CASE NO. 18-7315

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

DAVID GRAHAM GOODMAN,

Plaintiff - Appellant,

v.

Z. DIGGS, Sherriffs Deputy;
T. MOISETT, Sergeant/Sheriffs Deputy;
C. HAYES, Deputy Sheriff; C. RESPASS, Sheriffs Deputy,

Defendants - Appellees,

and

KENNETH W. STOLLE, Sheriff/High Constable,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA

BRIEF OF APPELLEES

Jeff W. Rosen
Lisa Ehrich
PENDER & COWARD, PC
222 Central Park Avenue
Virginia Beach, VA 23462
757-490-3000
jrosen@pendercoward.com
lehrich@pendercoward.com

Counsel for Appellees

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-7315 Caption: David Graham Goodman v. Z. Diggs, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Z. Diggs, C. Hayes, C. Repass, and T. Moisett
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Date: 11/05/2018

Counsel for: Hayes, Repass, Diggs, Moisett

CERTIFICATE OF SERVICE

****

I certify that on 11/05/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Mr. David Graham Goodman
#0038011
Unit 1-1 E-203
River North Correctional Center
329 Dell Brook Lane
Independence, VA 24348-3705

/s/ 11/05/2018
(signature) (date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other

JURISDICTIONAL STATEMENT

Appellees agree with appellant's jurisdictional statement.

STATEMENT OF THE ISSUES

1. Whether the district court properly granted summary judgment because Mr. Goodman's opposition was neither sworn nor notarized and, thus insufficient as a matter of law to be considered as testimonial evidence for purposes of a motion for summary judgment?

2. Whether the district court abused its discretion when Mr. Goodman failed to file an affidavit that set out the need for a discovery extension?

STATEMENT OF THE CASE

Appellant David Graham Goodman commenced this action on May 1, 2013 in the United States District Court for the Eastern District of Virginia by filing a complaint asserting constitutional violations against Defendant Kenneth W. Stolle, Sheriff/High Constable arising from his former incarceration at the Virginia Beach Correctional Center ("VBCC"). JA 009.

After remand by this Court, the district court dismissed the claims against Kenneth W. Stolle, by Order dated June 18, 2014, because the amended complaint failed to state a claim upon which relief could be granted. Further, the district court granted Appellant the ability to propound interrogatories to Kenneth W. Stolle for "the limited purpose of ascertaining the identities of the other officers . . .

who allegedly used excessive force" on the date in question. JA 62-66. Sheriff Stolle complied with the district court's Order. On August 20, 2014 Appellant filed an amended complaint naming several VBCC deputies ("Appellees"). JA 79-95.

On January 12, 2015, Appellees filed a Motion for Summary Judgment with a supporting Memorandum of Law seeking dismissal of Appellant's excessive force claims. JA 144-174. Appellant opposed Appellees' motion and moved to deny summary judgment based on his request for discovery. JA 132, 139, 176. By Opinion and Order dated June 24, 2015, the district court denied Appellees' Motion, granted Appellant's Motion to Deny/Squash Motion for Summary Judgment, and ordered Appellees to produce video footage of the November 7, 2012 incident that resulted in plaintiff's claims. JA 192-199.

On July 14, 2015, Appellees responded to the district court's Order by filing with the Court an Affidavit of Capt. Linda E. Richie. Capt. Richie attested that the video from November 7, 2012 was not preserved. Capt. Richie stated that, "[s]hortly after the incident, the video footage was reviewed by the deputies' supervisor, and internal affairs division, as is customary for every use of force incident that occurs at the facility." She then explained that the videotape in question could not be produced "[b]ecause there were no violations of policy; nor evidence of any excessive force; and no complaint by the inmate at the time[;] the video was not preserved." JA 200-203.

In its June 24, 2015 Order, the district court set forth that "[u]pon production of the video footage, both parties may renew their Motions for Summary Judgment, if they so choose." JA 198. Given that Appellees could not produce the subject video footage, they renewed their Motion for Summary Judgment.

By Order of September 26, 2018, the district court granted summary judgment in Appellees' favor (JA 294 -305) finding that there was no suggestion in the evidence presented that they applied force to Appellant with the intent of causing harm. The district court also dismissed Appellant's Motions for Summary Judgment and Motion for Subpoenas to be issued. Final judgment was entered on September 26, 2018, prompting this appeal. JA 306-307.

STATEMENT OF FACTS

At all times relevant to Appellant's claims, he was incarcerated at the Virginia Beach Correctional Center ("VBCC"). JA 009, 155, 161. On November 7, 2012, after completing the intake process at VBCC, Dep. Hayes asked Appellant to sit in a wheelchair so that he could be taken to the medical block. JA 163, 155.

