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

REPLY BRIEF OF PLAINTIFF-APPELLANT JAMES VERN PENNEWELL

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Given the factors present in this case, the district court was required to consider and explicitly acknowledge the specific circumstances Mr. Pennewell faced and then explain why it nonetheless refused to appoint counsel. This Court's precedent also makes clear that the district court abused its discretion by making Mr. Pennewell litigate his complex claims through discovery and summary judgment without counsel. Both of these failures prejudiced Mr. Pennewell because "assistance of counsel could have strengthened the preparation and presentation of the case in a manner reasonably likely to alter the outcome." *Pruitt v. Mote*, 503 F.3d 647, 660 (7th Cir. 2007) (en banc). Defendants fail to refute any of this, and instead take turns mischaracterizing Mr. Pennewell's arguments and offering sweeping claims without supporting authority. None of their arguments explain why this Court should depart from its precedent and overlook the district court's abuse of discretion.

Mr. Pennewell also established sufficient evidence of Defendants' deliberate indifference to survive summary judgment. Contrary to Defendants' arguments, this Circuit's precedent is clear that the factual assertions in Mr. Pennewell's verified complaint constitute admissible evidence. This and the other record evidence directly contradicts Defendants' evidence and challenges the arguments Defendants make solely on the basis of their own medical notes. The full scope of the record demonstrates that Mr. Pennewell presented evidence sufficient to survive summary judgment.

Accordingly, the district court's judgment should be reversed, and this case should be remanded with instructions to appoint counsel and reopen discovery.

I. The District Court Abused Its Discretion In Not Appointing Counsel For Mr. Pennewell.

A. Seventh Circuit Precedent Required The District Court To Consider And Address The Specific Circumstances Mr. Pennewell Faced.

This Circuit's precedent requires a district court denying a motion for appointment of counsel to do more than make "cursory reference" to the plaintiff's circumstances "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) (citation omitted); *see also Dewitt v. Corizon, Inc.*, 760 F.3d 654, 658 (7th Cir. 2014). That means that the district court must explain the basis of its decision on a motion for appointment of counsel after explicitly addressing the plaintiff's individual characteristics. In this case, the district court failed to meet that requirement in a clear abuse of discretion.

Defendants do not refute that the district court failed to discuss Mr. Pennewell's personal characteristics or the specifics of his case in its second order denying appointment of counsel. Defendants also do not refute Mr. Pennewell's characterization of the legal standards that govern abuse of discretion in the appointment of counsel context. Instead, State Defendants argue this case is "unexceptional," charge Mr. Pennewell with asking for a rule that either requires empty "form" or one that guarantees a "blanket" right to

counsel in every medical conditions case, and make various policy arguments.[1] 7th Cir. Dkt. 29 (hereinafter "State Defs. Br.") at 14–16, 23. All of these assertions are wrong.

First, State Defendants' claim that Mr. Pennewell's case is "unexceptional" is unsupported and strains credulity. *See id.* at 23. Unlike the overwhelming majority of litigants, Mr. Pennewell is *legally blind.* His specific characteristics also include litigating this case *pro se*, while incarcerated, and with extremely limited resources. And the nature of this case involves complex medical claims requiring evidence of Defendants' states of mind and evidence spanning two years from at least three correctional institutions and multiple defendants. It may be true that many *pro se* litigants face one or some of the factors present in this case, but Mr. Pennewell's case is exceptional because *all* of these factors are present. This Court has held that all of these factors are "aggravating issues," and they must be considered together and in their totality. *Eli*, 889 F.3d at 330; *see also Dewitt*, 760 F.3d at 658; *Pruitt*, 503 F.3d at 655.

Rather than addressing these factors together, however, State Defendants downplay the challenges Mr. Pennewell faced and parse characteristics one by one after stripping away needed context. State Defs. Br. at 17–18. For example, State Defendants quickly discount the challenges

[1] Dr. Richter does not make these arguments. Instead, his brief focuses almost exclusively on whether Mr. Pennewell was prejudiced by the denial of counsel with regard to his claim against Dr. Richter. 7th Cir. Dkt. 31 at 31–36.

