No. 15-13791-AA

In the United States Court of Appeals for the Eleventh Circuit

FRANKLIN HARRIS,
Plaintiff-Appellant,

v.

PRISON HEALTH SERVICES, a Florida Corporation, *et al.*,
Defendants,

WILLIAM NEILDS, Doctor, RICKY ALLEN,
Sergeant, and JAMES BUNTING, Nurse,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, Jacksonville Division
Case No. 3:12-cv-999, Hon. Timothy J. Corrigan

APPELLANT'S BRIEF OF FRANKLIN HARRIS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Allen, Ricky – Defendant-Appellee;
2. Bunting, James – Defendant-Appellee;
3. Burns, P.A. – Appellate counsel for Plaintiff-Appellant;
4. Burns, Thomas A. – Appellate counsel for Plaintiff-Appellant;
5. Corrigan, Hon. Timothy J. – United States District Judge;
6. Garland, Cedell Ian – Assistant Attorney General;
7. Hill, Ward & Henderson, P.A. – Appellate counsel for Plaintiff-Appellant;
8. Harris, Franklin – Plaintiff-Appellant;
9. Kowalchyk, Dean Clinton – Assistant Attorney General;
10. Murphy, J. Logan – Appellate counsel for Plaintiff-Appellant;
11. Neiberger, Eric – Assistant Attorney General;
12. Neilds, William – Defendant-Appellee;
13. Prison Health Services – Defendant;
14. Richardson, Hon. Monte C. – United States Magistrate Judge;
15. Simcox, Holly Noel – Assistant Attorney General.

No publicly traded company or corporation has an interest in the outcome of this appeal.

March 15, 2016

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

In this Addendum Five appeal, Plaintiff-Appellant Franklin Harris requests oral argument.

This appeal raises novel issues whether the subjective component of an Eighth Amendment deliberate indifference claim requires proof of "more than gross negligence" instead of "more than mere negligence" and whether, under the objective component, head trauma constitutes a serious medical need. Additionally, once those pure legal issues are determined, this appeal requires the Court to review the District Court's misapplication of the summary judgment standard and consider somewhat extensive medical evidence.

Oral argument will assist the Court.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3) because the complaint asserted federal claims arising under the Eighth Amendment, 42 U.S.C. § 1983, and other federal statutes. Docs. 1; 23. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the District Court granted summary judgment (Doc. 90) and entered a final judgment (Doc. 91), which Mr. Harris timely appealed (Doc. 94).

The notice of appeal, however, designated only the order granting summary judgment to Dr. William Neilds and Nurse James Bunting (Doc. 90),[1] not the previous order dismissing all other claims against Sergeant Ricky Allen (Doc. 51). *See* Doc. 94. For that reason, although this Court has jurisdiction to consider the summary judgment order, it lacks jurisdiction to consider the dismissal order. *See Moton* v. *Cowart*, 631 F.3d 1337, 1340 n.2 (11th Cir. 2011).

[1] The notice of appeal designated "the final order entered in this action on August 10, 2015" (Doc. 94), which was the summary judgment order (Doc. 90). The judgment in favor of Dr. Neilds and Nurse Bunting was entered on August 11, 2015 (Doc. 91), and the judgment in favor of Sergeant Allen was entered on August 14, 2015 (Doc. 92).

STATEMENT OF THE ISSUES

1. Did the District Court err when it required Mr. Harris to demonstrate the subjective component of his deliberate indifference claim by proving "more than gross negligence" instead of "more than mere negligence" and ruled he did not meet the objective component because his head trauma was supposedly not a serious medical need?

2. Did the District Court improperly assess witness credibility and weigh evidence at summary judgment when it accepted the testimony of prison officials while expressly rejecting Mr. Harris's contrary narrative because it concluded medical records created by those prison officials were unassailable?

