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.

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 AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT JAMES VERN PENNEWELL

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Dated: January 25, 2019

ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. 18-3029

Short Caption: Pennewell v. Parish *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.**

[X] 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 Vern Pennewell

(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:

Jenner & Block Supreme Court and Appellate Clinic at The University of Chicago Law School
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(3) If the party or amicus is a corporation:

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

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

N/A

Attorney's Signature s/ Sarah M. Konsky Date: January 25, 2019 (new)

Attorney's Printed Name: Sarah M. Konsky

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

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N/A

Attorney's Signature s/ David A. Strauss Date: January 25, 2019

Attorney's Printed Name: David A. Strauss

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

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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/ Matthew S. Hellman Date: January 25, 2019

Attorney's Printed Name: Matthew S. Hellman

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

I. Jurisdiction Of The District Court

This is a direct appeal from a final judgment of the United States District Court for the Eastern District of Wisconsin, Milwaukee Division, in a civil case. Plaintiff-Appellant James Vern Pennewell filed his *pro se* complaint under 42 U.S.C. § 1983 alleging that Defendants violated his civil rights. On July 20, 2018, the district court issued an order dismissing one Defendant from the action and granting summary judgment to the remaining Defendants. Dkt. 51, A3–18.[1] The district court also entered its final judgment on July 20, 2018. Dkt. 52, A19. The district court had jurisdiction of this case under 42 U.S.C. § 1983 and 28 U.S.C. § 1331.

II. Jurisdiction Of The Seventh Circuit

The Seventh Circuit has jurisdiction of this case under 28 U.S.C. § 1291 because it is an appeal from an order and final judgment of the United States District Court for the Eastern District of Wisconsin that adjudicated all of the claims with respect to all parties. No parties or issues remain in the district court.

Mr. Pennewell filed a *pro se* motion for an extension of time to file his notice of appeal (his "Motion") on August 17, 2018, within 30 days of the district court's judgment. *See* Dkt. 54. Mr. Pennewell filed the Motion with the

[1] Citations to "Dkt. __" are to the district court docket in the case below, *Pennewell v. Parish, et al.,* No. 2:17-cv-00213-LA (E.D. Wis.). Citations to "7th Cir. Dkt. __" are to this Court's docket in this appeal, No. 18-3029. Citations to "A_" are to the required short appendix bound with this brief.

Seventh Circuit, which forwarded it to the district court. *Id.* The district court granted the Motion and extended the time for Mr. Pennewell to file his notice of appeal to September 19, 2018. Dkt. 55, A1–2. Mr. Pennewell filed a *pro se* notice of appeal with the district court on September 20, 2018. *See* Dkt. 56. This Court entered an Order on November 15, 2018, stating:

> IT IS ORDERED that the parties fully address in their respective briefs the issue of the appellate jurisdiction raised in the Jurisdictional Statement of Defendant-Appellee James Richter, D.O. Further, the parties should address whether the document filed by appellant with the court of appeals on August 17, 2018 (district court docket no. 54) can be treated as a notice of appeal. *See Smith v. Barry*, 502 U.S. 244 (1992); *Listenbee v. City of Milwaukee*, 976 F.2d 348, 350-51 (7th Cir. 1992); *see also* Fed. R. App. P. 4(d)."

7th Cir. Dkt. 17.

Mr. Pennewell's timely Motion constitutes a timely notice of appeal under this Court's precedent. *See, e.g.*, *Listenbee v. City of Milwaukee*, 976 F.2d 348, 350–51 (7th Cir.1992) (holding that motion for extension of time to appeal was effective notice of appeal). A motion for extension of time should be construed as a timely notice of appeal if it conveys the information required by Fed. R. App. P. 3 and it is filed within the timeline provided by Fed. R. App. P. 4. *See Smith v. Barry*, 502 U.S. 244, 248–49 (1992) (holding that documents that are timely filed and "give[ ] the notice required by Rule 3" are "'the functional equivalent"' of a notice of appeal) (citation omitted). Federal Rule of Appellate Procedure 3 requires that the notice identify "the party or parties taking the appeal," "the judgment, order, or part thereof being appealed," and "the court to which the appeal is taken." Fed. R. App. P. 3(c). It also states that "[a]n

appeal must not be dismissed for informality of form or title of the notice of appeal." *Id.* This Court interprets these requirements generously and construes *pro se* litigants' actions "liberally" when deciding whether Fed. R. App. P. 3 is satisfied. *Smith v. Grams*, 565 F.3d 1037, 1041 (7th Cir. 2009) (citing *Smith v. Barry*, 502 U.S. at 248); *see also Scherer v. Kelley*, 584 F.2d 170, 174 (7th Cir. 1978) ("[N]otices of appeal are entitled to a liberal construction where the intent of the appellant is apparent and the adverse party is not prejudiced."). The key is whether the *pro se* litigant conveys intent to appeal. *See Grams*, 565 F.3d at 1041–43; *Listenbee*, 976 F.2d at 350–51.

Mr. Pennewell's Motion provided the notice required by Fed. R. App. P. 3(c) and therefore constituted notice of appeal. The Motion announced his intent to pursue an appeal ("I James V. Pennewell am asking . . . for an extension of six months to appeal"); it repeatedly referenced the "defendants" and the "Wisconsin Department of Corrections," it specified the judgment being appealed ("United States District Court Eastern District of Wisconsin Honorable Judge Lynn Adelman's decision . . . to enter judegment [sic] in favor of the defendants"); and it identified this Court as the destination for the appeal ("the United States Court of Appeals Seventh Circuit"). *See* Dkt. 54. This information was sufficient to put Defendants on notice that Mr. Pennewell intended to appeal, thus satisfying Fed. R. App. P. 3's requirements and making Mr. Pennewell's Motion the "functional equivalent" of a notice of appeal. *Smith*, 502 U.S. at 248.

Mr. Pennewell's Motion also was timely. Under Fed. R. App. P. 4(a)(1), a notice of appeal must be filed "within 30 days after entry of the judgment or order appealed from." *Id.* The district court issued its order and entered judgment on July 20, 2018, and Mr. Pennewell filed his Motion 28 days later on August 17, 2018. *See* Dkts. 51, A3–18; 52, A19; 54. While Mr. Pennewell filed his Motion with this Court rather than the district court, it is deemed "filed" in the district court on the day it was filed in this Court under Fed. R. App. P. 4(d). *See* Fed. R. App. P. 4(d) ("If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted."). This Court received Mr. Pennewell's motion on August 17, 2018 and recorded that date on the document. Dkt. 54. Therefore, under this Circuit's precedent, Mr. Pennewell filed a timely notice of appeal on August 17, 2018. *See* Fed. R. App. P. 3; 4(d).

The district court subsequently granted Mr. Pennewell's Motion, setting the new due date for his notice of appeal to September 19, 2018. Dkt. 55, A1–2.[2] In his Jurisdictional Statement, Dr. Richter argues that this Court lacks

[2] In its order granting Mr. Pennewell's Motion, the district court did not address the fact that Mr. Pennewell timely filed his motion in the Seventh Circuit. *See* Dkt. 55, A1–2. Rather, the district court assumed for purposes of the Order that Mr. Pennewell's motion was filed on the later date it was received by the district court. *See id.* at 1, A1 ("Plaintiff requested an extension on August 22, 2018, two days after the time prescribed by Rule 4(a) expired . . . ."). The district court nevertheless granted Mr. Pennewell's motion, holding that he had shown "good cause for not being able to meet the 30-day deadline"

jurisdiction over this appeal because Mr. Pennewell subsequently filed his notice of appeal on September 20, 2018, one day after the extended deadline set by the district court for filing the notice of appeal. 7th Cir. Dkt. 16. That is of no consequence for two reasons.

First, a *pro se* litigant's appeal is timely if he or she files at least one document that serves as a valid notice of appeal within Fed. R. App. P. 4's 30-day window. *See Grams*, 565 F.3d at 1041. The date on which Mr. Pennewell filed his *pro se* notice of appeal is of no consequence, because his earlier Motion had already satisfied the requirements of Fed. R. App. P. 3 and Fed. R. App. P. 4.

Second, even assuming for sake of argument that Mr. Pennewell's Motion did not constitute a timely notice of appeal, the September 19, 2018 deadline the district court set after granting Mr. Pennewell's Motion was not jurisdictional. *See Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 21–22 (2017) (distinguishing jurisdictional deadlines from mandatory claim-processing rules). The deadline was not mandated by statute; it instead stemmed from Fed. R. App. P. 4(a)(5)(C), which is a nonjurisdictional claim-processing rule. The Supreme Court explicitly reserved the question of whether equitable exceptions apply to these rules. *See Hamer*, 138 S. Ct. at 18 n.3 (citing *Kontrick v. Ryan*, 540 U.S. 443, 457 (2004)). This Court does not appear

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for filing it. *See id.* Thus, even assuming for sake of argument that Mr. Pennewell's Motion was untimely filed, the district court already excused the untimely filing. *Id.*

to have addressed this issue, but Mr. Pennewell argues that equitable discretion would be warranted given the circumstances of this case. Mr. Pennewell was legally blind, had just been released from prison, and was living in a Veterans Affairs center with a shared mailbox when he mailed his notice of appeal. Dkt. 56. The notice of appeal was dated three days before it was due, and it arrived and was filed just one day late. *Id.* Defendants cannot point to any prejudice they suffered as a result of the one-day delay. So even if his Motion is not considered a notice of appeal, this Court should excuse the untimeliness of Mr. Pennewell's notice of appeal.

For all of these reasons, this Court has jurisdiction over this appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Did the district court abuse its discretion by refusing to appoint counsel for Mr. Pennewell and, in doing so, failing to address the specific circumstances of the case, including that Mr. Pennewell's claims involved complex medical issues and evidence bearing on Defendants' states of mind, and that Mr. Pennewell proceeded *pro se* while incarcerated, legally blind, and with no legal assistance?

(2) Did the record below give rise to genuine questions of material fact as to whether Defendants were deliberately indifferent to Mr. Pennewell's objectively serious medical conditions, thus precluding summary judgment?

STATEMENT OF THE CASE

I. Medical Conditions And Treatment

Mr. Pennewell was an inmate at Dodge Correctional Institution ("DCI"), the John Burke Correctional Center ("JBCC"), and Sanger B. Powers Correctional Center ("SPCC") in Wisconsin for operating a motor vehicle while intoxicated, a class H felony. *See* Dkts. 28 at 1; 51 at 2, A4; 54 at 1. When Mr. Pennewell began his incarceration on February 3, 2015, he was blind in his left eye. Dkt. 51 at 3, A5.

A. Retinal Detachment

During the following two months, Mr. Pennewell repeatedly complained to Defendants that he was losing vision and experiencing other problems with his right eye—the only eye out of which he could see. First, during his intake eye screening in early February 2015, Mr. Pennewell told an eye technician that he was blind in his left eye and had "shadows, ghosts and the vision is decreasing" in his right eye. Dkt. 42 at 3. The eye technician recorded these complaints in Mr. Pennewell's health services records. *Id.*

About a week later, on February 11, 2015, Mr. Pennewell received an eye examination from Defendant Dr. James Richter, an optometrist who provides eye care at DCI. Dkt. 51 at 3, A5. During the exam, Mr. Pennewell told Dr. Richter that he was blind in his left eye and the vision in his right eye was "decreasing, foggy, floaters, spots, ghosts, shadows, and flashes but not as bad as 2008 left detachment." *Id.* The notes Dr. Richter took during the exam state that Mr. Pennewell reported "blindness and no light perception in his left eye"

and "floaters [and] foggy" in his right eye. *Id.* Mr. Pennewell also reported that he "could not see very well even though his glasses were only a few months old." *Id.* Dr. Richter performed a "dilated fundus evaluation" on Mr. Pennewell's eyes and concluded that Mr. Pennewell had the wrong prescription. *Id.* He ordered new glasses for Mr. Pennewell and referred him to the University of Wisconsin Eye Clinic ("UWEC") "for evaluation and possible extraction of a right eye cataract." *Id.* However, that appointment was scheduled for more than two months later on April 14, 2015. Dkt. 42 at 3. Despite stating that Mr. Pennewell would be monitored and telling him to notify health services of any changes in his vision, *see id*, Dr. Richter did not communicate with or examine Mr. Pennewell again until September 22, 2015, seven months later. Dkt. 51 at 7, A9.

Also on February 11, 2015, Mr. Pennewell had an appointment with James Parish, a Physician's Assistant ("P.A.") at DCI. P.A. Parish reviewed the notes from Dr. Richter's examination and then administered his own "intake physical exam." *Id.* at 2–4, A4–6. He noted that Mr. Pennewell had been blind in his left eye since 2009 and that Mr. Pennewell reported a decrease in vision in his right eye, as well as floaters and fogginess. Dkt. 28 at 2, 13. P.A. Parish did not order anything for Mr. Pennewell's eye issues because Dr. Richter had already examined Mr. Pennewell, but he did order treatment for Mr. Pennewell's other medical issues. Dkt. 51 at 3–4, A5–6. P.A. Parish continued to provide care for Mr. Pennewell's other medical issues while he remained at

DCI, but he did not communicate with Mr. Pennewell again about his eye problems after the intake screening. *Id.* at 4, A6.

A month later, on March 17, 2015, Mr. Pennewell was transferred to JBCC. *Id.* That same day, Victoria Bruns, a nurse at JBCC, "performed a transfer screening similar to the intake screening Parish performed at DCI." *Id.* at 2, 4, A4, A6. Mr. Pennewell again reported "blind left eye, right eye vision was decreasing with foggy, floaters, ghosts, and spots in vision." *Id.* at 4, A6. At this intake screening, Mr. Pennewell expressed concerns about loss of vision to Nurse Bruns as well as nurses Sandra Jackson, Paula Lampe, Denise Bonnett, and Dr. Scott Hofteizer. Dkt. 1 at 4. Nurse Bruns's notes from that day confirm Mr. Pennewell reported left eye blindness and decreasing vision in his right eye. Dkt. 51 at 4, A6. Nurse Bruns also noted that Mr. Pennewell had an appointment with UWEC scheduled for April 14, 2015—which, at that point, was still approximately one month away. *Id.*

On March 30, 2015, Mr. Pennewell submitted a Health Services Unit ("HSU") request stating: "I am scheduled for an eye appointment in Madison. My right eye is painful the Tylenol is not working for pain. *It feels like there is a tear in my eye*. I am very red it drains then dries up. I have to put warm water on a washcloth to get it open. When can it be looked at, soon I'm hoping." *Id.* (emphasis added).