Mr. Pennewell faced due to his blindness. They instead emphasize that Mr. Pennewell's handwriting was "legible," that he referred to his blindness as "vision limitations" in his second motion for counsel (after having discussed his blindness in his complaint/first motion for counsel), and that he was "only legally blind." *Id.* at 13–14, 18. This myopic approach inappropriately discounted the weight that all of the complicating factors in this case posed in aggregate, and it callously dismissed the fact that Mr. Pennewell embarked on discovery in a complex case while *legally blind*. This is precisely the sort of factor the district court is required—at a minimum—to consider and address in its order under this Court's precedent. *See 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); *Merritt v. Faulkner*, 697 F.2d 761, 764–65 (7th Cir. 1983) (holding that district court abused its discretion in failing to appoint counsel and stating that "develop[ing] evidence concerning diagnosis, causation, treatment, and prognosis is obviously beyond the capacity of this blind, indigent, and imprisoned litigant").

Second, State Defendants' attempts to distinguish this Court's precedent fail. For example, this Court held in *Eli* that the district court's denial of motions for counsel *prior* to the district court's screening of the complaint was not an abuse of discretion, noting that "[m]any pro se suits turn out to be frivolous, and a judge justifiably will be reluctant to solicit pro bono assistance from the bar until she is sure that the case has at least some potential merit."

See 889 F.3d at 329 n.3, *quoting Pruitt*, 503 F.3d at 663 (Rovner, J., concurring). But that is not the posture of this case, because the district court had already screened Mr. Pennewell's verified complaint and allowed him to proceed with his claims at the time it denied his second motion for counsel, and because the district court contemplated in its order that the case would be proceeding into discovery. *See* Dkt. 6, A20-21. In any event, any factual differences State Defendants highlight between Mr. Pennewell's case and *Eli* and *Dewitt* do nothing to undermine this Circuit's rule—or its applicability here—that district courts must explain the bases of their decisions. *See, e.g.*, *Navejar v. Iyiola*, 718 F.3d 692, 697 (7th Cir. 2013) ("We therefore take this opportunity to remind district courts about the individualized analysis that *Pruitt* requires and caution against using boilerplate language that we criticized *en banc*." (internal citation omitted)); *Dewitt*, 760 F.3d at 658 (holding that district court abused its discretion where it "stated that it had considered the complexity of the case and [the plaintiff's] ability to litigate the case—without delving into any of [the plaintiff's] personal characteristics or the specifics of the case").

Moreover, to the extent that State Defendants are arguing that a district court should not be required to discuss a plaintiff's personal characteristics and case complexities in orders denying appointment of counsel issued in the early stages of a case, that also is unsupported by the case law. *See Armstrong v. Krupiczowicz*, 874 F.3d 1004, 1009 (7th Cir. 2017) (holding that district court's failure to engage in *Pruitt* inquiry at pleading stage was an abuse of

discretion). Indeed, because the district court cursorily stated in its order denying counsel only that "[Mr. Pennewell] 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), rather than explicitly discussing the specific facts and circumstances of this case, it is impossible to know, let alone argue, which factors the district court improperly ignored or discounted. This was an abuse of discretion.

Third, State Defendants set up a strawman in suggesting that Mr. Pennewell seeks a "blanket rule" that a plaintiff is entitled to counsel where he "used certain magic words" and that every case involving medical evidence requires appointed counsel. State Defs. Br. at 16–18. Rather, consistent with this Court's precedent, Mr. Pennewell argues only that the district court abused its discretion given the personal characteristics that are *specific to him* and the confluence of circumstances present *in this case*. 7th Cir. Dkt. 25 (hereinafter "Op. Br.") at 26–30. The fact-intensive nature of *pro se* § 1983 deliberate indifference cases thus offers a reliable limiting principle that prevents Defendants' slippery slope from being realized.

Similarly, while State Defendants argue that requiring district courts to explain the case-specific reasons for their orders "accomplishes nothing except forcing district courts to add [a] short phrase to each order denying counsel," (*see* State Defs. Br. at 16), this argument also is both wrong and irrelevant. This Circuit's precedent requires more than empty "form": the district court must actually consider and discuss the personal and case-specific

characteristics in its order. *See, e.g.*, *Navejar*, 718 F.3d at 697. And even assuming for sake of argument that a district court could satisfy this Circuit's precedent merely by mentioning or listing each of the relevant factors, it is undisputed that the district court failed to do even that in this case.