STATEMENT OF THE CASE

Course Of Proceedings

In the operative complaint, Mr. Harris sued Dr. William Neilds, Nurse James Bunting, and Sergeant Ricky Allen under 42 U.S.C. § 1983 for violating the Eighth Amendment through deliberate indifference to his emergent medical need. Doc. 23. Construed liberally, it asserted three claims against each defendant:

> 1. An Eighth Amendment violation through deliberate indifference to an emergent medical need;

2. A violation of the American with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*; and

3. A violation of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*

The ADA and Rehabilitation Act claims are not at issue in this appeal. *See* Doc. 23 ¶ VII(D), at 17.

Relevant here, the Eighth Amendment claims alleged Dr. Neilds and Nurse Bunting were deliberately indifferent to Mr. Harris's medical needs after he fell face-first out of a transport van and presented to Dr. Neilds and Nurse Bunting with head trauma and other evidence of neurological injury. Doc. 23 ¶¶ VII(A)-(B), at 16.

Mr. Harris also alleged his rights under the Eighth Amendment, the ADA, and the Rehabilitation Act were violated when Sergeant Allen denied him the use of a wheelchair, denied him the use of a wheelchair accessible van, and denied him assistance when exiting a non-handicap van, which resulted in a fall. Doc. 23 at 16–17.

Dr. Neilds, Nurse Bunting, and Sergeant Allen moved to dismiss for failure to state a claim. Docs. 40; 41. Mr. Harris opposed. Doc. 49. The District Court granted the motion with prejudice as to Sergeant Al-

len on all claims[2] and dismissed the ADA and Rehabilitation Act claims, but denied Dr. Neilds's and Nurse Bunting's motion in full. Doc. 51.

After discovery, Dr. Neilds and Nurse Bunting moved for summary judgment on all remaining claims. Doc. 81. Again, Mr. Harris opposed. Doc. 87. The District Court granted the motion, awarded summary judgment to Dr. Neilds and Nurse Bunting, and entered final judgment in their favor. Docs. 90; 91.

Mr. Harris now appeals the order granting the motion for summary judgment (Doc. 90), but not the order granting the motion to dismiss (Doc. 51). *See* Doc. 94 at 1.

Statement Of Facts

A. Mr. Harris Falls

Franklin Harris was an elderly man who used a wheelchair to get around. Doc. 23 ¶ 18. En route to a medical appointment, Sergeant Allen ordered Mr. Harris out of his wheelchair and wheelchair-accessible van and into a standard 15-passenger van. Doc. 23 ¶ 21. Shackled with a waist chain, handcuffs, and ankle restraints, Mr. Harris was forced to

[2] The order dismissed the claims against Sergeant Allen and dismissed Sergeant Allen as a defendant, withholding judgment pending final adjudication. Both actions imply that dismissal was with prejudice. Doc. 51 at 9-10.

exit the van. Doc. 23 ¶ 22. Sergeant Allen initially assisted, but then removed his support. Doc. 23 ¶ 24. When Mr. Harris fell face-first out of the van, his head smacked the pavement. Doc. 23 ¶ 25.

B. Mr. Harris Visits Dr. Neilds

Having witnessed the head trauma, Sergeant Allen took Mr. Harris to the emergency room, where Dr. Neilds saw him. Doc. 23 ¶ 26. Dr. Neilds knew Mr. Harris had fallen directly onto his head, observed an obvious contusion and swelling over his right eye, and heard Mr. Harris complain of "pain in his head, neck, and hands, numbness in the right arm, [and] impaired vision." Docs. 23 ¶ 27; 81-3 at 1, 2.

Despite these symptoms, Dr. Neilds did not order standard diagnostic testing for head trauma, such as an X-ray or MRI. Doc. 23 ¶ 28. Instead, he performed a perfunctory checkup, prescribed a couple aspirin, and commended Mr. Harris for having a "thick skull." Docs. 23 ¶ 29; 81-3 at 1.

