WI 53202
Attorney for Appellee Dr. James Richter

CERTIFICATE OF SERVICE

I, Douglas S. Knott, Esquire, hereby certify that on February 25, 2019, I caused the foregoing Brief of Appellee Dr. James Richter to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the Brief of Appellee Dr. James Richter to be transmitted to the Court via hand delivery within 7 days of that notice date.

Colin Thomas Roth, Esq.
WISCONSIN DEPARTMENT OF JUSTICE
Special Litigation and Appeals
P.O. Box 7857
Madison, WI 53707-7857
Counsel for the DOC Appellees

Matthew S. Hellman, Esq.
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001

Sarah M. Konsky, Esq.
David A. Strauss, Esq.
Eric E. Petry, Esq.
JENNER & BLOCK SUPREME COURT AND
APPELLATE CLINIC AT THE UNIVERSITY
OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
773-834-3190
Counsel for Plaintiff-Appellant