As discussed further below, the difficult factual and legal circumstances of this case were beyond Mr. Pennewell's "capacity as a layperson to coherently present [ ] to the judge or jury himself." *Pruitt*, 503 F.3d at 655. The district court failed to consider or acknowledge these complexities, especially Mr. Pennewell's blindness and the complex nature of the case involving complicated medical evidence, the states of mind of Defendants, and a lengthy medical record. Under this Court's precedent, the district court abused its discretion in denying Mr. Pennewell's motions for counsel.

B. The District Court Abused Its Discretion By Issuing A Dispositive Ruling That Dissuaded Renewed Motions For Counsel.

Even if the district court's denial of Mr. Pennewell's second motion for appointment of counsel was not an abuse of discretion for the reasons discussed above, it was an abuse of discretion under *Santiago v. Walls*, 599 F.3d 749 (7th Cir. 2010). *Santiago* stated that the district court cannot make a definitive ruling that the *pro se* litigant did not need counsel at the pretrial stage of the proceedings. *Id.* at 764–65. State Defendants attempt to distinguish *Santiago* by contrasting the language the district court used to deny plaintiff's motion for counsel in that case ("[p]laintiff is competent to represent himself *throughout the pretrial phase* of this litigation.") (*id.* at 764

n.13) (emphasis added), with the language the district court used below ("*[a]t this time*, I have no reason to believe that [Mr. Pennewell] cannot handle these [discovery and summary judgment] tasks on his own.") (Dkt. 6 at 2, A21 (emphasis added)). This is a distinction without a meaningful difference. In both instances, the district court made a definitive ruling that it did not believe the plaintiff needed counsel to litigate the case during the discovery and summary judgment phases. And in both cases, the language in the orders would lead a reasonable *pro se* plaintiff to believe that the district court did not intend to revisit these orders during discovery or summary judgment briefing.

State Defendants' conclusory claim that the district court's definitive ruling "could not have reasonably dissuaded Pennewell from filing another request for counsel later in the case," (*see* State Defs. Br. at 21), is not supported by authority. Nor is it borne out by the facts of this case. Given Mr. Pennewell's clear desire for appointed counsel and his complaints about not having counsel as late as his summary judgment sur-replies, it is implausible that Mr. Pennewell would not have filed a formal motion renewing that request if he had thought he could have a chance of obtaining appointed counsel. *See* Dkt. 45 at 1.

State Defendants' arguments that *Santiago* must be limited to its precise facts therefore are incorrect. In addition to being wrong, such a ruling would create troubling incentives for *pro se* litigants. State Defendants argue that Mr. Pennewell cannot be entitled to counsel because he filed an adequate enough complaint and then, after receiving the district court's order stating

that the district court believed him competent to litigate the case through the pretrial phases without counsel, did not file another formal motion again asking for the same relief. State Defs. Br. at 13–15, 19–21. State Defendants' approach would place unreasonable expectations and demands on *pro se* litigants who are unfamiliar with the inner workings of civil procedure—potentially chilling meritorious suits and penalizing *pro se* plaintiffs for trying to play by the rules they believe the district court laid down. It also could incentivize *pro se* plaintiffs to file motions repeatedly throughout the case, flooding courts with potentially frivolous motions to renew requests for counsel. As a result, State Defendants' very narrow reading of *Santiago* is both wrong and unwarranted.

C. Mr. Pennewell Was Prejudiced By The Denial Of Counsel.

In both briefs, Defendants assert without support that the denial of counsel did not prejudice Mr. Pennewell because he would have received no benefit from appointed counsel. State Defs. Br. at 21–22 ("Nothing counsel could have done during discovery was reasonably likely to defeat summary judgment here."); 7th Cir. Dkt. 31 (hereinafter "Richter Br.") at 36 ("Counsel could only have advised [Mr. Pennewell] to dismiss his claims against Dr. Richter."). As discussed below, these claims are based on a truncated view of the record, and they are meritless. The district court's decision was prejudicial because there is more than "a reasonable likelihood that the presence of counsel would have made a difference in the outcome." *Pruitt*, 503 F.3d at 660.