When Appellant learned that he would thereafter be taken to his housing assignment, he became disruptive and noncompliant. As Dep. Hayes took Appellant by the arm and began escorting him down the hall toward a holding cell, Appellant suddenly dropped all of his weight to the floor and refused to get up or move. Dep. Hayes was forced to drag Appellant into the holding cell. *Id*. After

Dep. Hayes placed Appellant into the cell, Appellant tried to get Dep. Hayes to slam the cell door on Appellant's foot. Dep. Hayes was able to move Appellant's foot and close the cell door. Id. Dep. Hayes notified one of the Sergeants of the incident, and security camera footage was reviewed and confirmed Dep. Hayes' report of the incident. *Id.*

After Appellant was seen and cleared by a nurse, Dep. Repass went to Appellant's cell to take him to his housing assignment. Id.; JA 155, 166. Appellant was noncompliant and refused all verbal commands to stand up or get into a wheelchair. JA 155, 166. Cpl. Moissett, Deputy Diggs, and Deputy Repass entered the cell and assisted Appellant to his feet. JA 155, 166, 169, 172. Cpl. Moissett placed Appellant in the wheelchair and pushed him out of intake and down the hall toward B1, Appellant's housing assignment. *Id.*

While in the hallway, Appellant purposefully threw his body out of the wheelchair. Appellant again was noncompliant and refused all verbal commands to get up or move. Id. Deputies Diggs and Repass each took one of Appellant's arms and began escorting him down the hallway. Appellant became disruptive and aggressive, and Deputies Diggs and Repass were required to restrain him while Cpl. Moissett placed him in handcuffs. *Id.* Appellant was brought up to his feet and Deputies Diggs and Repass continued escorting Appellant to his housing assignment. *Id.* Appellant attempted to hit his head on each doorframe he passed

through, and when Deputies Diggs and Repass placed Appellant against a wall next to one of the doorways, so that one of the other Deputies could open the door, Appellant purposefully banged his head against the wall and sustained a small laceration to his left brow bone. *Id.*

Once Appellant was placed in the cell, he complied with all verbal commands. When asked whether he needed medical attention, Appellant stated that he did not want medical attention. *Id*. Appellant was seen by one of the nurses. He had a 0.25" laceration to the outer edge of his left brow bone. The laceration was bandaged and a neurological check came back clear. Appellees informed the proper authorities of the incident. JA 155, 163, 166.

Appellees were at no time deliberately indifferent to Appellant's health or safety while he was at VBCC. JA 155, 163, 166, 169, 172.

SUMMARY OF ARGUMENT

The district court correctly determined that Appellees were entitled to summary judgment on Appellant's Eighth Amendment excessive force claim. Based on a review of the undisputed facts and those found in Appellant's favor, the district court properly concluded that Appellees employed a reasonable quantum of force in good faith to maintain and restore discipline on the date of the alleged incident. Further, Appellant did not present any evidence that Appellees applied force in a malicious or sadistic manner with the intent of causing him harm.

Rather, the record established that Appellees were acting in response to Appellant's disruptive and uncooperative behavior.

The district court was also correct in denying Appellant's request for additional discovery because Appellant lacked the proper Rule 56 affidavit. As the district court found, the additional evidence sought for discovery would not have by itself created a genuine issue of material fact sufficient to defeat summary judgment.

ARGUMENT

I. The District Court Correctly Granted Summary Judgment Because Appellant Failed to State a Plausible Eighth Amendment Excessive Force Claim Against Each Appellee

This Court reviews the granting of summary judgment *de novo*. *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 213 (4th Cir. 2007). The judgment of the district court should be affirmed if the result is correct, even if the court relied upon a wrong ground or gave a wrong reason. *Sec. & Exch. Comm'n v. Chenery Corp*., 318 U.S. 80, 88 (1943).

In this case, "the extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation. *Wilkins v. Gaddy*, 559 U.S. 34, 37, (2010) (*quoting Whitely v. Albers*, 475 U.S. 312, 321 (1986)). Even so, "[i]njury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts.

An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury." *Id*. at 38. Therefore, the "core judicial inquiry" for determining whether the Eighth Amendment has been violated is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

To prevail on an Eighth Amendment in an excessive force claim, the Court must consider: (1) the objective nature of the force used and the resulting harm and (2) the subjective intent of the officers. *Id.* at 8. While the objective component of the inquiry is "contextual and responsive to 'contemporary standards of decency' . . . when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." *Id.* at 8-9 (internal citation omitted). Thus, the Court must address whether the force applied was "in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm," and must balance the need for the application of force, the relationship between the need and the amount of force actually applied, and the extent of injury inflicted. *Id.* at 6-7.