C. Mr. Harris Visits Nurse Bunting

When he returned home, Mr. Harris showed his swelling eye and right arm to two guards. Doc. 23 ¶¶ 33, 34. One instructed Mr. Harris

to declare a medical emergency, while the other perceived the injuries as serious enough to summon Nurse Bunting. Doc. 23 ¶¶ 34, 36, 38.

Initially, Nurse Bunting refused to conduct a medical examination despite Mr. Harris's visibly swollen head and arm. Doc. 23 ¶¶ 37, 38. Instead, he ordered Mr. Harris, "Go to your dormitory," and threatened Mr. Harris with confinement if he continued to complain about his injuries. Doc. 23 ¶ 37.

Untreated, Mr. Harris again declared a medical emergency. Doc. 23 ¶ 39. A guard notified Nurse Bunting, who once again rebuffed Mr. Harris and his medical needs by asking, "What part of 'no' do you not understand"? Doc. 23 ¶¶ 40, 41. After consulting with the guard who had witnessed this entire exchange, however, Nurse Bunting took Mr. Harris's vital signs and conducted a perfunctory examination. Doc. 23 ¶ 42. Nurse Bunting's written assessment suggested a brief visit, and his comment left in large letters on the bottom of the page ("Utilize sick call for non-emergency issues.") suggested exasperation at having to examine Mr. Harris. Doc. 81-3 at 3. Despite Nurse Bunting's written assessment of a "normal neurological status," Mr. Harris left the examination untreated, dizzy, and in pain. Docs. 23 ¶ 43; 81-3 at 3.

D. A Different Nurse Evaluates Mr. Harris Three Days Later

Three days later, a different nurse evaluated Mr. Harris. Docs. 23 ¶ 44; 81-3 at 5. The nurse observed swelling of Mr. Harris's hands, arm, and head, including a pronounced knot on his forehead. Docs. 23 ¶ 45; 81-3 at 5. The medical records from that visit note the lack of a follow-up examination after Mr. Harris saw Dr. Neilds. Doc. 81-3 at 5. The nurse referred Mr. Harris to a physician assistant, who examined him and scheduled head, spine, hand, and forearm x-rays. Doc. 23 ¶¶ 45, 46. An x-ray technician interpreted head, hand, and forearm x-rays as normal, but noted narrowing between vertebrae and bone spurs in the spine. Docs. 23 ¶ 47; 81-3 at 8-11.

E. Two Weeks Later, Mr. Harris Receives Further Medical Treatment

About two weeks later, Mr. Harris returned for medical care due to pain in his head, jaw, right eye, and neck with sharp pains radiating down his right arm, back, and right leg. Docs. 23 ¶ 48; 81-3 at 12. A nurse evaluated Mr. Harris and noted swelling above his right eye "the size of a jawbreaker." Doc. 81-3 at 13. The nurse referred him to a phy-

sician, taking care to specify that the referral should occur "today." Docs. 23 ¶ 48; 81-3 at 13.

A physician assistant saw Mr. Harris about 2 hours later. Docs. 23 ¶ 49; 81-3 at 12. The physician assistant noted a contusion above the right eye, increased Mr. Harris's pain medication, and ordered an MRI. Docs. 23 ¶ 49; 81-3 at 12.

The MRI revealed disc bulging and narrowing of the space between Mr. Harris's vertebrae. Docs. 23 ¶ 52; 81-3 at 32. A second MRI revealed degenerative disc disease, including multilevel degenerative changes, spinal bone spurring, and disc bulges in Mr. Harris's spine. Docs. 23 ¶¶ 55, 56; 81-3 at 32, 34. Another MRI in April 2011 also revealed disc bulging with bone spurs. Doc. 81-3 at 51.

About three weeks after the MRI, Mr. Harris's symptoms were continuing. He returned to the medical center complaining of severe headaches, tenderness on his head, and continued pain and swelling above his right eye. Doc. 23 ¶ 53. As late as November 2010, Mr. Harris continued complaining of back, neck, shoulder, and arm pain existing since April, which was "constantly there" and "got more severe." Doc. 81-3 at 39.