Nurse Sandra Jackson saw Mr. Pennewell later that day. He reported that the symptoms in his right eye were "getting worse." *Id.* at 4–5, A6–7. She recorded in Mr. Pennewell's health service progress notes that Mr. Pennewell

reported "to have blind L eye" and "red 'tear' that is to be evaluated at UW-Madison (UWEC)." Dkt. 31-1 at 20. But Nurse Jackson did not arrange for Mr. Pennewell to receive treatment at UWEC or from a doctor. In her declaration, she stated that Mr. Pennewell likely suffered from "conjunctivitis," but this diagnosis does not appear in her contemporaneous notes from that appointment. Dkts. 31-1 at 20; 42 at 4. Rather, Nurse Jackson merely recorded that she told Mr. Pennewell to wash his hands regularly and not touch his eyes. Dkt. 31-1 at 20.

About a week later, on April 6, 2015, Mr. Pennewell submitted another HSU request stating: "The pain in my left eye is getting bad and the vision in my right eye is deteriorating, it's as if there is a retinal detachment. The vision in my right eye has a shadow in the lower right limiting my vision, some flashes of light, Thank you." Dkt. 42 at 4. Nurse Bruns saw him the next morning, April 7, 2015. Dkt. 51 at 5, A7. Mr. Pennewell told her "half my vision was gone" and "I had a right eye retinal detachment and I will lose all my vision if I did not get medical attention." Dkt. 42 at 4. This was eight days after his initial HSU request complaining of pain and feeling a tear in the eye, and almost two months after his intake examinations revealed loss of vision, flashes of light, floaters, fog, ghosts, and shadows in his right eye.

Mr. Pennewell was approved to be transferred to the Waupun Memorial Hospital Emergency Room that morning, April 7, 2015. Dkt. 51 at 5, A7. Shortly after he arrived at the Emergency Room, he was transported to UW Hospital in Madison. *Id.* at 6, A8. There, Dr. Michael Altaweel examined Mr.

Pennewell's eyes and diagnosed him with an "uncomplicated retinal detachment." *Id.* According to Dr. Altaweel, a retinal detachment requires "emergency medical care." Dkt. 51 at 13, A15. Dr. Altaweel performed surgery on Mr. Pennewell's right eye that day, and Mr. Pennewell returned to JBCC the next day, April 8, 2015. *Id.* at 6, A8. Following the surgery, Mr. Pennewell had a gas bubble in his right eye and therefore needed assistance to navigate the facility until the gas bubble dissipated approximately eight to ten weeks later. Dkt. 42 at 4.

B. Macular Tear

Mr. Pennewell's problems with his right eye only continued, however. On June 29, 2015, Mr. Pennewell filed another HSU request stating: "vision is starting to get worse. I can only read large print, foggy, double vision, halos around objects. I can only identify objects or people when within 3 feet." *Id.* at 5. Mr. Pennewell was taken to UW Hospital later that day and diagnosed with a macular hole, which required yet another surgery. *Id.*

On June 30, 2015, Mr. Pennewell filed an HSU request asking for a second opinion on whether he needed surgery to fix the macular hole. *Id.* He explained that he "wanted to be safe" and check if other options were available because it was the only eye he could still see with. Dkt. 42 at 5. He also explained shortly thereafter that he would be unable to see for eight to ten weeks post-surgery while the "gas bubble" in his eye dissipated, and that he did not feel safe being completely blind while incarcerated. *Id.* Nurse Jackson wrote back stating that the DOC "does not do second opinions." Dkt. 51 at 6–7,

A8–9. Thus, on July 16, 2015, Dr. Altaweel performed surgery on the macular hole. *Id.* at 7, A9; Dkt. 42 at 5.

Following the surgery, Mr. Pennewell was blind in both eyes and had no sight for eight to ten weeks. During this time, prison staff failed to accommodate his blindness. Rather, after both the retinal tear surgery and the macular hole surgery, Mr. Pennewell was "escorted to [his] room and left to care for all [his] own needs restroom, showers, meals totally blind for approximately 10 to 12 weeks." Dkt. 1 at 5. Prison staff "let [him] feel [his] way along the walls of the facility to use the restroom, shower, and get to health services . . . . [He] was at the mercy of other inmates." Dkt. 42 at 9. As another example, on July 17, 2015, JBCC Nurse Lampe walked Mr. Pennewell, who was completely blind, "directly into a brick wall" while escorting him to health services. *Id.* at 5.

C. Blindness

Mr. Pennewell did not recover his vision in his right eye, rendering him legally blind in both eyes. In a letter dated September 14, 2015, Dr. Altaweel stated: "Your right eye has required repair for retinal detachment, macular hole, and cataract. Your vision measures 20/200 at the last visit. This renders you legally blind at present. You may improve further with more healing time and refraction, but will continue with visions [sic] limitations." Dkt. 1-1 at 2.

Similarly, Dr. Altaweel stated in an affidavit that, as of his examination on May 25, 2016, Mr. Pennewell was "[l]egally blind 20/300 (R) eye after retinal detachment repair." *Id.* at 1. The records from Mr. Pennewell's December 7,

2016 appointment at UWEC to remove a loose stitch again recorded that Mr. Pennewell was legally blind. Dkt. 42 at 6–7 ("[V]isual acuity 20/500 . . . Best corrected visual acuity 20/400, legally blind . . . .").

D. Ongoing Problems With Treatment And Care.

In the year and a half following the surgery for his macular tear, Mr. Pennewell continued to suffer from serious problems with his right eye, and continued to complain that he was not receiving adequate medical treatment and care.

Dr. Richter performed his second examination of Mr. Pennewell on September 22, 2015. Dkt. 51 at 7, A9. Dr. Richter conducted a vision test, ordered new lenses for Mr. Pennewell, and ordered a "sheet magnifier" to help him read. *Id.* He also recommended a follow-up appointment in six weeks and noted that Mr. Pennewell should see someone at UWEC if his vision did not improve. *Id.* When Mr. Pennewell received his new glasses, they were the wrong prescription, and he therefore had to send them back to be corrected. *Id.* Mr. Pennewell was never scheduled for a follow-up appointment, and Dr. Richter did not have any further contact with Mr. Pennewell after this visit. *Id.*

Mr. Pennewell continued to have eye-related problems. On October 14, 2015, Mr. Pennewell filed an HSU request stating that his right eye was inflamed, painful, and causing headaches. *Id.* He was taken to the UW Hospital later that day and examined by Dr. Altaweel. Dkt. 42 at 5. Sgt. Nickel and another inmate remained in the examination room during Mr. Pennewell's

exam, which left Mr. Pennewell "uncomfortable" because they had access to his confidential, private, medical information. *Id.*

Mr. Pennewell was transferred to SPCC on March 22, 2016. Dkt. 42 at 6. Shortly after arriving there, on May 31, 2016, Mr. Pennewell filed an administrative complaint relating to the "delayed/denied medical attention, or treatment" he had received. *Id.* The complaint was not entered into the system by prison staff until three months later. *Id.* Mr. Pennewell filed another administrative complaint on November 9, 2016. *Id.*

Two days later, on November 11, he received notice that his November 25, 2016 follow-up appointment at UWEC was cancelled because of a staffing shortage. *Id.* Mr. Pennewell made an HSU request on November 14, 2016 reporting eye pain and requesting a follow-up appointment. *Id.* The nurse told him the earliest available appointment was on January 27, 2017, but Mr. Pennewell said he "could not wait that long." *Id.* He ultimately had to wait until December 7, 2016 to see a doctor, at which time the doctor removed the loose stitch that had been causing Mr. Pennewell eye pain. Dkt. 42 at 6–7. Mr. Pennewell also had a procedure to insert plugs in his tear ducts around this time because he was suffering from dry eyes. *Id.* at 7; Dkt. 51 at 8, A10.

Mr. Pennewell complained that prison officials again prevented him from receiving medical treatment in September 2017. Dkt. 42 at 7. Mr. Pennewell was scheduled to have an appointment with an ophthalmologist at a VA clinic on September 21, 2017. *Id.* Although the VA had arranged to pay for the visit,

the prison denied Mr. Pennewell permission to attend and told him that he could reschedule the appointment for after his release. *Id.*

Mr. Pennewell also filed complaints and requests for compassionate release due to his extraordinary health condition. Dkt. 42 at 6–7. The prison rejected his requests for compassionate release, saying that "the DOC could adequately accommodate [his] medical needs." *Id.* at 4–5. Mr. Pennewell was released from prison on July 31, 2018. Dkt. 54 at 1.

II. District Court Proceedings

Mr. Pennewell exhausted all administrative remedies prior to filing this lawsuit. *See* Dkt. 1-1 at 3. On February 15, 2017, Mr. Pennewell filed his *pro se* complaint in the U.S. District Court for the Eastern District of Wisconsin. *See* Dkt. 1. He alleged Eighth Amendment deliberate indifference claims against more than a dozen Defendants for "delay[ing] and ignor[ing] pleas and requests" for medical care "that caused blindness in [his] right eye." *See id.* at 2–3. Mr. Pennewell explained in his complaint that the case involved various serious eye conditions and procedures—including his retinal detachment, macular hole, vitrectomy, artificial lens implant, laser surgery, stitch removal, and implantation of artificial plugs in the tear ducts. *Id.* at 5. In addition to being legally blind in both eyes, Mr. Pennewell asserted that he also was suffering from "deteriorating mental health, and other disabilities." *Id.* He thus stated in his complaint: "Now with blindness, deteriorating mental health, and other disabilities, my incarceration has become grossly disproportionate to the severity of my crime, operating under the influence." *Id.*

Given his disability and the difficulty Mr. Pennewell had already encountered in litigating his case *pro se*, he moved for appointment of counsel in his complaint. *See id.* at 7. Mr. Pennewell stated in support of his request that he had "no funds available," suffered from "vision limitations," and that the "Dept of Correction is uncooperative in providing records, requests, and names." *Id.* The district court screened the complaint and concluded that Mr. Pennewell had met his burden to proceed against Defendants,[3] but held that it would not appoint counsel because Mr. Pennewell hadn't shown that he had exhausted other options. *See* Dkt. 4 at 3–6, A24–26.

Mr. Pennewell filed a second motion requesting appointment of counsel on March 29, 2017, in which he detailed his unsuccessful attempts to obtain counsel and notified the district court once more that he needed counsel because he had "vision limitations" and had to use "visual aids to read [and] write." Dkt. 5 at 1–2. Two days later, the district court denied Mr. Pennewell's motion without prejudice. *See* Dkt. 6, A20–21. In its order, the court reasoned that, while Mr. Pennewell had showed in the motion that he had made reasonable attempts to secure counsel on his own, appointment of counsel nevertheless was not appropriate because "[p]laintiff's 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 at 2, A21. The court

[3] The Court also dismissed the institution-defendants (State of Wisconsin Department of Correction (DOC), Dodge Correctional Institution, and Secretary of the DOC John E. Litscher) at this stage. Dkt. 4 at 5, A26.

then described how the litigation was likely to proceed—Defendants would answer, the court would issue a scheduling order, and the case would move to discovery—and concluded that "[a]t this time, I have no reason to believe that plaintiff cannot handle these tasks on his own." *Id*. The district court did not mention or discuss Mr. Pennewell's blindness or the complexity of his claims in its order.

In a letter to the district court dated June 23, 2015, Mr. Pennewell expressed concern about the costs of producing documents and renewed his hope that a lawyer would help him: "[i]f a plaintiff's attorney needs these or any documents in my possession please let them feel free to make arrangements with Sanger Center Staff and I will produce them for copy." Dkt. 14 at 2. The district court never addressed this letter, nor did it raise the prospect of Mr. Pennewell renewing his motion for appointment of counsel when it issued its discovery scheduling order on June 28, 2015. *See* Dkt. 15.

Mr. Pennewell therefore proceeded into discovery *pro se*, legally blind in both eyes, incarcerated, and with no legal assistance or knowledge of the investigative process. First, Mr. Pennewell began discovery by filing a series of letters and exhibits with the district court arguing the merits of his case. *See* Dkts. 16–19. When Mr. Pennewell eventually sent interrogatories to Defendants, they did not provide the information he sought. *See* Dkts. 22; 22-2; 25. Second, when Mr. Pennewell encountered roadblocks in discovery, he wrote letters to the district court in protest, rather than filing motions to compel discovery under Fed. R. Civ. P. 37. *See, e.g.*, Dkt. 20 at 1 ("To date I

have been unsuccessful in obtaining the name of the eye technician . . . . The DOC states [the] person is unknown and the records do not identify the individual"); Dkt. 25 at 1 (letter to district court calling Defendant Richter's refusal to respond to interrogatories "unreasonable"). Third, Mr. Pennewell appears to have conflated a second opinion with expert medical testimony. *See* Dkt. 42 at 9 ("I wasn't allowed to attend a[n] eye appointment on 9/21/17 . . . for an independent opinion as to why I am blind or if it could have been prevented with more laser retinopexy."). While Mr. Pennewell unsuccessfully tried to obtain a second opinion on his medical condition, he did not attempt to obtain the assistance of an independent medical expert. Mr. Pennewell thus failed to obtain any expert testimony, take any depositions, or obtain needed information through written discovery.

Defendants filed motions for summary judgment on October 24, 2017. *See* Dkts. 27; 37. In their briefs supporting their motions, they argued that, based on the lack of evidence produced by Mr. Pennewell in discovery, Defendants[4] were entitled to summary judgment. *See* Dkt. 28 at 18. Defendants attached as exhibits to their summary judgment motions the declarations of Dr. Altaweel and other medical professionals who treated Mr. Pennewell, their own declarations, and Mr. Pennewell's medical records. *See* Dkts. 29–36; 39; 40. Dr. Richter, in his separate brief in support of summary

[4] Defendants also argued that, based on his discovery responses, Mr. Pennewell "dropped his claims against" several Defendants and that the court should enter an order dismissing them from the case. *See* Dkt. 28 at 2.

judgment, argued that he was entitled to summary judgment because Mr. Pennewell was not suffering from a "serious medical condition during the relevant timeframe" and Dr. Richter met the "appropriate standard of care for an optometrist in his position." Dkt. 38 at 6, 9.