Defendants first inflate the perception that Mr. Pennewell was successful in prosecuting his claim. For example, State Defendants credited Mr. Pennewell for creating "a detailed timeline of events over the entire two-year period from multiple institutions," (*see* State Defs. Br. at 17, 21–22), and Dr. Richter argued that Mr. Pennewell "was fully capable of reviewing Appellees' submissions, and he prepared thoughtful responses" (*see* Richter Br. at 33). But Defendants gloss over the fact that Mr. Pennewell's responses are based solely on *Defendants'* records and his own statements.

While it is true that appointed counsel "could [not] have changed the contents of [Mr. Pennewell's] treatment records," as Dr. Richter states in his brief (*see* Richter Br. at 33), those treatment records are not the only relevant evidence in this case. Counsel could have taken depositions, demanded answers to interrogatories, and sought expert testimony. This evidence would have shed light on questions at the heart of this case, such as the applicable standard of care, Defendants' knowledge and states of mind, and the veracity of Defendants' records and statements. Counsel also could have generated additional facts and legal arguments by pressing Defendants to comply with discovery requests and conducting a more thorough fact investigation. Defendants' arguments regarding prejudice ring particularly hollow in light of their arguments in support of summary judgment, as they repeatedly fault Mr. Pennewell for presenting too little evidence and for failing to develop his case. *See* State Defs. Br. at 26–38; Richter Br. at 18–31.

On this record, there is a reasonable likelihood that appointed counsel would have made a difference in the outcome. As discussed below, Mr. Pennewell's claims should have survived summary judgment because, even with this very limited record, he presented genuine issues of material fact on his deliberate indifference claim. *See also* Op. Br. at 36–49. With the benefit of counsel during discovery and at summary judgment, Mr. Pennewell could have done far more to corroborate the serious allegations in his verified complaint and call into question Defendants' evidence and defenses. Appointed counsel thus would have provided a significant benefit on each of these fronts in ways that likely could have altered the outcome of this case.

II. Genuine Issues Of Disputed Fact Precluded Summary Judgment.

A. Mr. Pennewell Correctly Relied On The Evidence In His Verified Complaint, Which Was Equivalent To An Affidavit At Summary Judgment.

Both State Defendants' and Dr. Richter's response briefs are based on the flawed premise that Mr. Pennewell's verified complaint cannot be evidence at the summary judgment stage. However, that premise is wrong. Seventh Circuit precedent is clear that a verified complaint is the equivalent of an affidavit at the summary judgment stage. *Beal v. Beller*, 847 F.3d 897, 901 (7th Cir. 2017) ("[A] verified complaint is not just a pleading; it is also the equivalent of an affidavit for purposes of summary judgment."); *Ford v. Wilson*, 90 F.3d 245, 246–47 (7th Cir. 1996) ("[Plaintiff] had verified his complaint, and the complaint contains factual allegations that if included in an affidavit or deposition would be considered evidence, and not merely assertion.").

Mr. Pennewell verified his complaint by declaring under penalty of perjury that it was true and signing it. Dkt. 1 at 9; *see also Ford*, 90 F.3d at 247; 28 U.S.C. § 1746. This converted his complaint into an affidavit and turned all factual assertions based on his personal knowledge into evidence properly included in the record. *Ford*, 90 F.3d at 247; Fed. R. Civ. P. 56(c)(4). Indeed, the district court held as much in its summary judgment order, explicitly construing Mr. Pennewell's verified complaint as an affidavit for purposes of summary judgment.[2] *See* Dkt. 51 at 2 n.1, A4.

Both State Defendants and Dr. Richter erroneously disregard the sworn statements in Mr. Pennewell's verified complaint. *See, e.g.*, Richter Br. at 14 (Dr. Richter's assertion that Mr. Pennewell "may not rest upon the mere allegations set forth in his Complaint, but rather must come forward with *competent* evidence to establish that there is a genuine issue of *material* fact remaining for trial"); State Defs. Br. at 29 (State Defendants' argument that statements in Mr. Pennewell's complaint "are not admissible evidence that could have defeated summary judgment."). They tellingly cite no authority supporting their claims. To the contrary, State Defendants erroneously rely on *Estate of Perry v. Wenzel*, 872 F.3d 439 (7th Cir. 2017), a § 1983 case brought by the estate of a detainee who died in custody. *Id.* at 445; *see* State Defs. Br. at 29–30, 31 n.6. In that case, this Court held that the estate could not survive

