No. 18-7315

United States Court of Appeals
FOR THE FOURTH CIRCUIT

DAVID GRAHAM GOODMAN,
Petitioner-Appellant,

v.

Z. DIGGS, *et al.*,
Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

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APPELLANT'S REPLY BRIEF

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ARGUMENT

Mr. Goodman's two arguments in his opening brief each require reversal. The district court erred in granting summary judgment by failing to consider his verified complaints which raised a genuine dispute of material fact. Alternatively, he was entitled to discovery before the court granted summary judgment. Defendants refute neither argument.

Defendants do not respond to Mr. Goodman's dispositive argument that (1) the district court erred in failing to consider his verified complaints as affidavits on summary judgment, and (2) those verified complaints demonstrate a genuine dispute of material fact about defendants' malicious and sadistic intent. Instead of responding, defendants rebut an argument Mr. Goodman has never made, asserting that his opposition to their motion for summary judgment ("opposition") does not create a genuine dispute of material fact. Defendants' remaining arguments—they used only the force necessary to induce compliance and Mr. Goodman caused his own injuries to create a false claim against them—cannot survive his sworn and detailed factual allegations to the contrary. The district court erred in granting summary judgment.

Alternatively, remand is still necessary because Mr. Goodman received no discovery other than defendants' names. Defendants offer no serious argument Mr. Goodman failed to adequately raise a Rule 56(d) discovery claim in the district court.

They concede non-movants need not file Rule 56(d) affidavits when their other filings are the "functional equivalent" of such an affidavit, and they identify no reason Mr. Goodman's clear and repeated requests for discovery are not enough. Since 2013, Mr. Goodman has repeatedly told the district court digital photographs and his medical records show he suffered severe injuries. Such evidence would contradict defendants' self-exculpatory allegations they used only the minimum force necessary. The district court erred by deciding the case without first requiring disclosure of these records.

I. Mr. Goodman's Sworn Affidavits Demonstrate a Genuine Dispute of Material Fact About Whether Defendants Applied Force Maliciously and Sadistically with the Intent of Causing Harm.

In his opening brief, Mr. Goodman argued the district court erred in granting summary judgment because: (1) his two verified complaints are sworn affidavits the district court had to consider but did not, *see* P.'s Br. 28-33, and (2) those verified allegations demonstrate defendants acted maliciously and sadistically to cause harm, *see id.* at 20-27. Defendants' brief responds to neither point.

As to the first point, defendants' brief is silent on whether the district court erred in failing to consider Mr. Goodman's verified complaints when deciding whether to grant summary judgment. Mr. Goodman explained his verified complaints meet Rule 56(c)'s requirements, qualifying as affidavits the district court was required to consider at summary judgment. *See* P.'s Br. 28-33; *see also Williams*

v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991); *World Fuel Servs. Trading, DMCC v. Hebei Prince Shipping Co.*, 783 F.3d 507, 516 (4th Cir. 2015). Defendants' failure to acknowledge, let alone respond to, Mr. Goodman's argument that his verified complaints had to be considered resolves that issue. *See* Fed. R. App. P. 28(b); *cf. Hillman v. IRS*, 263 F.3d 338, 343 n.6 (4th Cir. 2001) (stating under Federal Rule of Appellate Procedure 28(b) appellees "risk . . . abandonment of [an] argument" if they fail to state their points in their response brief). Defendants' failure to respond perhaps is understandable. They cannot dispute this point because verified complaints are affidavits at summary judgment. *See, e.g.*, *World Fuel Servs.*, 783 F.3d at 516.

That brings us to the second point: had defendants acknowledged Mr. Goodman's complaints are affidavits, they would have had to concede the affidavits' allegations raise a genuine dispute of material fact. Defendants ignore the allegations in Mr. Goodman's verified complaints, responding to an argument they appear to prefer he had made. They argue that even had Mr. Goodman's *opposition* (not verified complaints) been sworn, it was insufficient to defeat summary judgment because it had only "conclusory allegation[s]." Defs.' Br. 9 (citation omitted).

Their assertion, even if true, is irrelevant and non-responsive to the argument Mr. Goodman made. This Court does not have to decide whether Mr. Goodman's

opposition is sufficient to defeat summary judgment because Mr. Goodman argued his *verified complaints* are sufficient to create a genuine dispute of material fact.[1] *See* P.'s Br. 28-33. Thus, defendants offer no response to the crux of Mr. Goodman's argument. *See* Fed. R. App. P. 28(b); *cf. Hillman*, 263 F.3d at 343 n.6.