F. The District Court Dismisses The Claim Against Sergeant Allen, But Allows The Claims Against Dr. Neilds And Nurse Bunting To Proceed

By written order (Doc. 51), the District Court granted Sergeant Allen's motion to dismiss (Doc. 41) and dismissed the ADA and Rehabilitation Act claims in full, but denied Dr. Neilds's and Nurse Bunting's motion to dismiss (Doc. 40). In denying Dr. Neilds's and Nurse Bunting's motion, the District Court looked to recent deliberate indifference cases, found "the extent of Plaintiff's injuries from the fall is in dispute," and concluded the complaint adequately alleged a serious medical need—or, at least, "further factual development [was] needed to determine whether such injuries constituted a serious medical need." Doc. 51 at 6.

Furthermore, the District Court acknowledged that a delay in providing treatment for pain could satisfy the subjective component of deliberate indifference (i.e., knowledge and disregard of a risk of serious harm beyond the level of gross negligence). *Id.* at 7. Accordingly, the District Court ruled the complaint plausibly alleged a claim against Dr. Neilds and Nurse Bunting under this "subjective component":

> Taking all of Plaintiff's allegations as true, the Court concludes that the [complaint] states a deliberate indifference

> claim against Dr. Neilds that is plausible on its face insofar as Plaintiff contends that Dr. Neilds failed to adequately examine and treat Plaintiff on April 8, 2010. The Court also finds that Plaintiff states a plausible deliberate indifference claim against Nurse Bunting based on his alleged failure to initially respond to Plaintiff's complaints on April 8, 2010, and his cursory examination of Plaintiff thereafter.

Doc. 51 at 7-8.

G. The District Court Grants Summary Judgment To Dr. Neilds And Nurse Bunting

After discovery, Dr. Neilds and Nurse Bunting filed a motion for summary judgment, which attached 20 pages excerpted from Mr. Harris's deposition, declarations from Dr. Neilds and Nurse Bunting, and 63 pages of medical records. Docs. 81-1; 81-2; 81-3; 81-4. Mr. Harris opposed. Doc. 87.

Without a hearing, the District Court granted the motion. Doc. 90. The District Court rejected Mr. Harris's narrative and relied on the medical records created by the defendants. *See* Doc. 90 at 10. Specifically, the District Court found the defendant-created medical records "reflect[ed] that Mr. Harris did not have a serious medical need" and that Mr. Harris provided "nothing more than his lay opinion regarding his injury, his degenerative condition, and the possibility that his fall had an effect on his condition." Doc. 90 at 10. Ultimately, the District Court

found Mr. Harris had only "minor swelling and bruising, but no broken bones or any significant injury as a result of his fall." Doc. 90 at 10.

The District Court also refused to credit Mr. Harris's verified allegations (i.e., sworn under oath) because "they lack[ed] medical documentation or support." Doc. 90 at 10. Set against the medical records created by the defendants, the District Court ruled Mr. Harris's sworn narrative could not create a question of fact when contradicted by contemporaneously created medical records, even if those medical records were created by the defendants. Doc. 90 at 11. In doing so, the District Court discounted Mr. Harris's verified allegations because "he is not a doctor" and characterized them as "conclusory." Doc. 90 at 10.

The District Court also refused to credit Mr. Harris's allegations because they were "self-serving" and therefore could not create a question of fact "'in the face of contradictory, contemporaneously created medical records.'" Doc. 90 at 11 (quoting *Whitehead* v. *Burnside*, 403 Fed. App'x 401, 403 (11th Cir. 2010)). As such, despite Mr. Harris's allegations to the contrary, the District Court concluded Dr. Neilds and Nurse Bunting conducted "more than a cursory examination" of Mr. Harris. *Id.*

Finally, the District Court held Mr. Harris could produce no evidence of cognizable damages because he did not suffer any physical pain, nor would the treatment he sought have remedied any of the pain he was suffering at that time. *Id.* at 12. Therefore, according to the District Court, Mr. Harris could not show how the defendants' conduct caused a constitutional harm. *Id.* at 13.