[2] As discussed below, while the district court correctly considered Mr. Pennewell's verified complaint as evidence at the summary judgment stage, it nevertheless improperly weighed the record evidence and misapplied the summary judgment standard. Op. Br. at 40–41.

summary judgment on its *Monell* claim merely by pointing to unsupported allegations in the complaint that other in-custody deaths had occurred at the same facilities. *Estate of Perry*, 872 F.3d at 461. The case of course did not involve a verified complaint setting forth facts within the detainee's knowledge because the detainee was deceased at the time the complaint was filed. That case thus is wholly distinguishable from this one, in which Mr. Pennewell's verified complaint attested under oath to facts within his first-hand knowledge. In short, Defendants failed to recognize the crucial difference "between an ordinary complaint that serves as a pleading, and a verified complaint" that "is not just a pleading; it is also the equivalent of an affidavit for purposes of summary judgment." *Beal*, 847 F.3d at 901. Defendants instead base their briefs solely on their own evidence, which left them with a mistaken view of the record and a faulty foundation for their arguments.

B. Mr. Pennewell Presented Individualized Evidence That Each Defendant Acted With Deliberate Indifference.

The record confirms that Mr. Pennewell's deliberate indifference claims against each Defendant were sufficient to survive summary judgment. In his verified complaint, Mr. Pennewell stated that he "expressed concerns and described symptoms of a retinal detachment" and complained of "ghosts, shadows, floaters, spots, fogg[y] vision, [and] flashes of light" to Dr. Richter and P.A. Parish at the Dodge Correctional Institution ("DCI") intake evaluation on February 11, 2015. *See* Dkt. 1 at 4. Likewise, at his John Burke Correctional Center ("JBCC") intake screening on March 17, 2015, Mr. Pennewell "expressed concerns about loss of vision" to Nurse Jackson and Nurse Bruns as well as

Dr. Hoftiezer, Nurse Lampe, Nurse Bonnett, and Superintendent Rice. *Id.* Given these statements, State Defendants are wrong in arguing that "none of [the material in Mr. Pennewell's complaint or summary judgement brief] connects his purported reports of vision loss to any specific State Appellee." State Defs. Br. at 29.

In fact, Mr. Pennell's complaint further detailed that he submitted a series of "verbal and written requests" to JBCC medical staff in late March and early April 2015 explicitly concerned about "loss of vision." Dkt. 1 at 5. And it is undisputed that, on March 30, 2015, Mr. Pennewell alerted Nurse Jackson that "[m]y right eye is painful the Tylenol is not working for pain. It feels like there is a tear in my eye." Dkt. 31-1 at 93. State Defendants try to downplay this fact, arguing that there is no reason this should have "triggered emergency care." State Defs. Br. at 30. A reasonable jury could conclude otherwise, though, finding that Mr. Pennewell's undisputed complaint of eye pain that was not relieved with Tylenol and the feeling of "a tear in [his] eye" signaled a medical emergency requiring immediate treatment. But especially in the context of Mr. Pennewell's repeated complaints about "loss of vision" and "flashes of light," it is implausible that a minimally competent medical professional would have ignored this new "tear in [his] eye." These facts alone are enough for Mr. Pennewell to survive summary judgment with respect to Nurse Jackson.

Thus, Mr. Pennewell alerted Dr. Richter, P.A. Parish, Nurse Jackson, and Nurse Bruns that he was experiencing the telltale symptoms of retinal

detachment at various points from February through April 2015. All Defendants failed to take emergency action in response to these symptoms, subjecting Mr. Pennewell to weeks of severe pain before he finally received the needed treatment for his detached retina. Dkt. 1 at 2–3. The district court speculated that it was "entirely possible that [Mr. Pennewell] first suffered the [retinal detachment] when he complained about it to Bruns . . . on April 6, 2015." *See* Dkt. 51 at 12, A14. But it also is entirely possible, based on the record, that Mr. Pennewell suffered the detached retina as early as February 2015 and that Dr. Richter, P.A. Parish, Nurse Jackson, and Nurse Bruns knew about his condition and took no action, which would constitute deliberate indifference under this Court's precedent. Deciding which account is true was a factual question for a jury to decide.