Further, the Supreme Court has rejected the notion that a plaintiff must demonstrate significant injury to prevail, but "[t]his is not to say that the 'absence of serious injury' is irrelevant to the Eighth Amendment inquiry." *Wilkins*, 559

U.S. at 37 (citing *Hudson*, 503 U.S. at 7). Rather, the extent of the injury is one factor that the court is to consider. *Id.*

Here, there was no suggestion of evidence presented to the district court that Appellees applied force maliciously or sadistically with the intent of causing harm to Appellant. As the undisputed facts establish, Appellant was noncompliant and disruptive at almost every instance of being transported to the medical block and/or his housing assignment. JA 155, 163, 166, 169, 172. Appellees used only the minimum amount of force necessary to maintain order and discipline once Appellant became disruptive and noncompliant. *Id*. Appellant offers no evidence that the alleged force used by Appellees was used other than "in a good faith effort to maintain or restore discipline." *Hudson v. McMillian*, 503 U.S. at 7.

Furthermore, the undisputed facts establish that the injury complained of by Appellant was caused by Appellant's own actions. *Id*. As a result of his disruptive and uncooperative behavior, Appellees employed reasonable force in good-faith efforts to maintain control of the situation. Likewise, Appellant beat his own head against the wall during transportation, causing a small laceration to his left brow bone. JA 155, 166, 169, 172. Appellant's own actions strongly suggest that he was trying to create a false claim against Appellees by injuring himself. In the end, each of the Appellees attested to the use of minimum force necessary to maintain

order and secure appellant's compliance with their instructions. JA 161, 163, 166, 169, 172.

Moreover, these facts were uncontested because the appellant failed to challenge the evidence presented by Appellees through a sworn declaration. Appellant filed an opposition to the summary judgment motion on August 6, 2018. JA 247. Yet, this pleading was unsworn and consisted of merely a reiteration of the allegations in the complaint. *Id.* Therefore, the district court correctly held that the response was insufficient as a matter of law to oppose Appellees' summary judgment motion and could not be considered. JA 301.

In the alternative, even if Appellant's response had been sworn, a nonmoving party may not defeat a properly supported summary judgment motion by simply substituting the "conclusory allegation of the complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 88 (1990). Here, the factual allegations in Appellant's response amount to nothing more than a conclusory recapitulation of the complaint, without additional supporting evidence. JA 247. Instead, as the nonmoving party, Appellant was required to set forth specific facts with affidavits, depositions, interrogatories or other evidence to show a genuine issue for trial *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Using the Supreme Court's decisions in *Hudson* as its guide, the district court properly determined that Appellant's Eighth Amendment claim failed

because the uncontested evidence showed that Appellees applied force in a good-faith effort to maintain and restore discipline in response to Appellant's disruptive and uncooperative behavior.

II. The Appellant Was Not Prejudiced By The Denial of An Extension for Discovery

This Court affords "substantial discretion to a district court in managing discovery and review[s] discovery ruling only for abuse for that discretion." *United States ex rel. Becker v. Westinghouse Savanna River Co*., 305 F.3d 284, 290 (4th Cir. 2002). *See L.J. v. Wilbon*, 633 F.3d 297, 3054 (4th Cir. 2011) (holding "[a] district court abuses its discretion only where it has acted arbitrarily and irrationally, has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises.")

Further, this Court will not reverse the district court's granting of summary judgment before the opportunity to conduct discovery "unless there is a clear abuse of discretion or, unless there is a real possibility the party was prejudiced by the denial of the extension." *Ingle v. Yelton*, 439 F.3d 191, 195 (4th Cir. 2006). Under Rule 56(d), the district court may defer ruling on a summary judgment motion and permit further discovery so that the nonmoving party may obtain the information necessary to show an issue of material fact in dispute. *See* Fed. R. Civ. P. 56(d). The purpose of the affidavit is to ensure that the nonmoving party is invoking the

protections of Rule 56(d) in good faith and to afford the trial court the showing necessary to assess the merit of a party's opposition. *See First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 298 (1968).

A party opposing summary judgment is required to provide specific facts showing there is a genuine issue for trial or explain why it cannot immediately do so. *See* Fed. R. Civ. P. 56(d).[1] "A non-moving party may not rest upon the mere allegations or denials in its pleadings." *Gray v. Udevitz*, 656 F.2d 588, 592 (10th Cir. 1981). Further, this Court has "warned litigants that [it] will 'place great weight' on the Rule 56(f) affidavit." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002) (*quoting Evans v. Techs. Applications & Serv. Co*., 80 F.3d 954, 961 (4th Cir. 1996).