Mr. Goodman's verified complaints contain significantly more factual details and allegations than the opposition.[2] Far from providing conclusory statements (like defendants acted maliciously or sadistically), the verified complaints: (1) contain detailed and specific factual allegations about each individual defendant, and (2) would allow a reasonable jury to draw an inference of malicious intent.

Mr. Goodman's verified complaints allege:

- Deputy Hayes grabbed him by the collar and dragged him fifty to sixty feet across a concrete floor. JA15-16, JA40.
- Sergeant Moissett cursed at him, slammed his head into the floor twice (once while handcuffed), and dragged him about 100 yards while he was handcuffed. JA20-21, JA42-43.

[1] In his opposition, Mr. Goodman explains that his verified complaints contain more detail. *See, e.g.*, JA278 (explaining that defendants' allegations "are answered in original complaint").

[2] *See, e.g.*, JA20, JA44 (explaining he communicated his neck surgeries and complications to Deputies Diggs and Repass as they stepped on his neck and back); JA17-18, JA20, JA44-45 (alleging Deputy Repass ground his "face into the floor" and accessed a pressure point behind his ear).

- Deputy Diggs assisted Sergeant Moissett in dragging Mr. Goodman about 100 yards, slammed him into the concrete floor while he was handcuffed, and forcefully stepped on Mr. Goodman's back. JA20-21, JA43.
- Deputy Repass stood on Mr. Goodman's neck, ground his face into the floor, placed her weight on his left hand, and dug her thumb into a pressure point behind his ear. JA17-18, JA20, JA44-45.

Mr. Goodman alleges he did not resist, JA16, and defendants even concede he was compliant the second time they slammed his head into the ground, JA147 ¶ 12. Mr. Goodman suffered extreme pain and lost consciousness. JA18, JA38. After their assault on Mr. Goodman, defendants left him lying in a pool of blood with a laceration to the head and injuries to his hand. JA18, JA20-21, JA43, JA91, JA156-57.

Nothing about these sworn statements was conclusory, and Mr. Goodman asserted factual allegations to establish each element of his claim. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). Defendants identify no factual allegations needed to establish an element of Mr. Goodman's claim that were missing from his verified complaints. *See* Defs.' Br. 8-9; *Lujan*, 497 U.S. at 888. Nor do they rebut Mr. Goodman's arguments about any particular defendant, responding only to his allegations collectively. *See* Defs.' Br. 8.

Defendants argue Mr. Goodman put forth no evidence defendants applied force maliciously or sadistically with the intent of causing him harm, and they instead used the minimum force necessary to respond to noncompliance.[3] *See id.* Defendants base this argument on the premise that their allegations are undisputed. *See id.* But their facts are disputed, as Mr. Goodman's opening brief pointed out in great detail. *See* P.'s Br. 20-28. In his verified complaints, Mr. Goodman disputes whether he was noncompliant. JA16. And he disputes the nature and amount of force used against him, identifying specific allegations from which a reasonable juror could infer malicious intent.[4] Defendants do not respond to this dispositive argument.

What's more, even had Mr. Goodman been noncompliant, defendants are wrong their brutal use of force was justified. *See* Defs.' Br. 8. This Court has consistently held noncompliance may justify *some* use of force, but only the force

[3] Defendants' brief does not dispute Mr. Goodman's argument defendants applied more than *de minimis* force.

[4] These allegations include: (1) Mr. Goodman posed no security threat to any of the defendants, and they do not allege he did; (2) even if some force was needed, defendants dragged him several hundred feet by the collar knowing he had a spinal cord injury; (3) Deputy Hayes became angry when Mr. Goodman said he could not sleep on the floor; (4) Deputy Diggs and Sergeant Moissett slammed Mr. Goodman into the ground while he was handcuffed; (5) Sergeant Moissett cursed at Mr. Goodman; and (6) defendants left him lying unconscious in a pool of blood. *See* P.'s Br. 22-27 (citing to his verified complaints); *see also Brooks v. Johnson*, 924 F.3d 104, 112-18 (4th Cir. 2019) (finding malicious intent may be inferred where plaintiff was handcuffed and posed no threat and defendants cursed at plaintiff and acted out of anger).

necessary to secure compliance. *See Brooks v. Johnson*, 924 F.3d 104, 114 (4th Cir. 2019); *see also Sawyer v. Asbury*, 537 F. App'x 283, 295 (4th Cir. 2013) (responding to inmate's "mere insulting words and noncompliance" with a blow to the head was excessive and did not constitute a good faith effort to maintain discipline). Indeed, "[a] detainee's refusal to comply with an officer's lawful order, without more, is not a license to 'take the gloves off.'" *Sawyer*, 537 F. App'x at 294. Mr. Goodman posed no threat to the officers—a fact defendants do not dispute—nor did they have any other reason to use brutal force against him. *See Brooks*, 924 F.3d at 116. Despite this, defendants rely on Mr. Goodman's alleged noncompliance as their only defense for "taking the gloves off," causing substantial injuries and leaving him unconscious in a pool of blood. *See* Defs.' Br. 8; *see also Sawyer*, 537 F. App'x at 294.