Mr. Pennewell's opposition to summary judgment consisted of a ten-page brief and fifteen exhibits consisting solely of medical records dated *prior* to his time in prison and copies of various administrative records and treatment notes received from Defendants. *See* Dkt. 42. He did not submit expert medical testimony, declarations or affidavits, deposition testimony, or other exhibits. In Mr. Pennewell's brief opposing summary judgment, Mr. Pennewell objected once more to the fundamental unfairness of his proceeding: "The only facts that are represented in this procedure, are on the side of the DOC. I have not had an equal or fair chance to question physicians, staff or get independent opinions on my eye condition." Dkt. 42 at 9. Indeed, the brief consisted primarily of a timeline of the events giving rise to his claim, with citations to Defendants' summary judgment exhibits. Mr. Pennewell argued that Defendants "violated my . . . 8th Amendment Rights" and that "[t]he deliberate indifference of DOC physicians, health services staff, and security staff caused me to be legally blind in the right eye by negligence and failure to act." *Id.* Mr. Pennewell's brief did not contain any legal argument or citations to cases or other authority.

Mr. Pennewell subsequently filed two sur-replies, in which he argued that both summary judgment motions were inappropriate on the merits and

that he had not been given the opportunity to build his case. *See* Dkts. 45; 47. Mr. Pennewell again notified the district court of his need for counsel: "I am not a lawyer by profession, I cannot cite case law, I don[']t know civil procedure, I do not have access to material. Some days I can't see good enough to read or write[.] I'm incarcerated." Dkt. 45 at 1. *See also* Dkt. 47 at 1 ("I have not had equal opportunity to get different opinions on my eye condition. The DOC has denied the opportunity. I also did not get to contact witnesses or get statements."). The district court granted Defendants' motions to strike the sur-replies because Mr. Pennewell "did not file an opposition to [D]efendants motions to strike nor did he explain in his sur-reply why he needed to file a sur-reply to properly prosecute this case." Dkt. 51 at 2, A4.

Despite Mr. Pennewell's repeated protests, the district court granted summary judgment on July 20, 2018. *See* Dkt. 51, A3–18. The district court held that Mr. Pennewell had failed to show that Defendants Rice, Hofteizer, Bonnett, Bunker, Nickle, Lampe, Redeker, Lang, Beyer, and Rollins were sufficiently personally involved. *Id.* at 11, A13. It therefore held that "no reasonable jury could conclude that [they] knowingly approved, condoned, or turned a blind eye to plaintiff's medical conditions" without delving into an analysis of deliberate indifference. *Id.* at 8–11, A10–13. But for Defendants Richter, Parish, Jackson, and Bruns, the district court did reach the substance of Mr. Pennewell's deliberate indifference claims before ultimately granting summary judgment in their favor. The district court held that "[i]t's entirely possible that plaintiff first suffered the [retinal detachment] condition when he

complained about it . . . on April 6, 2015" because he had no proof showing that his retinal detachment happened earlier. *Id.* at 12, A14. It also held that Mr. Pennewell failed to prove that he exhibited the key symptoms of a detached retina—"flashes of light" and "loss of vision"—before April 6, 2015, or that his 2015 detached retina caused his blindness in 2017. *Id.* at 12–13, A14–15. Finally, the district court held that nothing in the record established that the four Defendants "generally ignored" Mr. Pennewell's eye problems. *Id.* at 13, A15. Thus, the district court held that "no reasonable jury could conclude that Richter, Parish, Jackson, or Bruns were deliberately indifferent towards plaintiff's eye problems" and granted summary judgment in their favor. *Id.* at 15, A17.

SUMMARY OF ARGUMENT

Mr. Pennewell entered prison with sight in one eye, and he left legally blind in both eyes. Prison medical officials ignored his need for emergency medical care for months, persisted in treatments that were clearly ineffective, unnecessarily delayed needed treatments, and caused him pain and suffering. The district court abused its discretion by failing to appoint counsel for Mr. Pennewell. It also improperly granted Defendants' summary judgment motions, because it disregarded key evidence establishing genuine disputes of material fact and failed to draw all reasonable inferences in Mr. Pennewell's favor. These errors require reversal.

First, the district court abused its discretion in failing to appoint counsel for Mr. Pennewell. It was clear from the outset of the case that, as a *pro se*

litigant who was blind, incarcerated, indigent, and making claims that would necessarily involve complex medical evidence, Mr. Pennewell was not able to litigate this case on his own. This Court's precedent required the district court to consider both Mr. Pennewell's personal characteristics and the difficulty of litigating his specific claims through discovery and then opposing summary judgment. Yet the district court never addressed these factors in its cursory denials of his requests for counsel. The district court thus abused its discretion by denying both of Mr. Pennewell's formal motions to appoint counsel and ignoring his subsequent complaints of inability to build or present his case effectively.

The district court's refusal to appoint counsel also prejudiced Mr. Pennewell. He ultimately opposed summary judgment without having obtained a medical expert, deposition testimony, declarations or affidavits, and other critical evidence. At summary judgment, Mr. Pennewell made no legal arguments and cited no legal authority. The district court found these deficiencies fatal to his case, and they would have been prevented if Mr. Pennewell had appointed counsel.

Second, a reasonable jury could have concluded that Defendants were deliberately indifferent to Mr. Pennewell's serious medical needs during his incarceration, violating his Eighth Amendment rights. The district court correctly assumed that Mr. Pennewell's eye conditions were objectively serious. But in granting summary judgment, the district court erred by improperly weighing evidence that Defendants: (1) deviated from their own treatment

protocols and ignored Mr. Pennewell's symptoms of retinal detachment requiring emergency care for two months; (2) persisted in a course of treatment known to be ineffective; (3) unjustifiably delayed effective treatment, causing unnecessary pain to Mr. Pennewell; and (4) delayed and denied follow-up appointments after Mr. Pennewell finally received surgery, ignored his requests for mobility assistance because of his blindness, and subjected him to additional risks of harm. Under this Court's precedent, and based on the record, a reasonable jury could find for Mr. Pennewell on his deliberate indifference claims. Thus, this Court should reverse the grant of summary judgment and give Mr. Pennewell the opportunity to litigate his case with appointed counsel.

STANDARD OF REVIEW

This Court reviews a district court's decision to deny a request for appointment of counsel for an abuse of discretion. *Pruitt v. Mote*, 503 F.3d 647, 658 (7th Cir. 2007) (en banc).

This Court reviews a district court's grant of summary judgment *de novo*, "viewing the record in the light most favorable" to the non-movant and "drawing all inferences in his favor." *Petties v. Carter*, 836 F.3d 722, 727 (7th Cir. 2016) (en banc).

ARGUMENT

I. The District Court Abused Its Discretion By Failing To Appoint Counsel For Mr. Pennewell, And Mr. Pennewell Was Prejudiced By The District Court's Failure.

It was an abuse of discretion for the district court to deny Mr. Pennewell's motions for appointed counsel. Mr. Pennewell faced the uniquely difficult position of being incarcerated and legally blind when he brought this case, and he was left to litigate it *pro se* through the discovery and summary judgment phases. From the outset, it was clear that this case would involve complex medical issues and questions regarding the standard of acceptable care for retinal detachments, macular holes, and other serious eye conditions; the cause of Mr. Pennewell's blindness in his right eye; and the mental state of the people involved. Dkts. 1; 5.

The district court nevertheless denied both of Mr. Pennewell's formal motions for counsel, and it 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. *See* Dkts. 1; 4, A22–28; 5; 6, A20–21; *see also* Dkts. 22; 22-2; 25; 45; 47. In doing so, the district court failed to address Mr. Pennewell's blindness, other characteristics, and the complex nature of the case. The district court therefore abused its discretion, and Mr. Pennewell was prejudiced as a result.

A. The District Court's Failure To Appoint Counsel Was An Abuse Of Discretion.

Civil litigants, although not given a constitutional or statutory right to counsel, can ask the district court to appoint counsel to represent them, and the district court has discretion to do so under 28 U.S.C. § 1915(e)(1). *See Dewitt v. Corizon, Inc.*, 760 F.3d 654, 657 (7th Cir. 2014); *Pruitt*, 503 F.3d at 649. When considering a request for counsel, a district court must ask "(1) whether the plaintiff has made a reasonable attempt to obtain counsel and (2) whether the plaintiff appears competent to litigate the case himself, given the difficulty of the particular case at hand." *McCaa v. Hamilton*, 893 F.3d 1027, 1031 (7th Cir. 2018); *see also Pruitt*, 503 F.3d at 654. The district court must seek counsel to represent the plaintiff "[i]f the answer to the first question is yes and the answer to the second question is no." *Walker v. Price*, 900 F.3d 933, 935 (7th Cir. 2018).

When considering the second question, the district court must "consider *both* the difficulty of the case *and* the pro se plaintiff's competence to litigate it himself." *Pruitt*, 503 F.3d at 649 (emphasis in original). A district court should consider "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.* at 655. This inquiry focuses on the plaintiff's competency to *litigate* his own claims and the degree of difficulty of litigating those claims, which includes the plaintiff's ability to undertake "tasks that normally attend litigation: evidence gathering, preparing and responding to motions and other court filings, and trial." *Id.*

1. The district court abused its discretion in denying Mr. Pennewell's motions for appointment of counsel, given the specifics of Mr. Pennewell's case.

The district court correctly held that Mr. Pennewell had reasonably attempted to obtain counsel, thereby satisfying the first question. Dkt. 6 at 1, A20 ("I am satisfied that [Mr. Pennewell] has made reasonable attempts to secure counsel on his own."). But the district court abused its discretion in answering the second question.

As a threshold matter, it is an abuse of discretion for a district court considering a motion for appointment of counsel merely to make "cursory reference to plaintiff's awareness of the facts, comprehensible filings, use of the court's processes, and understanding of the applicable legal standard, without delving into any of plaintiff's personal characteristics or the specifics of the case." *James v. Eli*, 889 F.3d 320, 330 (7th Cir. 2018) (internal quotation marks and citation omitted). Yet that is precisely what the district court did in this case. In its orders denying Mr. Pennewell's motions for counsel, the district court stated only that "[p]laintiff's 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" and "[a]t this time, I have no reason to believe that plaintiff cannot handle these tasks on his own." Dkt. 6 at 2, A21. The district court never indicated that it had considered Mr. Pennewell's personal characteristics, nor did it address any specifics of his case. Dkt. 6, A20–21. The failure to even address these factors is an abuse of discretion. *See Dewitt*, 760 F.3d at 658 (holding that the district court had to do more than simply *state*

that it considered the complexity of the case and the plaintiff's ability to litigate it, and that the district court actually had to delve into the specifics in support of its decision); *Eli*, 889 F.3d at 330.

The facts of this case underscore that the district court abused its discretion in denying Mr. Pennewell's formal motions for appointment of counsel. First, Mr. Pennewell explicitly stated in his complaint and in both motions to recruit counsel that one reason he was requesting counsel was that he was legally blind. Dkt. 1 at 5 ("now with blindness, deteriorating mental health, and other disabilities"), 7; Dkt. 5 at 1 ("I have . . . vision limitations [and] use visual aids to read [and] write"). Mr. Pennewell's complaint and motions also alerted the district court to the complexities that he would face litigating this case through discovery and opposing summary judgment, especially since he had already complained to the district court about Defendants' uncooperative behavior. Dkt. 1 at 4, 7 ("after verbal [and] written requests [the] DOC will not provide full names" and "Dept of correction is uncooperative in providing records, requests, names"); s*ee also Dewitt*, 760 F.3d at 658 (holding that district court "abused its discretion" because it did not address the challenges that plaintiff, a blind and indigent prisoner with no legal experience, faced investigating facts and deposing witnesses)*; Eli*, 889 F.3d at 327 ("[C]omplexity increases and competence decreases as a case proceeds to the advanced phases of litigation."); *Bracey v. Grondin,* 712 F.3d 1012, 1017 (7th Cir. 2013) ("Complexities anticipated (or arising) during discovery can justify a court's decision to recruit counsel.").

Second, Mr. Pennewell's complaint made clear that his case involved both complex medical evidence regarding Defendants' treatment of his retinal detachment, macular hole, and other serious eye conditions, and the claim that Defendants acted with deliberate indifference to Mr. Pennewell's serious medical needs. Dkts. 1; 5. The sheer range of medical conditions and procedures at issue, including "retinal detachment, macular hole, vitrectomy, artificial lens implant, laze surgery to clear lens, stitch removal, [and] artificial plugs implanted in tear ducts," made Mr. Pennewell's case highly complex. Dkt. 1 at 5; *see also Henderson v. Ghosh,* 755 F.3d 559, 566 (7th Cir. 2014) (holding that case was factually and legally complex because it involved "complex medical terms and concepts" like "kidney disease, end stage renal failure, creatine and blood urea nitrogen levels, 'out of range' lab results, and dialysis," and also because it required "proof of the defendants' state of mind."). This Court has held that cases involving complex medical evidence are inherently more difficult for *pro se* litigants. *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). This difficulty is especially profound when "a prisoner has received at least *some* medical treatment" because then "he must show 'a substantial departure from accepted professional judgment, practice, or standards,' and expert medical evidence is often required to prove this aspect of his claim." *Eli*, 889 F.3d at 328 (citations omitted). This Court also has recognized that *pro se* plaintiffs have more difficulty litigating cases involving the state of mind of the defendant, such as

cases involving deliberate indifference. *Santiago*, 599 F.3d at 761; *Henderson*, 755 F.3d at 566.