The summary judgment order did not discuss any verified facts supporting Mr. Harris's narrative and did not mention evidence from the medical records that supported that narrative. Among the facts in evidence but not accounted for in the District Court's analysis were:

- Guards who witnessed Mr. Harris's fall believed the injury serious enough to take him to the emergency room. Doc. 23 ¶ 26.
- On arrival at the emergency room, Mr. Harris had pain in his head, neck, and hands, numbness and swelling in his right arm, impaired vision, dizziness, and visible swelling over his right eye. Docs. 23 ¶¶ 26, 38; 81-1 at 6 (19:23), 8 (28:6).
- Dr. Neilds's declaration contended Mr. Harris suffered only a "contusion" and "right wrist pain" with no other complaints. Doc. 81-2 ¶ 4.
- Nurse Bunting had no recollection of Mr. Harris and relied on medical records created by him and Dr. Neilds for his declaration. Doc. 81-4 ¶ 4.
- Medical records created by professionals other than Dr. Neilds or Nurse Bunting memorialized complaints of dizziness, visual dis-

turbance in the right eye, pain and swelling in the right hand and wrist, and signs of unsteadiness. Doc. 81-3 at 5.

- The dizziness, pain, and swelling continued for days after he was initially examined. Docs. 23 ¶ 48; 81-1 at 8 (28:6, 28:8-9), 15 (62:20-25), 16 (64:14).

- 20 days after the fall, Mr. Harris was still complaining of pain and swelling in the right side of his head, a growing knot above his right eye, pain in his eye, and tenderness. Doc. 81-3 at 13.

- 20 days after the fall, a medical professional other than the defendants noted swelling above Mr. Harris's right eye "the size of a jawbreaker." Doc. 81-3 at 13.

- Nurse Bunting only took Mr. Harris's vital signs and did not complete a full examination. Doc. 23 ¶ 42.

- Mr. Harris suffered from degenerative disc disease causing bulging discs and osteophytes in his spine. Doc. 81-3 at 17.

- Mr. Harris's right arm weakness began at the time of the fall and continued until at least September 21, 2010, when he was examined by a medical professional other than the defendants. Doc. 81-3 at 32.

This appeal followed. Doc. 94.

Standard Of Review

This Court reviews the grant of summary judgment de novo, considering the facts and drawing all reasonable inferences in the light most favorable to the nonmovant. *Melton* v. *Abston*, 841 F.3d 1207, 1219 (11th Cir. 2016).

SUMMARY OF THE ARGUMENT

1. The District Court erred when it required Mr. Harris to demonstrate the subjective component of his deliberate indifference claim by "more than gross negligence" instead of "more than mere negligence" and ruled he did not demonstrate the objective component because his head trauma was supposedly not a serious medical need. Prior panel precedent required the District Court to apply the "more than mere negligence" standard. And even laypeople would (and did) recognize Mr. Harris's head trauma as a serious medical need: that is, after all, where the brain is.

2. The District Court improperly assessed witness credibility and weighed evidence at summary judgment when it accepted the testimony of prison officials while expressly rejecting Mr. Harris's narrative because it concluded medical records belatedly created by those prison officials were unassailable. That is not how the summary judgment rubric works, nor does the Seventh Amendment permit that kind of covert bench trial.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ERRED WHEN IT REQUIRED MR. HARRIS TO DEMONSTRATE "GROSS NEGLIGENCE" RATHER THAN "MORE THAN MERE NEGLIGENCE" AND RULED HIS HEAD TRAUMA WAS NOT A SERIOUS MEDICAL NEED

The District Court misconceived the subjective component of Mr. Harris's deliberate indifference claim when it required him to prove "more than gross negligence" instead of "more than mere negligence." It also misconceived the objective component when it ruled his head trauma was not a serious medical need.