C. Record Evidence Shows That Defendants Unjustifiably Delayed Treating Mr. Pennewell's Detached Retina.

To survive summary judgment, Mr. Pennewell needed to show only that Defendants caused "[a] significant delay in effective medical treatment" that resulted in "prolonged and unnecessary pain." *Berry v. Peterman*, 604 F.3d 435, 441 (7th Cir. 2010). Yet in their brief, State Defendants argue that Mr. Pennewell failed to explain "why the one-week span between his March 30 appointment and April 7 surgery was unjustifiable." State Defs. Br. at 33. State Defendants cite no authority requiring Mr. Pennewell to do so, and such a requirement has no basis in this Court's precedent. The case law instead shows that, once a plaintiff demonstrates a significant delay in treatment, that is enough to support a deliberate indifference claim. If anything, the onus falls

on Defendants to explain why the delay was reasonable under the circumstances. *See Petties v. Carter,* 836 F.3d 722, 730 (7th Cir. 2016) (en banc) (collecting cases and suggesting delays can be explained by valid penological interests); *see also Berry*, 604 F.3d at 442 ("The only apparent reason for that delay was that [the plaintiff] had the misfortune of being transferred to a jail without an on-site dentist.").

The record shows that Defendants caused Mr. Pennewell to suffer through significant delays before receiving treatment for his detached retina. As Mr. Pennewell argued in his opening brief and reiterates above, each of the four named Defendants delayed treating his detached retina for weeks, causing him unnecessary pain and suffering. *See* Dkt. 1 at 3–6. According to Mr. Pennewell, Dr. Richter and P.A. Parish knew of his condition by February 11, 2015, and Nurse Jackson and Nurse Bruns knew by March 17, 2015. But *at minimum*, Mr. Pennewell alerted Nurse Jackson to his symptoms requiring emergency care for a detached retina on March 30, 2015, a full week before he received surgery to repair his detached retina. Under Seventh Circuit precedent, these delays support a claim of deliberate indifference. *See, e.g.*, *Grieveson v. Anderson*, 538 F.3d 763, 779–80 (7th Cir. 2008) (holding that delays of even just a few days can support a finding of deliberate indifference).

Defendants offer no persuasive explanation for the delays in providing emergency treatment. They claim they did not know Mr. Pennewell had a detached retina until after April 6, 2015 or, relatedly, that they observed only chronic symptoms before that time. *See* State Defs. Br. at 28–29; Richter Br. at

34–35. But these arguments fail because the evidence in Mr. Pennewell's verified complaint raises disputes of material fact about what Defendants knew and when they knew it. In granting summary judgment, the district court improperly answered these questions that should have gone to a jury.

D. Defendants' Arguments Rely On Evidence That Is Irrelevant Or Shows There Is A Dispute Of Material Fact.

Defendants' other arguments in support of summary judgment fail, both because they disregard record evidence and because they draw impermissible inferences from their own evidence. Even under Defendants' characterization of the record, there are genuine issues of material fact that a jury must resolve.

Defendants err in placing unquestioning and nearly exclusive reliance on the medical exam notes that are in the record. Defendants present the medical records as if they are dispositive proof. *See generally* State Defs. Br.; Richter Br. But Mr. Pennewell stated in his verified complaint that he told Defendants additional information beyond what they recorded in their notes. *See* Section II.B above. As the nonmovant at summary judgment, Mr. Pennewell was entitled to a presumption resolving ambiguity in his favor. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014); *see also Navejar*, 718 F.3d at 697 ("We long ago buried—or at least tried to bury—the misconception that uncorroborated testimony from the non-movant cannot prevent summary judgment . . . ." (*quoting Berry v. Chicago Transit Auth.* 618 F.3d 688, 691 (7th Cir. 2010) (alteration omitted)). Because the evidence in Mr. Pennewell's verified complaint challenged Defendants' evidence in the exam notes, there are questions of

material fact as to what Defendants knew and when they knew it and the overall completeness and accuracy of their notes.[3]