Third, the complaint states that the incidents giving rise to Mr. Pennewell's claim spanned more than two years and occurred at different institutions—further adding to the complexity of the case. *See* Dkt. 1; *see also Greeno v. Daley,* 414 F.3d 645, 658 (7th Cir. 2005) (holding that the district court abused its discretion by assessing the case as factually and legally simple since "his medical records, letters, health services requests, and inmate complaints span over two years" and his case likely requires expert testimony to assess the adequacy of the treatment he received); *Eli*, 889 F.3d at 330 ("Additionally, his treatment took place at multiple medical institutions . . . and included x-rays and CT scans. This not only broadened the scope of relevant discovery, but also necessitated some level of expertise for its proper interpretation.").

Yet the district court failed to acknowledge *any* of these complexities in its decisions to deny counsel. Dkts. 6, A20–21; 4, A22–28. The district court should have known that this case almost certainly would involve complicated medical issues, require expert medical evidence, and be beyond the capacity of a legally blind, incarcerated, and indigent litigant. As this Court explained in a factually similar case: "The crucial facts here concern both the conduct of the defendants, the cause of [the plaintiff]'s blindness, and the standards of medical practice . . . . Consultation with outside medical specialists to develop evidence concerning diagnosis, causation, treatment, and prognosis is

obviously beyond the capacity of this blind, indigent, and imprisoned litigant." *See Merritt v. Faulkner*, 697 F.2d 761, 764–65 (7th Cir. 1983) (holding that district court abused its discretion in failing to appoint counsel). Instead, the district court, in its short and cursory orders, failed to consider "whether the difficulty of the case—factually and legally—exceed[ed] [Mr. Pennewell's] capacity as a layperson to coherently present it to the judge or jury himself." *Pruitt,* 503 F.3d at 655. The district court's orders therefore were an abuse of discretion.

2. The district court also abused its discretion by not appointing counsel later in the case.

The district court also abused its discretion by failing to appoint counsel later in the case. Mr. Pennewell repeatedly filed letters and other documents with the court demonstrating his inability to litigate the case, given his disabilities and the complexity of his claims. *See* Dkts. 45 at 1; 47 at 1. Additionally, Mr. Pennewell's summary judgment sur-replies complained of his need for counsel given his inadequate capability to litigate his case and the factual and legal complexities of his case: "I am not a lawyer by profession, I cannot cite case law, I don[']t know civil procedure, I do not have access to material. Some days I can't see good enough to read or write I'm incarcerated." Dkt. 45 at 1. Given his status as a *pro se* litigant, these filings should be liberally construed as a renewal of his request for counsel. *See, e.g., Hudson v. McHugh*, 148 F.3d 859, 864 (7th Cir. 1998) (holding that "district courts must construe pro se pleadings liberally"). The fact that the district court ultimately struck Mr. Pennewell's sur-replies only underscores that he is an inexperienced

plaintiff who does not understand the procedural complexities of litigation—and therefore needed counsel to navigate the summary judgment stage of his case.

But in any event, Mr. Pennewell's failure to file a formal motion for counsel after his initial two attempts should be excused under the rationale of *Santiago v. Walls*, 599 F.3d 749 (7th Cir. 2010). In *Santiago*, the district court denied a request for appointment of counsel, stating that "[p]laintiff is competent to represent himself throughout the pretrial phase of this litigation." *Id.* at 764 n.13. On appeal, this Court found that the district court's language "was articulated in definitive terms that would have made it clear to many attorneys, and certainly to [the plaintiff], that the court did not intend to revisit the matter unless and until a trial was a significant likelihood." *Id.* at 764. This Court therefore held that the district court made a "definitive ruling" that the plaintiff "did not need counsel at the pretrial stage of the proceedings" that may have deterred the plaintiff from renewing his request for counsel in his later attempts to conduct discovery, and that "we certainly can question, as we must here, whether the language of the district court in disposing of the matter impermissibly prevented [the plaintiff] from making later requests that would have been reviewable in this court." *Id.* As a result, this Court held that the district court's use of the definitive language contributed to the district court's abuse of discretion. *Id.* at 765–66.

As in *Santiago*, the district court here similarly deterred Mr. Pennewell from renewing his motion for counsel by using definitive language indicating

that it did not intend to revisit the matter of appointing counsel unless trial was a significant likelihood. In the district court's order denying Mr. Pennewell's second motion for appointment of counsel, the court stated that "[p]laintiff's 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" and, in referring to discovery and responding to any summary judgment motions, "[a]t this time, I have no reason to believe that plaintiff cannot handle these tasks on his own." Dkt. 6 at 2, A21. A reasonable *pro se* litigant would have interpreted this as a definitive statement from the district court that it did not intend to revisit the motion for counsel again, at least unless the case proceeded beyond discovery and summary judgment. Given this definitive language, it is no wonder that Mr. Pennewell did not formally renew his motion for counsel, despite the difficulties he faced throughout discovery and in opposing summary judgment and his clear need for the assistance of counsel. *See* Dkt. 45 at 1. Given the circumstances Mr. Pennewell faced with the legal and factual difficulties of this case, the district court's signal that further attempts to renew his motion for counsel were not welcome further demonstrates an abuse of discretion.

B. Mr. Pennewell Was Prejudiced By The District Court's Failure To Appoint Counsel.

Given the case's obvious complexity, and the fact that Mr. Pennewell was both incarcerated and legally blind, it is no surprise that he was unable to procure needed discovery while proceeding *pro se*. He did not get a medical expert or a second opinion from another doctor, he failed to take depositions of

any Defendants or obtain other needed discovery. Indeed, the district court ultimately granted summary judgment because Mr. Pennewell was unable to present enough evidence. *See* Dkt. 51, A3–18. Mr. Pennewell further failed to make legal arguments or cite a single case in his summary judgment briefing. Mr. Pennewell's performance throughout discovery and the summary judgment stage, and the district court's reasoning for granting summary judgment, demonstrate that he was prejudiced by the denial of counsel.

A "plaintiff's deficient pretrial performance sufficiently establishes prejudice." *Eli*, 889 F.3d at 331 ("Despite his numerous filings, he was unable to respond to defendants' summary judgment motions with admissible evidence. His attempts to conduct discovery were equally hopeless."); *Pruitt*, 503 F.3d at 660 (noting that evidence of pretrial shortcomings demonstrating prejudice included the plaintiff's "disorganized" filings and that the plaintiff did not take any depositions); *McCaa*, 893 F.3d at 1034 (stating that plaintiff's performance, including his unfruitful discovery requests and absence of deposing witnesses, showed he was prejudiced by the denial of counsel).

Mr. Pennewell's discovery performance was deficient in many respects. He began discovery by filing a series of letters and exhibits with the district court arguing the merits of his case. *See* Dkts. 16–19. When Mr. Pennewell eventually sent interrogatories to Defendants, they did not provide the information he sought. *See* Dkts. 22; 22-2; 25. Mr. Pennewell did not file any formal motions to compel discovery. He failed to procure a medical expert or expert testimony, and he even was unsuccessful in his attempt to get a second

opinion from another doctor during the course of the litigation. Dkt. 42 at 7. Mr. Pennewell did not take any depositions, and he therefore did not have the opportunity to question Defendants, Dr. Altaweel (the doctor who performed his surgeries and provided a declaration in support of Defendants' summary judgment motion), or any other witnesses. He faced additional complications because he was transferred among facilities and was unable to identify the John Doe Defendants, which resulted in the district court dismissing them from the case. Dkts. 42 at 6; 51 at 1, 3–4, A3, A5–6; see *also Navejar v. Iyiola*, 718 F.3d 692, 698 (7th Cir. 2013) (holding that the plaintiff was prejudiced by the district court's denial of appointed counsel because, after he was transferred to another institution, he could not readily identify key witnesses, depose defendants, gather evidence, or proceed against the John Doe defendants). In short, Mr. Pennewell's attempts to obtain needed discovery were unfruitful, and he faced numerous obstacles during discovery that would have signaled to an attorney that much more (including potentially a motion to compel) was needed. *See* Dkts. 20 at 1; 25 at 1.

In addition, Mr. Pennewell was prejudiced by the lack of counsel at the summary judgment stage. Mr. Pennewell's motion in response to summary judgment was a mere ten pages that primarily consisted of annotations to Defendants' exhibits, and it contained no legal argument or citation to legal authority. Dkt. 42. He did not submit any declarations, affidavits, or expert testimony, and his only exhibits were fifteen documents consisting solely of his medical records dated *prior* to his incarceration and copies of various

administrative records and treatment notes provided by Defendants. *See* Dkt. 42-1–42-6. Indeed, the primary evidence that Mr. Pennewell cited in his summary judgment brief was the medical records and other documents attached as exhibits to *Defendants'* summary judgment motions. *See* Dkt. 42. This proved fatal to his case. The district court granted summary judgment to Defendants, finding that Mr. Pennewell had failed to show that Defendants' actions had caused his blindness, and that Defendants' treatment had so departed from the standards of care to constitute deliberate indifference. Dkt. 51, A3–18. The district court's decision granting summary judgment to Defendants thus emphasizes many of the deficiencies from Mr. Pennewell's filings, and those deficiencies and the limitations he faced during discovery were fatal to his case at the summary judgment stage. Having the assistance of counsel would have greatly enhanced the pretrial performance and made a difference in the outcome of Mr. Pennewell's case, which is a clear indication of prejudice warranting reversal of the district court's decision. *See Eli*, 889 F.3d at 331; *Pruitt*, 503 F.3d at 660–61.

Mr. Pennewell recognized that the complexities of this case necessitated counsel, and he asked for counsel at the outset. But the district court failed to conduct the necessary inquiry and denied his requests. This decision was an abuse of discretion that clearly prejudiced him throughout the pretrial phase of litigation, and this Court should reverse.

II. The District Court Erred In Granting Summary Judgment Because Mr. Pennewell Raised A Genuine Dispute Of Material Fact As To Whether Defendants Violated His Eighth Amendment Rights.

Prison medical professionals violate the Eighth Amendment by displaying "'deliberate indifference to serious medical needs of prisoners."' *Greeno*, 414 F.3d at 652–53 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). This inquiry has an objective and a subjective element. A plaintiff must show that: (1) he "suffered from an objectively serious medical condition" and (2) "the individual defendant was deliberately indifferent to that condition." *Petties*, 836 F.3d at 728 (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

The record in this case would allow a reasonable jury to conclude that the Defendants who directly treated Mr. Pennewell at Dodge Correctional Institution (DCI) and John Burke Correctional Center (JBCC), including Dr. Richter, P.A. Parish, Nurse Jackson, and Nurse Bruns (hereafter "the Treating Defendants"), were deliberately indifferent to Mr. Pennewell's objectively serious medical needs.[5] The district court's grant of summary judgment should be reversed.

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[5] The district court also granted summary judgment as to the other Defendants named in Mr. Pennewell's complaint, holding that Mr. Pennewell either had failed to determine their identities or had failed to raise a genuine issue of material fact with respect to them. Dkt. 51 at 9–11, A11–13. But this ignored the claim in Mr. Pennewell's complaint that he reported "loss of vision at health intake screening to nurses S. Jackson RN[,] V. Bruns RN[,] P. Lampe RN[,] Denise Bonnett Nurse Practitioner, and Dr. Scott Hoftiezer M.D." as well as "Superintendent Mark Rice." Dkt. 1 at 4. With assistance of counsel, Mr. Pennewell could have developed the record to show that these other Defendants also acted with deliberate indifference toward his serious medical needs. Accordingly, as discussed in Section II.D below, the grant of summary judgment as to these Defendants was inappropriate as well.

A. Mr. Pennewell's Detached Retina And Macular Hole Constitute Objectively Serious Medical Conditions.

Mr. Pennewell's detached retina and macular hole both are objectively serious medical conditions. The district court correctly assumed as much in its summary judgment order and proceeded straight to the question of whether Defendants were deliberately indifferent to the serious medical condition. Dkt. 51 at 11–12, A13–14. Likewise, the Defendants other than Dr. Richter conceded that Mr. Pennewell "suffered from an objectively serious medical condition" in their summary judgment brief.[6] Dkt. 28 at 6, n.2.

This Court's precedent confirms that Mr. Pennewell suffered from objectively serious medical conditions. *See Smith v. Knox Cty. Jail*, 666 F.3d 1037, 1040 (7th Cir. 2012) (acknowledging that retinal and corneal damage are serious). A condition is serious if a "'reasonable doctor or patient would find [it] important and worthy of comment or treatment,"' if it "'affects an individual's daily activities,"' or if it involves "'chronic and substantial pain."' *Hayes v. Snyder*, 546 F.3d 516, 522–23 (7th Cir. 2008) (citation omitted). Thus, when a condition has been diagnosed or if it would be "obvious to a layperson," this

[6] Dr. Richter argued in his summary judgment brief that Mr. Pennewell's detached retina was not a serious medical condition because Dr. Richter had no reason to suspect a retinal detachment before April 6, 2015. Dkt. 38 at 6–8. The district court did not address this argument in its summary judgment order, but Dr. Richter's argument is wrong for two reasons. First, it conflates the first prong of the test (whether a detached retina objectively is a serious medical condition) with the second prong of the test (whether Dr. Richter's actions constitute deliberate indifference to that serious health condition). Second, as discussed further below, Dr. Richter's argument ignores the many statements Mr. Pennewell made throughout February and March of 2015 complaining of flashes of light and decreasing vision. Dkt. 51 at 3–4, 12–13, A5–6, A14–15; *see also* Section II.B.1 below.

Court has "easily [ ] rejected" arguments that it was not serious. *Ortiz v. Webster*, 655 F.3d 731, 734 (7th Cir. 2011); *see also Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011). Even nonemergency conditions can be serious if they would "result in further significant injury or unnecessary and wanton infliction of pain if not treated." *Gayton v. McCoy*, 593 F.3d 610, 620 (7th Cir. 2010); *see also Berry v. Peterman*, 604 F.3d 435, 439–40 (7th Cir. 2010) (holding that tooth decay can be an objectively serious medical condition "because of pain and the risk of infection" even if not a "dental emergency").