A. Deliberate Indifference Claims Have An Objective Component And A Subjective Component

Prison officials violate the Eighth Amendment's prohibition against cruel and unusual punishment when they subject a prisoner to "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976). "To show that a prison official acted with deliberate indifference to serious medical needs, a plaintiff must satisfy both an objective and a subjective inquiry." *Farrow* v. *West*, 320 F.3d 1235, 1243 (11th Cir. 2003); *accord Kruse* v. *Williams*, 592 Fed. App'x 848, 856 (11th Cir.

2014) (citing *Goebert* v. *Lee County*, 510 F.3d 1312, 1326 (11th Cir. 2007)).[3]

To meet the objective component, the plaintiff "must set forth evidence of an objectively serious medical need." *Farrow*, 320 F.3d at 1243. To meet the subjective component, the plaintiff "must prove that the prison official acted with an attitude of 'deliberate indifference' to that serious medical need." *Id.*

The "deliberate indifference" subjective component includes three further elements: "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is *more than mere negligence*." *Melton* v. *Abston*, 841 F.3d 1207, 1223 (11th Cir. 2016) (emphasis added). Finally, as with any tort claim, the plaintiff must also establish "causation between that indifference and the plaintiff's injury." *Youmans* v. *Gagnon*, 626 F.3d 557, 563 (11th Cir. 2010); *accord Goebert*, 510 F.3d at 1327.

[3] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

B. Prior Panel Precedent Demonstrates That The Third Element Of The Subjective Component Requires "More Than Mere Negligence," Not "More Than Gross Negligence"

The third element of the subjective component (i.e., conduct that is "more than mere negligence") has caused heartburn among district courts and practitioners and has generated a legal error here. In *Townsend* v. *Jefferson County*, this Court had required a deliberate indifference plaintiff to prove conduct that was "more than gross negligence." 601 F.3d 1152, 1158 (11th Cir. 2010). *Townsend*'s "more than gross negligence" standard was purportedly based on *Cottrell* v. *Caldwell,* 85 F.3d 1480, 1490 (11th Cir. 1996), which "made clear that after *Farmer* v. *Brennan*, 511 U.S. 825 (1994), a claim of deliberate indifference required proof of more than gross negligence." 601 F.3d at 1158.

Last year, however, this Court retreated from *Townsend*'s "more than gross negligence" standard based on prior panel precedent. *Melton*, 841 F.3d at 1223 n.2. The *Melton* panel reviewed *Farmer* and discovered that the phrase "more than gross negligence" never turned up. In fact, *Farmer* did not specifically address the official's degree of culpability. Because *Farmer* did not address the standard, the first panel

decision after *Farmer* to announce the degree of culpability required under *Farmer* constituted binding Circuit precedent on the issue.

That decision was not *Cottrell*, as held in *Townsend*, but *McElligott* v. *Foley*, 182 F.3d 1248 (11th Cir. 1999):

> "Accordingly, under *Estelle* and *Farmer*, deliberate indifference has three components: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is *more than mere negligence*.

Id. at 1255 (emphasis added).

However well intentioned, *Townsend*'s interlineation of "gross negligence" into the third element of the subjective component was inconsistent with prior panel precedent. Under *McElligott*, the correct degree of an official's culpability is "more than mere negligence." *Melton*, 841 F.3d at 1223 n.2. As prior panel precedent, *McElligott* must be followed. *Morrison* v. *Amway Corp.*, 323 F.3d 920, 929 (11th Cir. 2003).

C. The District Court Erred By Applying *Townsend*'s "More Than Gross Negligence" Standard

When granting summary judgment, the District Court incorrectly quoted and applied *Townsend*'s "more than gross negligence" standard. Doc. 90 at 9. In doing so, it did not follow *McElligott* and inserted a

higher degree of culpability into the analysis, effectively raising Mr. Harris's standard of proof.