For example, in *Evans v. Techs. Applications & Serv. Co*., the nonmoving party, like Appellant, never filed an affidavit as required by Rule 56 to oppose summary judgment and set out reasons for the need for discovery. *Evans v. Techs. Applications & Serv. Co*., 80 F.3d at 961. This Court determined that merely stating "the need for additional discovery in a memorandum of law in opposition to a motion for summary judgment is not an adequate substitute for a Rule 56(f) affidavit . . . and the failure to file an affidavit under Rule 56(f) is itself sufficient

[1] In the 2010, Rule 56 was amended so that Subdivision (d) carried forward without substantial change the provisions of former subdivision (f). *See* Fed. R. Civ. P. 56 (2010).

grounds to reject a claim that the opportunity for discovery was inadequate." *Id.* (*quoting Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994) (internal citations omitted)).

Other circuits have excused the absence of such affidavit if additional documents filed by the plaintiff, such as opposing motions and outstanding discovery requests, bring to the court's attention that discover is still outstanding. *First Chi. Int'l v. United Exch. Co.*, 836 F.2d 1375, 1380 (D.C. Cir. 1988). An "[a]ppellant's filings must "alert the district court of the need for further discovery and thus served as the functional equivalent of an affidavit." *Id*. (*citing Sames v. Gable*, 732 F.2d 49, 51-52 & n.3 (3d Cir. 1984)). Here, documents filed by Appellant are not the functional equivalent of an affidavit. His request for medical records and photographs from other institutions, among other things, would not have enabled him to withstand the motion for summary judgment. *See Licari v. Ferruzzi*, 22 F.3d 344, 350 (1st Cir. 1994) (finding no abuse of discretion in district judge's denial of discovery motion because the evidence sought was not the type that would render the claims viable). As aforementioned, the extent of the Appellant's injury is just one factor to be considered.

Also, Appellant incorrectly asserts that he "has not gotten discovery." App. Br., p. 37. Rather, by Order dated June 18, 2014, Appellant was permitted discovery to ascertain the identity of the deputies involved in the alleged incident.

JA 62. Thereafter, the district court considered multiple motions for additional discovery and appointment of counsel. Ultimately on June 26, 2015, the district court denied Appellees' initial summary judgment motion and ordered them to produce video footage of the incident as requested by Appellant. In response, Lt. Linda Richie submitted an affidavit attesting to the facts that the pertinent video footage was reviewed both by the deputies' supervisor and the internal affairs division, as is policy in any use of force incident, and "because there were no violations of policy; nor evidence of any excessive force; and no complaint by the inmate at the time, the video was not preserved." JA 200-203. Further, Appellees provided the district court, and Appellant, with contemporaneous incident reports, their own affidavits, and Appellant's medical record. JA 155-172.

Thus, Appellant offers no basis upon which to hold that the district court abused its discretion with regard to his discovery requests. *See Long v. Vaughan*, 652 Fed. Appx. 176 (4th Cir. 2016) (affirming summary judgment and denial of discovery requests prior to entry of judgment); (*Richardson v. Ray*, 492 Fed. App. 395 (4th Cir. 2012) (affirming denial of discovery requests ahead of summary judgment where the appellant's challenge to the validity of the evidence presented was conclusory and unsupported).

And, unlike in *Ingle*, the district court here could conduct a thorough assessment of the officer's statements. *Ingle*, 439 F.3d at 196. Appellant has not

presented compelling reasons to allow the requested discovery because Lt. Riche's affidavit established that the videotapes no longer existed. Additionally, Appellant failed to present a plausible argument that such videotapes may actually exist, as in *Ingle*. *Id.* Appellant did not allege that the Appellees' affidavits conflict with the physical evidence, nor did he submit any expert affidavits to conflict the facts before the district court.

In this case, Appellant's request for additional discovery was properly denied because he lacked the proper Rule 56 affidavit and "the additional evidence sought for discovery would not have by itself created a genuine issue of material fact sufficient to defeat summary judgment." *Strag v. Bd. of Trs., Craven Cmty. Coll.*, 55 F.3d 943, 954 (4th Cir. 1995).

CONCLUSION

For the foregoing reasons, appellees C. Hayes, T. Morisett, C. Repass, and Z. Diggs respectfully request this Court to affirm the District Court's decision granting their Motion for Summary Judgment.

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request oral argument.

Respectfully submitted,

C. HAYES
T. MORISETT
C. REPASS
Z. DIGGS

By: /s/Jeff W. Rosen

Jeff W. Rosen
Lisa Ehrich
PENDER & COWARD, PC
222 Central Park Avenue
Virginia Beach, VA 23462
757-490-3000
jrosen@pendercoward.com
lehrich@pendercoward.com

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   [x] This brief contains 3,231 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

   [x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14 point style.

Dated: November 18, 2019

s/Jeff W. Rosen
Jeff W. Rosen

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 18th day of November, 2019, I have filed the required copies of the foregoing Response Brief of Appellees with the Clerk, United States Court of Appeals for the Fourth Circuit electronically using the Court's CM/ECF system which will send notification to all counsel of record.

s/Jeff W. Rosen
Jeff W. Rosen