The obviousness of Mr. Pennewell's suffering and the statements he made to Treating Defendants show that "'even a lay person would perceive the need for a doctor's attention."' *Roe*, 631 F.3d at 857 (quoting *Greeno*, 414 F.3d at 653). Moreover, both his retinal tear and his macular hole were diagnosed by medical professionals. At a minimum, these facts created a genuine dispute of fact that Mr. Pennewell's eye conditions were objectively serious.

B. Defendants Were Deliberately Indifferent Toward Mr. Pennewell's Serious Eye Conditions.

To establish that a prison official acted with deliberate indifference, a plaintiff must show that the prison official acted with a "sufficiently culpable state of mind." *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citation omitted). In other words, "a plaintiff must provide evidence that an official *actually* knew of and disregarded a substantial risk of harm." *Petties*, 836 F.3d at 728. In the medical context, deliberate indifference means "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the

decision on such a judgment." *Id.* at 729 (quoting *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261–62 (7th Cir. 1996)).

A reasonable jury could have found for Mr. Pennewell on his deliberate indifference claims. The district court erred in concluding otherwise and ran afoul of the proper legal standard for summary judgment by ignoring or failing to give proper weight to evidence of Defendants' deliberate indifference for Mr. Pennewell's eye conditions. *See Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (vacating summary judgment and remanding when lower court "credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion"). As such, the grant of summary judgment for Defendants should be reversed.

1. A reasonable jury could find that, based on his symptoms, Defendants knew Mr. Pennewell required emergency medical care in February and March of 2015, long before he received it.

Defendants' own records and evidence make clear that Mr. Pennewell repeatedly complained of symptoms requiring "emergency medical care" for more than two months before he was taken to the hospital for needed surgery. As the district court pointed out, Defendants' own declarant stated that "loss[es] of vision" and "flashes of light" are signs of a detached retina and therefore require "emergency medical care." Dkt. 51 at 13, A15 (quoting Declaration of Michael M. Altaweel, M.D., the doctor who performed Mr. Pennewell's retinal detachment surgery on April 7, 2015).

In granting summary judgment, the district court recognized that Mr. Pennewell complained to Treating Defendants of "flashes" of light starting on

February 11, 2015 and continuing through early April. Dkt. 51 at 3, 13, A5, A15. But the district court incorrectly held that Mr. Pennewell failed to complain of "loss of vision" until April 7, 2015, the day of his retinal detachment surgery. *See* Dkt. 51 at 13, A15. Defendants' own medical records from February and March repeatedly state that Mr. Pennewell complained that vision in his right eye was decreasing. Dkt. 42 at 3–4 ("[R]ight eye vision was decreasing"—Dr. Richter; "[R]ight eye decrease vision problems"—P.A. Parish; "[R]ight eye vision was decreasing"—JBCC Heath Services). And Mr. Pennewell's summary judgment brief clarifies that he was indeed complaining of "vision loss" when he told Defendants about his decreasing vision. Dkt. 42 at 10. His complaint also claims that he "expressed concerns about loss of vision at [his] health intake screening" at JBCC. Dkt. 1 at 4. Thus, at a minimum, there is a material issue of fact as to whether Mr. Pennewell complained of symptoms requiring "emergency medical care" in February and March of 2015.

The district court also misapplied the summary judgment standard by improperly weighing evidence in the record. For example, On March 30, 2015, a full week before he was taken to the hospital and underwent surgery, Mr. Pennewell explicitly told Nurse Jackson that "[i]t feels like there is a tear in my eye." Dkt. 51 at 4, A6. A reasonable jury thus could find that Mr. Pennewell needed emergency medical treatment for a likely detached retina at least by the end of March. But the district court held otherwise, stating: "It's entirely possible that plaintiff first suffered the [detached retina] when he complained about it to Bruns . . . on April 6, 2015." Dkt. 51 at 12, A14. This was error. At

the summary judgment stage, the district court was required to draw all inferences in Mr. Pennewell's favor and view the record in the light most favorable to him. *See Petties*, 836 F.3d at 727. By failing to do so, the district court misapplied the summary judgment standard and committed reversible error. *See Tolan*, 572 U.S. at 659–60.

2. A reasonable jury could find that Defendants provided constitutionally deficient medical care and unjustifiably delayed treating Mr. Pennewell's detached retina.

Mr. Pennewell claims that Defendants were deliberately indifferent to his serious eye conditions because their treatment fell below "a basic level standard of medical care" and because they unjustifiably "delayed and ignored" his pleas for treatment. Dkt. 1 at 3. Based on this Court's precedent, Mr. Pennewell raised genuine disputes of material fact on both issues, and therefore the grant of summary judgment should be reversed.

Ignoring Symptoms Requiring Emergency Care. Based on the record, a reasonable jury could conclude that the Treating Defendants were deliberately indifferent in failing to follow the standard response to telltale symptoms of a detached retina, refusing to follow through on instructions they gave Mr. Pennewell, and persisting with treatment they knew was ineffective. While Defendants' declarant Dr. Altaweel admitted that patients experiencing "flashes of light" and "loss of vision" require emergency medical treatment for a detached retina, it took *two months* of Mr. Pennewell complaining about these symptoms before Defendants finally took him to the hospital for the emergency retinal detachment surgery he needed. *See* Dkt. 42 at 3 (complaint to Dr.

Richter and P.A. Parish), 4 (complaint to JBCC medical staff); Dkt. 51 at 13, A15; *see also* Section II.B.1 above. Moreover, even when Mr. Pennewell complained about the feeling of a "tear" in his eye, and Nurse Jackson wrote in her notes that he had a "red 'tear' that is to be evaluated at UW-Madison," it still was *one week* before he was taken to the hospital. *See* Dkt. 42 at 3–4. Moreover, Defendants failed to follow their own treatment protocol when they told Mr. Pennewell to "seek medical attention immediately" if his vision changed but then ignored his repeated claims about his loss of vision. Dkt. 1 at 4.

Defendants' failure to follow through on treatment practices that they and their declarant recognized as necessary is sufficient for Mr. Pennewell to survive summary judgment under this Court's precedent. *See Petties*, 836 F.3d at 732–34 (reversing summary judgment when doctor failed to immobilize prisoner's ankle even though he testified that his practice was to "always immobilize the [Achilles] tendon" under similar circumstances).

Persisting with Ineffective Treatment. This Court also has held that a claim should survive summary judgment when a prison official "persists in a course of treatment known to be ineffective." *Petties*, 836 F.3d at 729–30; *see also Sherrod v. Lingle*, 223 F.3d 605, 611–12 (7th Cir. 2000) (citation omitted) ("If knowing that a patient faces a serious risk of appendicitis, the prison official gives the patient an aspirin and an enema and sends him back to his cell, a jury could find deliberate indifference although the prisoner was not simply ignored."). A reasonable jury thus could find that Defendants' refusal to

treat Mr. Pennewell's emergency symptoms for months—and their persistence in treating Mr. Pennewell as if he had a less serious condition even though that treatment was ineffective—constituted deliberate indifference.

The district court's ruling to the contrary ignores the record facts and should be reversed. First, the district court's holding that Defendants provided "sufficient" care stems from its conclusion that Defendants did not know Mr. Pennewell had a detached retina until April 7, 2015. Since that conclusion was in error on this record, everything following from it also is in error. The district court also erred in emphasizing that Mr. Pennewell did receive some medical care, like glasses and scheduled appointments, and concluding that this undermined his claim that Defendants "ignored his eye problems." Dkt. 51 at 13–14, A15–16. "[A] prisoner is not required to show that he was literally ignored by the staff." *See Sherrod*, 223 F.3d at 611–12 (reversing summary judgment). At a minimum, there is a material issue of fact as to whether, by failing to respond immediately to Mr. Pennewell's retinal detachment symptoms and continuing with ineffective care, Defendants deviated from a minimally competent standard of care. *See Petties*, 836 F.3d at 729–30.

Unjustified Delays. Mr. Pennewell also should survive summary judgment based on Defendants' delays in providing treatment. This Court has reversed summary judgment when, as in this case, there was a "significant delay in effective medical treatment . . . especially where the result is prolonged and unnecessary pain." *Berry*, 604 F.3d at 441. Prison officials can present evidence to try to justify or explain delays, but "whether the length of a delay is

tolerable depends on the seriousness of the condition and the ease of providing treatment." *Petties*, 836 F.3d at 730; *Berry*, 604 F.3d at 441. Delays of "[e]ven a few days" can constitute deliberate indifference. *Knox Cty. Jail*, 666 F.3d at 1040; *see also Grieveson v. Anderson*, 538 F.3d 763, 778–80 (7th Cir. 2008) (reversing summary judgment when plaintiff's broken nose went untreated for two days). Moreover, "a non-trivial delay in treating serious pain can be actionable even without expert medical testimony showing that the delay aggravated the underlying condition." *Berry*, 604 F.3d at 441.

A reasonable jury could conclude that Defendants delayed Mr. Pennewell's emergency medical care and needed retinal surgery, and that he suffered "prolonged and unnecessary pain" as a result. *Id.*; *See* Dkts. 1 at 2 (complaining of "delayed" treatment); 42 at 9–10 (same). As the district court acknowledged, Mr. Pennewell reported significant eye pain in late March 2015, after having complained about other serious eye symptoms for months. *See* Dkt. 51 at 4–5, A6–7 ("My right eye is painful [and] the Tylenol is not working for pain."). He did not receive the needed emergency surgery until more than a week later, on April 7, 2015. Based on this evidence, a jury could find that Defendants' delay was deliberate indifference, especially since the record includes no evidence that justifies or explains the delay. The district court's grant of summary judgment was in error for this reason as well, and the grant of summary judgment should be reversed.

3. A reasonable jury could find that actions after Mr. Pennewell's surgeries also constituted deliberate indifference.

Mr. Pennewell never regained the vision in his right eye after his retinal detachment surgery, leaving him legally blind in both eyes throughout the remainder of his imprisonment. *See* Dkts. 42 at 9; 54 at 1. He explained in his complaint and summary judgment motion that, in the months that followed his retinal surgery, Defendants and other prison staff denied and delayed needed follow-up appointments, ignored his requests for assistance in light of his blindness, and subjected him to additional risks of harm. Dkt. 42 at 6–9. But the district court improperly discounted record evidence on these claims.

As the district court acknowledges, prison staff denied several requests Mr. Pennewell made for medical treatment and delayed his follow-up appointments. Dkt. 51 at 6–8, A8–10; *see also* Dkt. 42 at 8–9. In November 2016, for example, prison staff cancelled his follow-up appointment and told him there was "no staff for transportation." Dkt. 42 at 6. Mr. Pennewell claims the appointment was instead cancelled because "staff wanted a 4 day Thanksgiving weekend." Dkt. 51 at 7–8, A9–10. Missing the appointment caused Mr. Pennewell to "suffer[] pain," and he "could not see for a month," *id.*; the delay therefore "exacerbated" and "unnecessarily prolonged" his pain. *See Petties*, 836 F.3d at 730–31; *see also* Section II.B.2 above; *Reed v. McBride*, 178 F.3d 849, 855 (7th Cir. 1999) (citation omitted) ("[E]ven where a plaintiff has previously received good care, 'mistreatment for a short time might . . . be evidence of a culpable state of mind' regarding deliberate indifference.").

This cancellation occurred in a broader context of indifference to the "difficult circumstances and seriousness of [his] blindness." Dkt. 42 at 5. Mr. Pennewell's complaint and summary judgment brief claim that, even though he was legally blind in both eyes, Defendants and other prison staff refused to assist him. Dkts. 1 at 5; 42 at 5. Blind in prison, Mr. Pennewell was left "at the mercy of other inmates." Dkt. 42 at 9. He feared for his safety and repeatedly injured himself because he could not see. *Id*. Under this Court's precedent, a reasonable jury could find that the lack of care Mr. Pennewell received in prison demonstrated a pattern of negligence amounting to deliberate indifference. *See Kelley v. McGinnis*, 899 F.2d 612, 616–17 (7th Cir. 1990) (holding that jury could find deliberate indifference from prison medical staff's pattern of negligent acts); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983) (same).

Moreover, in his summary judgment brief, Mr. Pennewell argued that he was denied care and his appointments were canceled because he was being "punished for seeking health care." *See* Dkt. 42 at 6. And, indeed, many of the incidents Mr. Pennewell complained about occurred *after* he filed his inmate complaint on May 31, 2016 alleging inadequate medical care. *Id.* Against this background of improper and delayed treatment, and with the specter of retaliation raised, a reasonable jury could find for Mr. Pennewell on his deliberate indifference claims. *See Rasho v. Elyea*, 856 F.3d 469, 476–77 (7th Cir. 2017) (holding that jury could find deliberate indifference after considering

evidence of retaliation); *Hayes v. Snyder*, 546 F.3d 516, 525 (7th Cir. 2008) (same).

C. The District Court Erred In Its Analysis Of Whether Defendants' Deliberate Indifference Caused Mr. Pennewell To Go Blind.

Mr. Pennewell also alleged in his complaint and summary judgment brief that Defendants' deliberate indifference to his serious medical conditions caused him to go blind. *See* Dkts. 1 at 3; 42 at 6. The district court concluded, however, that Mr. Pennewell had "no evidence showing that his retinal detachment from April 2015 (or any other eye condition he has had since then) caused his blindness in June 2017." Dkt. 51 at 13, A15. To the extent this was a basis on which the district court denied summary judgment, that also was in error.

The district court improperly discounted evidence that supported Mr. Pennewell's causation claim. Dkt. 51 at 12–13, A14–15. Mr. Pennewell never regained eyesight after the April 2015 retina surgery, and he claimed that Defendants' substandard medical care was the cause. Dkt. 1 at 3. The record shows that Mr. Pennewell was legally blind in both eyes as of September 14, 2015—after both surgeries on his right eye—and that he remained legally blind after that. Dkt. 1-1 at 2; *see also* Dkt. 42 at 9 ("[Mr. Pennewell] lost [his] vision 3 weeks after arriving at JBCC."). Moreover, he submitted an affidavit from his treating physician stating that he was "[l]egally blind 20/300 [right] eye after retinal detachment repair" as of May 2016. *See* Dkt. 1-1 at 1. The district court

overlooked this evidence, instead mentioning only that he met "the criteria for legal blindness" as of June 2017. Dkt. 51 at 8, A10.