Defendants also ignore Mr. Goodman's argument that their failure to preserve the videotape footage supports an adverse inference in favor of malicious intent. *See* P.'s Br. 21-22. To be sure, they argue there was "no complaint by the inmate at the time." Defs.' Br. 13. But as Mr. Goodman explained in his opening brief, *see* P.'s Br. 21-22, the record does not support this. *See* JA303 n.5. The nurse who examined him "after [the] altercation" concluded Mr. Goodman "expressed his interest in viewing the videos for a lawsuit." JA257. The district court found the absence of the videotape "concern[ing]," as it had "encountered . . . other cases," like this one,

"where [videotapes] arguably should have been preserved." JA303 n.5. Defendants also offer their assurance the evidence revealed "no violations of policy; nor evidence of any excessive force." Defs.' Br. 13 (citation omitted). But because litigation was foreseeable, defendants had an obligation to preserve all relevant evidence. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995).

Instead of engaging with Mr. Goodman's sworn factual allegations supporting a reasonable inference of malicious intent, defendants argue Mr. Goodman caused his own injuries to create a false claim against defendants. Defs.' Br. 8. But a court could only agree with this argument if it accepts defendants' facts as true and ignores Mr. Goodman's verified complaints in their entirety. *See World Fuel Servs.*, 783 F.3d at 516. As Mr. Goodman has explained without rebuttal, this Court cannot ignore his sworn factual allegations from which a reasonable juror could infer malicious intent by defendants. This Court should reverse the district court's grant of summary judgment.

II. Mr. Goodman Was Repeatedly Denied Discovery of Evidence That Plausibly Would Have Created a Genuine Dispute of Material Fact.

Even if this Court finds Mr. Goodman's sworn testimony insufficient, it should still reverse and remand because summary judgment is "not appropriate where the parties have not had an opportunity for reasonable discovery." *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 448 (4th Cir. 2011). Mr. Goodman's filings adequately informed the district court of his outstanding need for

discovery—a point defendants do not dispute. And the evidence he sought could plausibly have created a genuine dispute of material fact.

Defendants offer no reason to believe Mr. Goodman forfeited his discovery argument. They implicitly concede—as they must—this Court does not require a Rule 56(d) affidavit if the nonmoving party has "adequately informed the district court that the motion is pre-mature and that more discovery is necessary." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002); *see* Defs.' Br. 12 (conceding "[o]ther circuits have excused the absence" of a Rule 56(d) affidavit). And Mr. Goodman's opposition and discovery motions adequately informed the district court of his outstanding need for discovery, which defendants do not dispute. Nor could they. Mr. Goodman's opposition asked the district court to stay summary judgment and allow discovery, described the evidence he sought, and explained this "evidence should be examined and *then* a ruling by the honorable court [should issue]." P.'s Br. 35-36 (quoting JA282 (emphasis added)). The district court had six outstanding discovery motions from Mr. Goodman before it, one submitted *alongside* his opposition. *See id*. There is no dispute Mr. Goodman "adequately informed" the district court of his need for discovery.

Because Mr. Goodman did not forfeit his discovery argument, the only question is whether the evidence he sought could plausibly, in defendants' words,

"enable[] him to withstand the motion for summary judgment." Defs.' Br. 12.[5] Mr. Goodman sought several documents through discovery, including medical reports and digital photographs of his injuries immediately following the incident. *See* P.'s Br. 34. He alleges these documents show he suffered: (1) spinal and shoulder damage; (2) serious bruising across his body; and (3) injuries to his hand requiring surgery. Mr. Goodman is entitled to discovery because "there [is] a sufficient basis to believe" this evidence exists, and it would contradict defendants' allegations they used only the minimum force necessary, raising a genuine dispute of material fact. *See Ingle ex rel. Ingle v. Yelton*, 439 F.3d 191, 196 (4th Cir. 2006).