Dr. Richter and State Defendants also incorrectly accuse Mr. Pennewell of mischaracterizing the medical notes in the record. *See* Richter Br. at 36 ("[Mr. Pennewell] erroneously believed that his treatment records contained statements that they do not."); State Defs. Br. at 27 n.5 ("Pennewell's brief misleadingly quotes his own characterization of records."). These arguments incorrectly present Mr. Pennewell's position: he does not challenge what Defendants recorded in their treatment notes; he challenges whether the records accurately reflect the events that transpired in this case. In other words, Mr. Pennewell argues that the treatment records are incomplete and omit information and statements that for some reason were not recorded.[4]

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[3] As one example, Nurse Jackson stated in her affidavit in this case that she diagnosed Mr. Pennewell with pink eye on March 30, 2015 (*see* Dkt. 32 at 3, 4 ¶¶ 8, 12), but Nurse Jackson's pink eye diagnosis does not appear in her treatment notes from March 30, 2015 (*see* Dkt. 31-1 at 20). This calls into question whether her treatment notes are accurate and complete.

[4] Dr. Richter and State Defendants argue that, because Mr. Pennewell cited to his summary judgment brief in his opening brief, he referred to material that is not in the district court record. *See* State Defs. Br. at 27 n.5; Richter Br. at 19. This is not true. Like the district court in its summary judgment order, Mr. Pennewell cited the summary judgment brief for the underlying documents and evidence it contains, not for its assertions. Defendants' arguments that Mr. Pennewell relied on the assertions in the summary judgment brief themselves as evidence therefore are incorrect.

Specifically, Dr. Richter takes issue with the district court's statement that Mr. Pennewell "told Dr. Richter . . . the vision in his right eye was 'decreasing, foggy, floaters, spots, ghosts, shadows, and flashes but not as bad as 2008 left detachment,'" and with Mr. Pennewell's citation to that statement in his opening brief. Richter Br. at 8, 19. Dr. Richter charges Mr. Pennewell and the district court with misquoting the medical records "[a]s in a children's game of 'Telephone'" (*see id.* at 8), but this is not true. The facts in this statement are

Defendants' self-serving interpretations of ambiguous evidence are inappropriate at the summary judgment stage, as well. For example, Defendants seek to downplay evidence in their medical records that Mr. Pennewell complained of a decrease in vision in the weeks and months prior to his retinal detachment surgery, arguing that the term "decrease" in vision does not mean a "loss of vision." *See* State Defs. Br. at 28–29 (contrasting chronic and acute symptoms); Richter Br. at 4–5, 20 (acknowledging that Mr. Pennewell complained of "decreased vision" but holding this apart from "loss of vision"). Of course, Defendants' claims ignore Mr. Pennewell's verified complaint, which makes clear he repeatedly complained of "loss of vision" during and after his intake exams. Dkt. 1 at 4–5. But at a minimum, Defendants' arguments give rise to questions of fact for a jury about what precise words Mr. Pennewell used and what those words meant.

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taken not only from the medical records, but also from Mr. Pennewell's verified complaint. *See, e.g.*, Dkt. 1 at 4 ("I expressed concerns and described symptoms of a retinal detachment[,] ghosts, shadows, floaters, spots, fogg[y] vision[, and] flashes of light in my right eye . . . to Dr. J. Richter O.D. . . ."); Dkt. 42 at 3, *citing* Dkt. 31-1 at 82–83 (DOJ Ex. 1001-082-083) (Dr. Richter notes from February 11, 2015 appointment stating that Mr. Pennewell complained his vision was "foggy" and he "can't see with glasses"). Dr. Richter therefore is wrong that these facts are not in the record. His contrary claims are based on the unreasonable view that Mr. Pennewell's complaint is not evidence, and they are without merit.

State Defendants also criticize Mr. Pennewell's summary judgment brief for citing to "Jp Ex. 16," which does not appear in the record. *See* State Defs. Br. at 7 n.3. While Mr. Pennewell's summary judgment brief did refer to "Jp Ex. 16," this appears to be a mere typographical error. *See* Dkt. 42 at 5. The request he referred to (in which he asked for a second opinion regarding his macular hole surgery) is actually labeled "Jp Ex. 5." Dkt. 42-4.