Regardless, Mr. Pennewell does not have to prove that the delayed treatment caused him to go blind to succeed on his deliberate indifference claims. *See Petties*, 836 F.3d at 730–31 (holding that deliberate indifference claim can succeed with evidence that the defendants either "exacerbated the injury or unnecessarily prolonged pain"). Mr. Pennewell's argument that Defendants "caused blindness" in his right eye was just *one* of his arguments regarding Defendants' deliberate indifference. Because he presented evidence to create genuine issues of material fact on his other arguments, the grant of summary judgment should be reversed regardless of whether he successfully proved causation. *See, e.g., Petties*, 836 F.3d at 730–31; *see also* Section II.B above.

D. Based On This Record, A Reasonable Jury Could Find That Defendants Were Deliberately Indifferent To Mr. Pennewell's Serious Eye Conditions.

A reasonable jury could find for Mr. Pennewell on his deliberate indifference claims based on this record. There are triable issues of fact regarding whether Treating Defendants "knew of and disregarded a substantial risk" to Mr. Pennewell. *Petties*, 836 F.3d at 728; *see also* Sections II.A, II.B, and II.C above. The district court therefore erred in granting summary judgment for Defendants.

Moreover, with the benefit of counsel and the opportunity to develop a full record, Mr. Pennewell could have acquired additional evidence of the

Treating Defendants' deliberately indifferent care and also evidence of deliberate indifference by other Defendants. Notably, the record includes only facts generated by Defendants and information in Mr. Pennewell's medical records. This limited record deprived Mr. Pennewell of the opportunity to litigate this case fairly and fully. *See* Section I above. He asserted as much in his summary judgment brief: "The only facts that are represented in this procedure, are on the side of the DOC. I have not had an equal or fair chance to question physicians, staff or get independent opinions on my eye condition." Dkt. 42 at 9. Without the help of legal counsel, Mr. Pennewell lacked the ability to challenge this denial or fully litigate his claims. *See* Section I above.

As in *Berry*, the district court's grant of summary judgment should be reversed, and Mr. Pennewell should be given the opportunity to litigate this case with counsel. *See Berry*, 604 F.3d at 444 ("Thus far, [the plaintiff] has pursued this case without a lawyer, and he has presented the evidence and his legal arguments well. If this matter proceeds to a trial on the merits, however, the district court will want to consider the possibility . . . of requesting counsel to represent him at trial if [plaintiff] is receptive to the idea.).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment and remand this case with instructions to appoint counsel and reopen discovery.

Dated: January 25, 2019

Respectfully submitted,

JAMES VERN PENNEWELL

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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, according to the word count function of Microsoft Word 2013, the Brief contains 13,355 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 2013 in 12-point Bookman Old Style font.

Dated: January 25, 2019

/s/ Sarah M. Konsky
Sarah M. Konsky

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), I, Sarah M. Konsky, an attorney, certify that all materials required by Circuit Rule 30(a) and (b) are included in Plaintiff-Appellant's required short appendix.

Dated: January 25, 2019

/s/ Sarah M. Konsky
Sarah M. Konsky

CERTIFICATE OF SERVICE

I, Sarah M. Konsky, an attorney, hereby certify that on January 25, 2019, I caused the foregoing **Brief And Required Short Appendix Of Plaintiff-Appellant James Vern Pennewell** 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 And Required Short Appendix Of Plaintiff-Appellant James Vern Pennewell** to be transmitted to the Court via hand delivery within 7 days of that notice date.

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INDEX TO REQUIRED SHORT APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JAMES VERN PENNEWELL,
Plaintiff,

v. **Case No. 17-C-213**

DR. JAMES PARISH, *et al*.,
Defendants.

ORDER

On July 20, 2018, I granted defendants' motions for summary judgment and dismissed this case. Docket No. 51. The Clerk of Court entered judgment that same day. Docket No. 52. Plaintiff asks for a six-month extension of time to file his appeal. Docket No. 54. He explains that he was recently released from prison and needs time to find a lawyer to help with his appeal. *Id*.

I can extend the notice of appeal deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the 30-day deadline. *See* Fed. R. App. P. 4(a)(5)(A). A request for an extension of time is timely if it is made "no later than 30 days after the time prescribed by this Rule 4(a) expires." *See* Fed. R. App. P. 4(a)(5)(A)(i). Plaintiff requested an extension on August 22, 2018, two days after the time prescribed by Rule 4(a) expired, and he has good cause for not being able to meet the 30-day deadline. Therefore, I will grant plaintiff's motion for an extension of time to appeal.

Plaintiff, however, cannot have a six-month extension of time. *See* Fed. R. App. P. 4(a)(5)(C). He must file his notice of appeal on or before **September 19, 2018**, which is

30 days after the prescribed time expired. *Id.* The court lacks the power to grant any further extensions.

IT IS ORDERED that plaintiff's motion for extension of time to appeal (Docket No. 54) is **GRANTED**. Plaintiff must file his notice of appeal on or before **September 19, 2018**.

Dated at Milwaukee, Wisconsin, this 5th day of September, 2018.

s/Lynn Adelman
LYNN ADELMAN
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JAMES VERN PENNEWELL,
Plaintiff,

v. **Case No. 17-C-213**

DR. JAMES PARISH, *et al*.,
Defendants.

ORDER

Plaintiff James Pennewell, a Wisconsin state prisoner who is representing himself, filed a complaint under 42 U.S.C. § 1983 alleging that defendants violated his civil rights. Docket No. 1. I screened the complaint on March 20, 2017 and allowed plaintiff to proceed with an Eighth Amendment claim that defendants (including a party identified as "Unknown Eye Technicians") showed deliberate indifference towards his eye problems. Docket No. 4 at 4-5. I instructed plaintiff to identify "Unknown Eye Technicians," on or by August 25, 2017, and warned him that, if he did not, I would dismiss that party from the case. Docket No. 15. Plaintiff did not identify "Unknown Eye Technicians" by the deadline, and therefore I will dismiss his claims against it. Below, I consider the parties' pending motions.

I. DEFENDANTS' MOTIONS TO STRIKE PLAINTIFF'S SUR-REPLIES

Defendants filed motions for summary judgment on October 24, 2017. Docket Nos. 27 and 37. They also filed motions to strike plaintiff's sur-replies to the motions for summary judgment. Docket Nos. 46 and 48. Defendants explain that they did not raise any new issues in their reply brief and that plaintiff never sought leave from the court to file a sur-reply. *Id*.

Plaintiff did not file an opposition to defendants motions to strike nor did he explain in his sur-reply why he needed to file a sur-reply to properly prosecute this case. *See* Docket Nos. 45 and 47. Therefore, I will grant defendants' motions to strike the sur-replies. *See* Civ. L. R. 7(i) ("Any paper, including any motion, memorandum, or brief, not authorized by the Federal Rules of Civil Procedure, these Local Rules, or a Court order must be filed as an attachment to a motion requesting leave to file it.").

II. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

a. Facts[1]

At the time relevant to this matter, plaintiff was an inmate at the Dodge Correctional Institution ("DCI") who was transferred to the John Burke Correctional Center ("JBCC"). Docket No. 29, ¶¶ 6, 15. Defendants are Department of Corrections ("DOC") employees/contractors who work at DCI and JBCC: James Richter is an Optometrist who provides eye care at DCI; James Parish is a Physician's Assistant at DCI; Sandra Jackson and Victoria Bruns are Nurses at JBCC; and Brian Lange and Heather Bunker are Correctional Sergeants at JBCC. *Id*., ¶¶ 4-5. Mark Rice, Scott Hofteizer, Denise Bonnett, Paula Lampe, Julie Nickel, Patricia Beyer, Jeffrey Rollins, and Nicholas Redeker are also defendants in this case but neither party provides

[1] I take facts from defendants' proposed findings of fact (Docket Nos. 29 and 40) and plaintiff's sworn complaint (Docket No. 1), which I construe as an affidavit at the summary judgment stage. *Ford v. Wilson,* 90 F.3d 245, 246-47 (7th Cir. 1996). Where plaintiff fails to dispute defendants' proposed findings of fact with relevant evidentiary material, I consider those facts admitted for purposes of summary judgment. *See* Civ. L. R. 56(b)(4).

specific information on who these individuals are or what institution they worked at. *See* Docket Nos. 29 and 42.

Plaintiff arrived at DCI on February 3, 2015. Docket No. 29, ¶ 6. Plaintiff talked to an eye technician during his "intake eye screening" and explained that he was blind in his left eye and had "shadows, ghosts, and the vision is decreasing" in his right eye. Docket No. 42 at 3. The eye technician said she would "fast track" plaintiff for a quicker eye exam. *Id*.

About a week later, on February 11, 2015, Richter examined plaintiff's eyes. Docket No. 40, ¶ 1. Plaintiff told Richter that he was blind in his left eye and the vision in his right eye was "decreasing, foggy, floaters, spots, ghosts, shadows, and flashes but not as bad as 2008 left detachment." Docket No. 42 at 3. The "Eyecare Examination Form" that Richter completed during the exam indicates that plaintiff reported blindness and no light perception in his left eye and "floaters + foggy" in his right eye. Docket No. 17-1 at 53; *see also* Docket No. 40, ¶ 2-3. Plaintiff also told Dr. Richter he could not see very well even though his glasses were only a few months old. Docket No. 42 at 3.

Richter performed a "dilated fundus evaluation" on plaintiff's eyes and concluded that plaintiff had the wrong prescription. Docket No. 40, ¶ 4. Richter ordered new glasses with a proper prescription. *Id*., ¶ 5. Richter also referred plaintiff to the University of Wisconsin Eye Clinic ("UWEC") for evaluation and possible extraction of a right eye cataract. *Id*., ¶ 6. Richter did not communicate with or examine plaintiff again until seven months later, on September 22, 2015. *Id*., ¶¶ 35-36.

After Richter's evaluation, Parish performed an "intake physical exam" of plaintiff later that same day. Docket No. 29, ¶¶ 7-8. Parish reviewed Richter's notes on plaintiff's

eye problems and recorded the issues on plaintiff's "problem list." Docket No. 29, ¶¶ 9-11. Plaintiff told Parish that he had a "blind left eye and right eye decrease vision problems." Docket No. 42 at 3. Plaintiff had already been seen by an eye specialist earlier in the day; therefore, Parish did not order anything for plaintiff's eyes. Docket No. 29, ¶¶ 11-13. He did, however, order treatment for plaintiff's other medical issues. *Id*. Parish continued to provide plaintiff with medical care for his other medical issues while at DCI, but he never communicated with plaintiff regarding his eye problems after the intake screening on February 11, 2015. *Id*., ¶ 14.

About one month later, on March 17, 2015, the DOC transferred plaintiff to JBCC. *Id*., ¶ 15. Bruns performed a transfer screening similar to the intake screening Parish performed at DCI. *Id*., ¶¶ 16-19. Plaintiff reported "blind left eye, right eye vision was decreasing with foggy, floaters, ghosts, and spots in vision." Docket No. 42 at 4. The "Progress Notes" that Burns completed that day shows that plaintiff reported left eye blindness and poor vision in his right eye with cataract. Docket No. 29, ¶ 18; Docket No. 31-1 at 20. Bruns noted that plaintiff had an appointment with UWEC scheduled for April 14, 2015. *Id*., ¶ 20.

About a week later, on March 30, 2015, plaintiff submitted a Health Services Unit ("HSU") request. *Id*., ¶ 24. The requested stated:

> I am scheduled for an eye appointment in Madison. My right eye is painful the Tylenol is not working for pain. It feels like there is a tear in my eye. I am very red it drains then dries up. I have to put warm water on a washcloth to get it open. When can it be looked at, soon I'm hoping.

Docket No. 42 at 4*; see* Docket No. 31-1 at 93. Jackson saw plaintiff's HSU request and scheduled him for an appointment that same day at 4:15 p.m. Docket No. 29, ¶ 26.

Plaintiff told Jackson that the symptoms in his right eye "was getting worse." Docket No. 42 at 4. Jackson states that plaintiff complained about pain but did not report floaters, shadows, or a loss of vision, nor did he state that he needed to be seen more quickly or that his eye condition was an emergency. Docket No. 29, ¶¶ 18, 32. Jackson told plaintiff to wash his hands regularly and not touch his eyes. Docket No. 29, ¶¶ 29, 34; *see also* Docket No. 31-1 at 20. According to Jackson, plaintiff's primary focus at the appointment was to find out when his appointment with UWEC was scheduled. Docket No. 29, ¶ 30. Jackson told plaintiff that he was scheduled for an appointment in April but she couldn't tell him the exact date. *Id*. ¶ 31; *see also* Docket No. 42 at 4. Plaintiff allegedly responded "OK, that's good. I am glad its scheduled." Docket No. 31-1 at 20.

About a week later, on April 6, 2015, plaintiff submitted another HSU request. Docket No. 29, ¶ 36. The request stated:

> "The pain in my left eye is getting bad and the vision in my right eye is deteriorating, it's as if there is a retinal detachment. The vision in my right eye has a shadow in the lower right limiting my vision, some flashes of light, Thank you."

Docket No. 42 at 4; *see* Docket No. 31-1 at 94. Bruns scheduled plaintiff for an appointment the next morning, on April 7, 2015. Docket No. 29, ¶ 37. Plaintiff states that he told Bruns "half [his] vision was gone" and "I had a right eye retinal detachment and I will lost all my vision if I did not get medical attention." Docket No. 42 at 4. Bruns contacted Denise Bonnett and Scott Hoftiezer regarding plaintiff's complaints; by 9:30 a.m. that morning, Bonnett and Hoftiezer approved plaintiff's transfer to the Waupun Memorial Hospital Emergency Room. Docket No. 29, ¶¶ 39-40. Bunker transported

plaintiff to the ER at 11:00 a.m. Docket No. 42 at 4. Bunker had no other interactions with plaintiff regarding his eyes. Docket No. 29, ¶¶ 69-85; *see also* Docket No. 42.