As it is impossible to prove what evidence would show without discovery, a non-movant need only present a "plausible argument that [evidence creating a genuine dispute of material fact] may actually exist." *Ingle*, 439 F.3d at 196; *see also* Defs.' Br. 14 (agreeing plausibility is the correct standard). Defendants do not deny the existence of these documents and it is certainly plausible these documents describe the injuries he alleges. This is no last-minute discovery motion conjured to avoid summary judgment; Mr. Goodman has sought to discover these records for over five years. *See, e.g.*, JA23 (filed June 24, 2013). His descriptions of these

[5] Defendants argue Mr. Goodman's filings "are not the functional equivalent of an affidavit" for this reason. Defs.' Br. 12. But their argument goes to whether the district court abused its discretion by denying Mr. Goodman discovery he told it he needed, not to whether he "adequately informed" it of his need in the first place.

documents and his injuries have not wavered since this case was filed in 2013. *See* P.'s Br. 35. And the injuries he alleges they document are consistent with his own contemporaneous notes of the assault. *See* JA287 (grievance filed morning after assault). True, defendants deny Mr. Goodman suffered severe injuries and so deny documents could prove that he had. *See, e.g.*, JA166 ¶ 6. But one party's denials cannot be enough to prevent the other from receiving discovery—else why have discovery at all?

As described, these documents would raise a genuine dispute of fact about defendants' intent. Although defendants rightly concede the relevance of Mr. Goodman's injuries, they attempt to minimize those injuries as "just one factor to be considered" when inferring malicious intent. Defs.' Br. 12. But even if Mr. Goodman was non-compliant as defendants allege, that does not explain away the serious injuries he alleges. Mr. Goodman uses a wheelchair and posed no risk to defendants. Evidence he suffered extensive bodily injury, including spinal damage, would show defendants used a degree of force that "could [not] plausibly have been thought necessary." *Whitley v. Albers*, 475 U.S. 312, 321 (1986). What's more, the location and extent of these injuries, if consistent with Mr. Goodman's allegations, would contradict defendants' claims they merely held his arms and accessed a pressure point to restrain him—claims the district court found dispositive when awarding defendants summary judgment. *See* P.'s Br. 34. Documentary evidence

contradicting official accounts and demonstrating serious and unnecessary injury would raise a genuine dispute over defendants' intent. *See Tyree v. United States*, 642 F. App'x 228, 230 (4th Cir. 2016) (ordering discovery when inmate's "discovery requests could result in relevant evidence to which he would otherwise have no access").

Defendants point out Mr. Goodman was granted a single interrogatory to ascertain defendants' identities six years ago as well as the right to review video footage of the incident. *See* Defs.' Br. 12-13. But defendants' identities do not go to their intent—the central factual issue in this case—and as they are well aware, Mr. Goodman never received the footage because they destroyed it. *See* P.'s Br. 36.

Defendants also claim Mr. Goodman was not prejudiced by the absence of discovery and their destruction of evidence because they filed defendants' affidavits and medical notes prepared by a nurse at defendants' facility. *See* Defs.' Br. 13. But defendants' own affidavits, submitted to secure summary judgment against Mr. Goodman, are not a substitute for discovery. *See Ingle*, 439 F.3d at 196 (reversing district court's grant of summary judgment and ordering discovery despite movant's submission of affidavits). And the incomplete examination performed by the nurse only underscores the need to examine Mr. Goodman's full medical record. The nurse's notes confirm Mr. Goodman was discovered on the floor, lying in a pool of his blood, with scalp and shoulder damage. *See* JA156. But she did not document

the extent of his shoulder damage or record the extent of his bruising. *See id.* And despite Mr. Goodman's documented neck and back problems, she did not examine him for spinal damage beyond administering a field "neuro check" which consisted of asking him to grip her fingers, rotate his arms, and tell her if he felt numbness. *See id.*

There is no need to rely on these triage notes when Mr. Goodman's full medical records include x-rays, photographs of his injuries, and detailed notes prepared by providers who do not work with defendants. *See* JA205, JA282; *see also Courtney-Pope v. Bd. of Educ. of Carroll Cty.*, 304 F. Supp. 3d 480, 492 (D. Md. 2018) ("[B]ecause plaintiff has had no opportunity for discovery, I cannot conclude as a matter of law that the evidence defendant offers constitutes the full story."). For five years, Mr. Goodman was denied discovery on documents that would plausibly create a genuine dispute of material fact. His case must be remanded.

CONCLUSION

Defendants offer no answer to Mr. Goodman's dispositive argument that his verified complaints are affidavits describing facts raising a genuine dispute of material fact. There is none. And even if this Court finds Mr. Goodman's sworn facts insufficient, reversal is still warranted because the district court erroneously granted summary judgment without discovery. For the foregoing reasons, this Court should reverse summary judgment and remand for pre-trial discovery.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 3152 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on December 9, 2019, a copy of Appellant's Reply Brief was served via the Court's ECF system on:

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