As another example, Dr. Richter misplaces his reliance on Dr. Altaweel's declaration. Dr. Altaweel's declaration states that "[Mr. Pennewell] self-reported that the shadows in his right eye were ongoing for about 10 days, and that the prior day, April 6, it started to get worse, noting that he was now experiencing lower field vision loss." Dkt. 30 at 2 ¶ 6. Dr. Richter interprets this statement to mean that Mr. Pennewell "*only began* experiencing vision loss on April 6, 2015 and shadows in his vision on approximately March 28, 2015." Richter Br. at 10 (emphasis added). From this, Dr. Richter concluded that Mr. Pennewell "did not begin experiencing the requisite symptoms of retinal detachment—vision loss—until over seven weeks after his February 11, 2015 examination by Dr. Richter." *Id.* This reading of Dr. Altaweel's declaration is strained at best. Dr. Altaweel's assertion that Mr. Pennewell's shadows were "ongoing for about 10 days" does not mean they "only began" 10 days before the appointment. Likewise, that Mr. Pennewell noted his vision "started to get worse" on April 6, 2015, and that he was "now experiencing lower field vision loss" does not, without more, suggest that he had not experienced those symptoms earlier. At a minimum, there is a genuine issue of material fact as to whether these statements mean what Dr. Richter suggests.

Moreover, Dr. Richter relies on notes from post-hoc questioning that are inconsistent with earlier treatment records. In his brief, Dr. Richter claims that Mr. Pennewell told Dr. Richter that "he was happy with his vision until April 6, 2015 and that the only symptom he had experienced prior to April 6, 2015 was continued blurred vision in the right eye from his cataract." Richter Br. at 11

(paraphrasing Richter's Declaration, Dkt. 39 at 5 ¶ 22). But the notes Dr. Richter cites in support are dated September 24, 2015, more than *five months after* Mr. Pennewell's retinal detachment surgery. Deciphering the writing is difficult,[5] but nowhere in Dr. Richter's contemporaneous treatment records, or anywhere else in the record, does it indicate that Mr. Pennewell expressed being "happy" with his vision. *See* Dkt. 31-1 at 82–83. Indeed, the record contains evidence that the opposite was true. *See* Dkt. 1 at 3–5.

In short, the conflicting evidence in the record underscores the disputed facts that make summary judgement inappropriate. Defendants may disagree with Mr. Pennewell's claims, but it is not for them to decide which story is more convincing. Nor was it appropriate for the district court to choose at summary judgment. The authority to make that decision rests solely with the factfinder at trial.

E. Defendants' Other Claims Are Unpersuasive And Only Emphasize That Mr. Pennewell Was Prejudiced By The Denial Of Counsel.

On the current record, Mr. Pennewell presented individualized evidence sufficient to survive summary judgment with respect to Dr. Richter, P.A. Parish, Nurse Jackson, and Nurse Bruns. A reasonable jury could find for Mr. Pennewell on his deliberate indifference claims, and the district court's grant of summary judgment therefore was in error.

[5] The difficulty of parsing documents like these is another reminder of the challenge Mr. Pennewell faced due to his blindness. Through depositions and interrogatories, appointed counsel could have helped to clarify these questions and build a more complete factual record.

Defendants' remaining claims that Mr. Pennewell failed to identify other defendants or present additional evidence only underscore that Mr. Pennewell was prejudiced by the lack of counsel. Presenting this case on a limited record comprised almost exclusively of Defendants' own evidence deprived Mr. Pennewell of a fair and full opportunity to litigate his claims. Mr. Pennewell should have that opportunity with the help of appointed counsel through discovery and at summary judgment. Nothing in Defendants' briefs alter this result.

CONCLUSION

For the foregoing reasons and for those stated in Mr. Pennewell's opening brief, this Court should reverse the district court's judgment and remand this case with instructions to appoint counsel and reopen discovery.

Dated: March 11, 2019

Respectfully submitted,

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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 5,924 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: March 11, 2019

/s/ Sarah M. Konsky
Sarah M. Konsky

CERTIFICATE OF SERVICE

I, Sarah M. Konsky, an attorney, hereby certify that on March 11, 2019, I caused the foregoing **Reply Brief 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 **Reply Brief 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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