Once plaintiff arrived at Waupun Memorial Hospital, ER staff transported plaintiff to UW Hospital in Madison. Docket No. 29, ¶ 43. At UW Hospital, Dr. Michael Altaweel[2] examined plaintiff's eyes and diagnosed him with "uncomplicated retinal detachment." *Id*., ¶ 44. He surgically repaired plaintiff's eye that same day. *Id*. Plaintiff returned to JBCC the next day, on April 8, 2015. Docket No. 42 at 4.

On June 29, 2015, plaintiff filed a HSU request stating

> "vision is starting to get worse. I can only read large print, foggy, double vision, halos around objects. I can only identify objects or people when within 3 feet."

Docket No. 42 at 5; *see also* Docket No. 31-1 at 96. Bruns called UW Hospital for advice on how to handle the issue; they told her that plaintiff should be seen at the clinic that same day. Docket No. 30, ¶ 24. JBCC staff took plaintiff to UW Hospital later that day and plaintiff was diagnosed with a "macular hole," which would have to be corrected with surgery. *Id*., ¶¶ 20-22.

The next day, on June 30, 2015, plaintiff filed an HSU request asking for a second opinion on whether he needed surgery to fix the macular hole. Docket No. 42 at 5; *see also* Docket No. 31-1 at 29. He explained that he "wanted to be safe" because it was the only eye he could still see with. Docket No. 42 at 5. Jackson wrote back stating

[2] Dr. Altaweel is a Board Certified ophthalmologist who works at the University of Wisconsin Hospital and Clinics. Docket No. 30, ¶¶ 1-2 Dr. Altaweel's declaration is based on review of plaintiff's certified medical records from the DOC dated February 3, 2015 through July 5, 2017, which included "progress notes," eye exams, "prescriber's orders," and plaintiff's HSU requests. *Id*., ¶ 8.

that the DOC does not do second opinions. *Id*. Dr. Altaweel performed surgery to fix plaintiff's macular hole in July 2015. Docket No. 40, ¶ 32. Plaintiff explains that for the next 8-10 weeks, he had to wear a "blind right eye shield" for the "gas bubble" in his eye to dissipate. Docket No. 42 at 5. He could not see with either eye during this time period.

On September 22, 2015, Richter performed his second and final examination of plaintiff. Docket No. 40, ¶¶ 36, 40. Richter did a vision test, corrected the prescription in plaintiff's right eye, ordered new lenses, and ordered a "sheet magnifier" to help plaintiff read. Docket No. 40, ¶ 40. Richter's progress notes state that plaintiff was "happy with vision." Docket No. 17-1 at 58. Richter recommended a follow-up appointment in six weeks and noted that plaintiff should be scheduled for an appointment with UWEC if his vision did not improve. Docket No. 40, ¶¶ 41-42. Plaintiff notes that he was never actually scheduled for a follow-up appointment and when he received his new glasses it was the wrong prescription so he had to send them back for the correct prescription. Docket No. 42 at 5. Richter did not have any further interactions or communications with plaintiff after this date. Docket No. 40, ¶ 36.

On October 14, 2015, plaintiff filed an HSU request stating that his right eye was painful and causing headaches. Docket No. 42 at 5. Bruns called UW Hospital to determine how to treat plaintiff and was told to bring plaintiff into the clinic at 3:00 p.m. that day. Docket No. 30, ¶ 28. Julie Nickel took plaintiff to UW Hospital later that day. Docket No. 42 at 5.

About a year later, in November 2016, plaintiff's follow-up appointment at UWEC was cancelled because there was no staff for transportation. *Id*. at 6. Plaintiff states he

suffered pain and could not see for a month because "staff wanted a 4 day Thanksgiving weekend." *Id*. at 7.

On December 7, 2016, plaintiff had "punctual plug" surgery to help relieve symptoms of dry eye. Docket No. 40, ¶ 45. At that time, plaintiff's visual acuity was 20/500. Docket No. 42 at 6.

Six months after that, in June 2017, Dr. Altaweel tested plaintiff's visual acuity again and it was 20/2000, which meets the criteria for legal blindness. Docket No. 40, ¶¶ 46-47.

b. Discussion

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law." Fed. R. Civ. P. 56(c); *Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665, 668 (7th Cir. 2011). The movant bears the burden of establishing that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court grants summary judgment when no reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

1. Section 1983's Personal Involvement Requirement

Section 1983 imposes liability based on a defendant's personal involvement in the constitutional deprivation. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). "An official satisfies the personal responsibility requirement of section 1983…if the conduct causing the constitutional deprivation occurs at [his] direction or with [his] knowledge and consent." *Id*. (quoting *Crowder v. Lash*, 687 F.2d 996, 1005 (7th Cir. 1982)). He

"must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye." *Id*. (quoting *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988)).

Defendants assert that Mark Rice, Scott Hofteizer, Denise Bonnett, Paula Lampe, Julie Nickel, Patricia Beyer, Jeffrey Rollins, and Nicholas Redeker are entitled to summary judgment based on lack of personal involvement. According to defendants, they sent plaintiff interrogatories asking him to: (1) identify every individual he talked to or wrote to about the events alleged in the complaint, and (2) describe the content of the conversation/correspondence. Docket No. 36-1 at 4-5. Plaintiff identified Parish, Richter, Jackson, Bruns, Lange, and Bunker as individuals he notified about his condition. Docket No. 36-1 at 7-9. He did not identify Rice, Hofteizer, Bonnett, Lampe, Nickel, Beyer, Rollins, and Redeker. *See id*. Based on plaintiff's interrogatory response, defendants ask for dismissal of Rice, Hofteizer, Bonnett, Lampe, Nickel, Beyer, Rollins, and Redeker from the action for lack of personal involvement.

In response, plaintiff explains that "defendants named in this case violated my constitutional, 8th Amendment rights" but he "cannot remember every name and detail of every encounter." Docket No. 42 at 9. Plaintiff does not mention Lange, Beyer, or Rollins anywhere in his briefing materials. Docket No. 42. Therefore, he cannot establish that Lang, Beyer, or Rollins were personally involved in the alleged constitutional violation.

Plaintiff asserts that Rice denied him "compassionate release" in June 2016. Docket No. 42 at 5. He explains that "this was not Rice's decision to make; he violated state statutes and DAI Policy. *Id*. Plaintiff does not have a constitutional right to compassionate release. *See Puerner v. Smith*, No. 09-C-1051, 2009 WL 4667996, at *2

(E.D. Wis. Dec. 3, 2009). ("The continued incarceration of an ill inmate does not violate the Eighth Amendment."). Further, compassionate release is a matter of state law which must be pursued in state court. *Id*. Thus, plaintiff cannot proceed past summary judgment with a claim against Rice.

Next, plaintiff states that Hofteizer and Bonnett were involved in approving his transfer to UW Hospital on April 7, 2015; Bunker and Nickle were the individuals who drove him to UW Hospital. *See* Docket No. 42 at 4-5. Based on plaintiff's allegations, it's unclear how Hofteizer, Bonnett, Bunker, and Nickle "knowingly approved, condoned, or turned a blind eye" towards his eye problems. Plaintiff's allegations show that all four attempted to get plaintiff the treatment he needed. Therefore, plaintiff cannot proceed past summary judgment with claims against Hofteizer, Bonnett, Bunker, and Nickle.

Plaintiff states that Lampe "walked [him] directly into a brick wall while escorting [him] to health services." Docket No. 42 at 5. Plaintiff says "I know it was not intentional but this is an instance the DOC staff does not realize my difficult circumstances and seriousness of my blindness. *Id*. Lampe's conduct was (at most) negligent, and negligence does not violate the Eighth Amendment. *See Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996)("Mere negligence or even gross negligence does not constitute deliberate indifference."). Therefore, plaintiff cannot proceed past summary judgment with claims against Lampe.

Finally, plaintiff states that Redeker "knew of my vision problems" and was "only interested in being a part of the punishment." Plaintiff provides no details on how Redeker knew about his vision problems or what Redeker specifically did or did not do

to violate his constitutional rights. Therefore, plaintiff cannot proceed past summary judgment with claims against Redeker.

Based on plaintiff's allegations, no reasonable jury could conclude that Rice, Hofteizer, Bonnett, Bunker, Nickle, Lampe, Redeker, Lang, Beyer, or Rollins knowingly approved, condoned, or turned a blind eye to plaintiff's medical conditions. Therefore, I will grant their motion for summary judgment.

2. Eighth Amendment Deliberate Indifference

"Prison officials violate the Eighth Amendment. . . when their conduct demonstrates 'deliberate indifference to serious medical needs of prisoners.'" *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997). Deliberate indifference contains both an objective element and a subjective element *Id.*

Under the objective element, the plaintiff must show that his medical condition was sufficiently serious. *Id*. at 1373. A medical condition is sufficiently serious if it has been diagnosed by a physician as mandating treatment or is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. *Id*. "A medical condition need not be life-threatening to be serious; rather, it could be a condition that would result in further significant injury or unnecessary and wanton infliction of pain if not treated." *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011)(quoting *Gayton v. McCoy*, 593 F.3d 610, 620 (7th Cir. 2010)).

Under the subjective element, the plaintiff must show that the officials acted with a sufficiently culpable state of mind. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994). A prison official must have actual knowledge of the inmate's serious medical condition and either act or fail to act in disregard of that risk. *Roe*, 631 F.3d at 857. Deliberate

indifference "is more than negligence and approaches intentional wrongdoing." *Collignon v. Milwaukee Cnty.*, 163 F.3d 982, 988 (7th Cir. 1998).

Mere disagreement with a medical professional's medical judgment is insufficient to prevail on a claim. *See Estelle v. Gamble*, 429 U.S. 97, 106; *see also Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011). A plaintiff must show that a "professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, 'no minimally competent professional would have so responded under those circumstances.'" *Arnett,* 658 F.3d at 751 (quoting *Roe*, 631 F.3d at 857).

Plaintiff makes two main arguments: (1) that Richter, Parish, and Jackson's failure to diagnose his right eye retinal detachment in February and March 2015 caused him to go completely blind in June 2017, and (2) that Richter, Parish, Bruns, and Jackson generally ignored his eye problems while he was incarcerated. *See* Docket No. 42.

Regarding plaintiff's first argument, plaintiff has no proof showing that he had a retinal detachment when he interacted with Richter, Parish, and Jackson in February and March 2015. Dr. Altaweel diagnosed plaintiff with retinal detachment on April 7, 2015 but Dr. Altaweel did not draw any conclusions on how long the plaintiff had the condition. It's entirely possible that plaintiff first suffered the condition when he complained about it to Bruns the day before, on April 6, 2015.

In any event, even if plaintiff had a retinal detachment prior to April 7, 2015, misdiagnosis of a medical condition, alone, does not show "deliberate indifference." *See Williams v. Guzman*, 346 F. App' 102, 106 (7th Cir. 2009). Instead, plaintiff must show that "no minimally competent" medical professional would have acted as defendants

did. According to Dr. Altaweel, absent "loss of vision" and "flashes of light" there is no need for emergency medical care. The record shows that plaintiff complained about "foggy, floaters, spots, ghosts, shadows, and flashes" numerous times in February and March 2015, but the first time he complained about loss of vision was on April 7, 2015, when he told Bruns he could not see in the bottom portion of his eye. At that point, Bruns immediately requested approval to transfer plaintiff to UW Hospital, and two hours later, plaintiff was treated at the UW Hospital.

Moreover, plaintiff has no evidence showing that his retinal detachment from April 2015 (or any other eye condition he has had since then) caused his blindness in June 2017. To the contrary, Dr. Altaweel specifically concluded that plaintiff's blindness was not caused by any of plaintiff's prior medical conditions or anything the defendants did or did not do. Docket No. 30, ¶¶ 33-34. Dr. Altaweel reviewed plaintiff's medical requests, medical record, and the prescriber's orders and concluded that defendants carried out all medical orders and follow-up treatment exactly as UWEC recommended. Docket No. 30, ¶¶ 8, 35.

Regarding plaintiff's second argument, that defendants generally ignored his eye problems while he was incarcerated, the record shows otherwise. Richter sufficiently treated plaintiff's eye problems. Plaintiff complained about decreased vision and Richter corrected plaintiff's prescription both times he examined plaintiff; he referred plaintiff to UWEC for evaluation (and possible extraction) of a right eye cataract; he also recommended several follow up appointments with UWEC if plaintiff's vision did not improve. Parish interacted with plaintiff once, after Richter had already examined plaintiff earlier in the day, and he relied on Richter's expertise in eye care. Nothing in the

record shows that either Richter or Parish were deliberately indifferent towards plaintiff's eye care needs. *See Lewis v. Gray*, No. 2:10-CV-200-JMS-WGH, 2012 WL 899255, at *4 (S.D. Ind. Mar. 15, 2012) (concluding that defendants were not deliberately indifferent towards plaintiff's eye care needs when the record showed that the DOC doctor submitted numerous requests and consultations for plaintiff to be examined by eye specialists.)

Similarly, the record shows that Jackson and Bruns responded to and/or scheduled plaintiff for an appointment in response to each HSU request he filed. Jackson scheduled plaintiff for an appointment on March 30, 2015 when he complained about redness and eye pain. She gave him treatment consistent with pinkeye. Dr. Altaweel reviewed plaintiff's HSU request and medical records and concluded that Jackson's decision to give plaintiff treatment consistent with pinkeye did not fall below the standard of care. Docket No. 30, ¶ 9. Jackson did deny plaintiff's request for a second opinion on his macular hole surgery, but plaintiff does not have a constitutional right to the treatment of his choosing or to have second opinions on his medical needs. *See Snipes v. DeTella*, 95 F.3d 586, 591 (7th Cir. 1996); *see also Lacy v. Cole*, No. 11-CV-1084, 2012 WL 441284, at *2 (E.D. Wis. Feb. 10, 2012)(concluding that plaintiff's desire for a "second opinion" did not state a valid Eighth Amendment claim).

Similarly, Bruns scheduled plaintiff for appointments when he requested and called UW Hospital on at least two occasions to determine how to handle plaintiff's eye care needs. Bruns also requested an immediate transfer to UW hospital when plaintiff complained about loss of vision. Nothing in the record shows that either Jackson or Bruns were deliberately indifferent towards plaintiff's eye care needs. *See Famous v.*

Zohia, No. 13-CV-195, 2015 WL 4949601, at *5 (E.D. Wis. Aug. 18, 2015)(concluding that defendants were not deliberately indifferent towards plaintiff's eye care needs because "plaintiff has never been denied any requested appointments, follow-up care, or referrals…[and] has been seen by multiple eye care specialists.")

Based on plaintiff's statements and allegations, no reasonable jury could conclude that Richter, Parish, Jackson, or Bruns were deliberately indifferent towards plaintiff's eye problems. Therefore, I will grant defendants' motions for summary judgment and will dismiss this case.

III. CONCLUSION

For the reasons discussed above, **IT IS ORDERED** that Unknown Eye Technicians is **DISMISSED** from the action.

IT IS FURTHER ORDERED that defendants' motions to strike plaintiff's sur-replies (Docket Nos. 46 and 48) are **GRANTED**.

IT IS FURTHER ORDERED that defendants' motions for summary judgment (Docket Nos. 27 and 37) are **GRANTED** and this case is **DISMISSED.** The Clerk of Court enter judgment accordingly.

This order and the judgment to follow are final. A dissatisfied party may appeal this decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within **30 days** of the entry of judgment. *See* Fed. R. App. P. 3, 4. I may extend this deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the 30-day deadline. *See* Fed. R. App. P. 4(a)(5)(A).

Under certain circumstances, a party may ask me to alter or amend my judgment under Federal Rule of Civil Procedure 59(e) or ask for relief from judgment under Federal Rule of Civil Procedure 60(b). Any motion under Federal Rule of Civil Procedure 59(e) must be filed within **28 days** of the entry of judgment. I cannot extend this deadline. *See* Fed. R. Civ. P. 6(b)(2). Any motion under Federal Rule of Civil Procedure 60(b) must be filed within a reasonable time, generally no more than one year after the entry of the judgment. I cannot extend this deadline. *See* Fed. R. Civ. P. 6(b)(2).

I expect parties to closely review all applicable rules and determine, what, if any, further action is appropriate in a case.

Dated at Milwaukee, Wisconsin, this 20th day of July, 2018.

s/Lynn Adelman_____
LYNN ADELMAN
District Judge

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

JAMES VERN PENNEWELL,
Plaintiff

v.

CASE NUMBER: 17-C-0213

DR. JAMES PARISH, et al.,
Defendants

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☑ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff shall take nothing by his complaint and judgment is entered in favor of the defendants on the merits.

July 20, 2018
Date

Stephen C. Dries
Clerk

s/ J. Dreckmann
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JAMES VERN PENNEWELL,
Plaintiff,

v. **Case No. 17-C-0213**

STATE OF WISCONSIN
DEPARTMENT OF CORRECTIONS, *et al*.,
Defendants.

ORDER

This matter comes before me on plaintiff's second request for appointment of counsel. ECF No. 5.

In a civil case, I have discretion to recruit counsel to represent a litigant who is unable to afford one. *Navejar v. Iyiola*, 718 F.3d 692, 696 (7th Cir. 2013); 28 U.S.C. §1915(e)(1); *Ray v. Wexford Health Sources, Inc*., 706 F.3d 864, 866-67 (7th Cir. 2013). First, the litigant must make reasonable efforts to hire private counsel on his own. *Pruitt v. Mote*, 503 F.3d 647, 653 (7th Cir. 2007). After the litigant demonstrates that he has made reasonable attempts to secure counsel on his own, I examine "whether the difficulty of the case – factually and legally – exceeds the particular plaintiff's capacity as a layperson to coherently present it." *Navejar*, 718 F.3d at 696 (citing *Pruitt*, 503 F.3d at 655. This inquiry focuses not only on plaintiff's ability to try his case, but also includes other "tasks that normally attend litigation" such as "evidence gathering" and "preparing and responding to motions." *Id*.

I am satisfied that plaintiff has made reasonable attempts to secure counsel on his own. *See* ECF No. 5-1. However, I will not appoint counsel at this time. I recently

entered an order screening plaintiff's complaint and allowing him to proceed with Eighth Amendment claims against prison staff at Dodge Correctional Institution and John C. Burke Correctional Center. ECF No. 4. Plaintiff's 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. See ECF. No. 1. I also ordered defendants to file an answer to the complaint within sixty days of entry of the screening order. All plaintiff must do right now is wait for defendants to file an answer.

If and when defendants file an answer, I will issue a scheduling order with further instructions on how to proceed with the case. For example, plaintiff can ask defendants to answer his interrogatories (Fed. R. Civ. P. 33) and/or ask them to produce documents that he believes support his version of the events (Fed. R. Civ. P. 34). He will also be able to present his version of the events through an affidavit or unsworn declaration, under 28 U.S.C. §1746, in response to any motion for summary judgment that defendants might file. At this time, I have no reason to believe that plaintiff cannot handle these tasks on his own.

For the reasons stated above, **IT IS ORDERED** that plaintiff's motion to appoint counsel (ECF No. 5) is **DENIED** without prejudice.

Dated at Milwaukee, Wisconsin, this 31st day of March, 2017.

_s/ Lynn Adelman_____
LYNN ADELMAN
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JAMES VERN PENNEWELL,
Plaintiff,

v. **Case No. 17-C-0213**

STATE OF WISCONSIN
DEPARTMENT OF CORRECTIONS, *et al*.,
Defendants.

ORDER

Plaintiff James Vern Pennewell, a Wisconsin state prisoner who is representing himself, filed a civil rights action under 42 U.S.C. § 1983, alleging that defendants violated his Eighth Amendment rights. On February 15, 2017, plaintiff paid the $400 civil case filing fee in full. This matter comes before me for screening of plaintiff's complaint.

The Prison Litigation Reform Act ("PLRA") applies to this action because plaintiff was incarcerated when he filed this complaint. 28 U.S.C. § 1915. Regardless of fee status, the PLRA requires me to screen any complaint brought by a prisoner seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). I may dismiss an action or portion thereof if the claims alleged are "frivolous or malicious," fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B).

To state a claim under the federal notice pleading system, plaintiff must provide a "short and plain statement of the claim showing that [he] is entitled to relief[.]" Fed. R.

Civ. P. 8(a)(2). The complaint need not plead specific facts, and need only provide "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "Labels and conclusions" or a "formulaic recitation of the elements of a cause of action" will not do. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).

The factual content of the complaint must allow me to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Allegations must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Factual allegations, when accepted as true, must state a claim that is "plausible on its face." *Iqbal*, 556 U.S. at 678.

I follow the two-step analysis set forth in *Twombly* to determine whether a complaint states a claim. *Id.* at 679. First, I determine whether the plaintiff's legal conclusions are supported by factual allegations. *Id*. Legal conclusions not support by facts "are not entitled to the assumption of truth." *Id.* Second, I determine whether the well-pleaded factual allegations "plausibly give rise to an entitlement to relief." *Id*. *Pro se* allegations, "however inartfully pleaded," are given a liberal construction. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

FACTS

Plaintiff was in custody at Dodge Correctional Institution ("DCI") between February 5 and March 17, 2015. ECF No. 1 at 4. During his initial "medical intake screening," he spoke to Doctor James Parish, Doctor J. Richter, and Unknown Eye

Technicians and "expressed concerns and described symptoms of a retinal detachment[,] ghosts, shadows, floaters, spots, fogg vision[,] [and] flashes of light in [his] right eye". *Id*. Plaintiff also told "medical staff" that he had been left blind after an unsuccessful medical procedure in March 2009. *Id*. "Medical staff" stated that they already had his medical history and they would monitor and evaluate him. *Id*. They also told him to seek medical attention immediately if his vision changed. *Id*.

On March 17, 2015, the Department of Corrections ("DOC") transferred plaintiff to John C. Burke Correctional Center ("JBCC"). *Id*. At the "health intake screening" at JBCC, plaintiff expressed concerns about loss of vision to S. Jackson, V. Bruns, P. Lampe, Denise Bonnett, Scott Hofteizer, and Mark Rice. *Id*. He also notified JBCC "security" about his eye problems and his need for medical care. *Id*. at 5. None of these individuals took action to provide medical care for plaintiff. *Id*. Plaintiff subsequently lost all vision. *Id*.

On April 7, 2015, the DOC transferred plaintiff to UW hospital for an emergency surgery for retinal detachment. *Id*. Plaintiff has had at least three additional eye procedures since then, leaving him "totally blind." *Id*. He has had to care for himself, *i.e*., using the restroom, showering, eating meals, etc., all on his own. *Id*. Plaintiff believes that "this situation could have been prevented by a timely exam by a qualified ophthalmologist." *Id*. He seeks monetary damages for relief. *Id.* at 8.

DISCUSSION

To state a claim for relief under 42 U.S.C. § 1983, plaintiff must allege that defendants: 1) deprived him of a right secured by the Constitution or laws of the United States; and 2) acted under color of state law. *Buchanan-Moore v. Cnty. of Milwaukee*,

570 F.3d 824, 827 (7th Cir. 2009) (citing *Kramer v. Vill. of North Fond du Lac*, 384 F.3d 856, 861 (7th Cir. 2004)); *see also Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

The Eighth Amendment prohibits prison staff from showing "deliberately indifference" to a substantial risk of serious harm to inmate health or safety. *Farmer v. Brennan*, 511 U.S. 825, 829, 834 (1994). Prison officials act with deliberate indifference when they know of a substantial risk of serious harm and either act or fail to act in disregard of that risk. *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011). Inmates have a "serious harm" if the inmate's condition "has been diagnosed by a physician as mandating treatment or . . . is so obvious that even a lay person would perceive the need for a doctor's attention." *Id.*

Plaintiff states that while at DCI and JBCC (both are DOC-operated correctional institutions) he notified "medical staff" about loss of vision and other eye problems. None of these individuals (Parish, Richter, Unknown Eye Technicians, Rice, Hofteizer, Bonnett, Jackson, Bruns, and Lampe) took action to help with his medical condition. As a result, plaintiff was left "totally blind." Therefore, plaintiff may proceed with an Eighth Amendment deliberate indifference claim against Parish, Richter, Unknown Eye Technicians, Rice, Hofteizer, Bonnett, Jackson, Bruns, and Lampe.

Plaintiff also states that he notified JBCC "security" that he needed medical care and no one acted to help him. The body of the complaint does not specifically identify which individuals he notified about his medical condition. The caption lists Sgt. Nicols, Sgt. Johns, Sgt. Rollins, Sgt. Lange, Sgt. Bunder, and Capt. Redecker/Redeker as "security" personnel. Therefore, taking a liberal construction of the complaint, I will allow plaintiff to proceed with an Eighth Amendment deliberate indifference claim against

Nicols, Johns, Rollins, Lange, Bunder, and Redecker/Redeker.

Plaintiff may not proceed with claims against "State of Wisconsin Department of Corrections," Dodge Correctional Institution, or Jon E. Litscher. Liability under § 1983 is based on an individual's personal involvement in the constitutional violation. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). The Wisconsin Department of Corrections and the Dodge Correctional Institution are not "persons" within the meaning of § 1983. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989). Plaintiff provides no factual allegations against Litscher regarding what he did or did not do regarding plaintiff's eye care. Therefore, I will dismiss these defendants from the action for lack of personal involvement.

PLAINTIFF'S REQUEST FOR COUNSEL

Plaintiff also asks me to recruit counsel for him. ECF No. 1 at 7. In a civil case, I have discretion to recruit counsel for litigants unable to afford one. *Navejar v. Iyiola*, 718 F.3d 692, 696 (7th Cir. 2013); 28 U.S.C. § 1915(e)(1). However, litigants must first show that they made reasonable attempts to secure private counsel on their own. *Pruitt v. Mote*, 503 F.3d 647, 653 (7th Cir. 2007). Generally, a litigant must contact at least three attorneys and provide me with: (1) the attorneys' names, (2) the addresses, (3) the date and way plaintiff attempted to contact them, and (4) the attorney's responses. Plaintiff has not established that he has attempted to recruit counsel on his own. Accordingly, I will not recruit counsel for him at this time.

CONCLUSION

For the reasons stated above, **IT IS ORDERED** that plaintiff may proceed with an Eighth Amendment deliberate indifference claim against Parish, Richter, Unknown Eye

Technicians, Rice, Hofteizer, Bonnett, Jackson, Bruns, Lampe, Nicols, Johns, Rollins, Lange, Bunder, and Redecker/Redeker.

IT IS FUTHER ORDERED that the State of Wisconsin Department of Corrections, Jon E. Litscher, and Dodge Correctional Institution are dismissed from this action.

IT IS ORDERED that pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being electronically sent today to the Wisconsin Department of Justice for service on Parish, Richter, Unknown Eye Technicians, Rice, Hofteizer, Bonnett, Jackson, Bruns, Lampe, Nicols, Johns, Rollins, Lange, Bunder, and Redecker/Redeker. These defendants shall file a responsive pleading to the complaint within sixty days of receiving electronic notice of this order.

IT IS ORDERED that copies of this order be sent to the warden of the Sanger B. Powers Correctional Center where plaintiff is confined.

IT IS ORDERED that plaintiff shall submit all correspondence and legal material to:

Office of the Clerk
United States District Court
Eastern District of Wisconsin
362 United States Courthouse
517 E. Wisconsin Avenue
Milwaukee, Wisconsin 53202

PLEASE DO NOT MAIL ANYTHING DIRECTLY TO THE COURT'S CHAMBERS. It will only delay the processing of the matter. As each filing will be electronically scanned and entered on the docket upon receipt by the clerk, plaintiff need not mail copies to the

defendants. All defendants will be served electronically through the court's electronic case filing system. Plaintiff should also retain a personal copy of each document filed with the court.

Plaintiff is further advised that failure to make a timely submission may result in the dismissal of this action for failure to prosecute. In addition, the parties must notify the Clerk of Court of any change of address. Failure to do so could result in orders or other information not being timely delivered, thus affecting the legal rights of the parties.

Dated at Milwaukee, Wisconsin, this 20th day of March, 2017.

s/ Lynn Adelman

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LYNN ADELMAN
United States District Judge