Since the District Court applied the wrong legal standard, the order granting summary judgment must be vacated and remanded for consideration under the appropriate standard.[4] *Rance* v. *Rocksolid Granite USA, Inc.*, 583 F.3d 1284, 1286 (11th Cir. 2009) (citing *United States* v. *Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc)).

D. Mr. Harris's Head Trauma Was A Serious Medical Need As A Matter of Law, And The District Court Erred By Concluding Otherwise

The District Court's also ruled Mr. Harris "did not have a serious medical need." Doc. 90 at 10. That ruling implicated the objective component of a deliberate indifference claim. By presenting evidence of

[4] This Court has long recognized that remands of summary judgment rulings preserve judicial resources and promote judicial economy: "[r]emand after reversal of summary judgment does not seriously impair judicial economy, because, unlike remand after a full trial, it does not involve the district court in redundant proceedings." *Roofing & Sheet Metal Servs., Inc.* v. *La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir. 1982). And even though appellate review of summary judgment orders is de novo, absent the "benefit if the district court's reasoning," the Court necessarily "commence[s] [such] analysis on appeal at a 'decided disadvantage,'" much akin to the "'proverbial blind hog, scrambling through the record in search of an acorn.'" *Hulsey* v. *Pride Restaurants, LLC*, 367 F.3d 1238, 1243-44 (11th Cir. 2004) (citations omitted).

head trauma with externally manifested symptoms, coupled with other contemporaneous injuries, Mr. Harris conclusively demonstrated as a matter of law that he suffered from a "serious medical need."

A serious medical need is one so obvious that even a layperson would easily recognize the necessity for a doctor's attention. *Mann* v. *Taser Int'l, Inc.*, 588 F.3d 1291, 1307 (11th Cir. 2009). As one would imagine, a serious medical need poses "a substantial risk of serious harm" if left unattended. *Farrow*, 320 F.3d at 1243.

Without citing to any particular evidence, the District Court ruled Mr. Harris had no serious medical need. Doc. 90 at 10. The District Court concluded that the contemporaneous medical records reflected "minor swelling and bruising, but no broken bones or any significant injury as a result of his fall." Doc. 90 at 10. By concluding Harris had no "significant injury," the District Court supplanted the medical evidence with its own opinion, which was at odds with legions of authority.

Mr. Harris fell a significant distance from a 15-passenger van while shackled; smacked his forehead on concrete pavement without bracing; complained of dizziness, numbness, impaired vision, persistent pain, and swelling; and had a substantial "knot" on his forehead for at

least 20 days after the accident. Docs. 23 ¶¶ 26, 38; 81-1 at 6 (19:23), 8 (28:6); 81-3 at 13. And laypersons recognized the necessity for a doctor's attention: at least four corrections officers urged medical care at one point on the day of Mr. Harris's injury. Doc. 23 ¶¶ 26, 33, 34, 36, 38, 42. Three days after Dr. Neilds's and Nurse Bunting's indifference, a nurse immediately referred Mr. Harris to a physician assistant after observing his symptoms, who in turn perceived the injuries and symptoms serious enough to immediately schedule head, spine, hand, and forearm x-rays. Docs. 23 ¶¶ 45, 46; 81-3 at 5.

In other words, the evidence was at least sufficient for a reasonable jury to conclude that Mr. Harris suffered head trauma with externally manifesting symptoms that four lay people perceived to be serious. The District Court did not find this "significant." Doc. 90 at 10. Other courts regularly have as a matter of law.

Unlike the District Court, the Seventh Circuit considers head trauma to be serious: "[I]njury to the head unless obviously superficial should ordinarily be considered serious and merits attention until properly diagnosed as to severity." *Murphy* v. *Walker*, 51 F.3d 714, 719 (7th Cir. 1995). And the Seventh Circuit's view is not an aberration.

Just about every court to consider the issue has determined that head trauma constitutes a serious medical need.[5]

Virtually all cases where a head injury was not a serious medical need are distinguishable because they involved light injuries without an external manifestation of symptoms, where the plaintiff did not require medical attention. *E.g.*, *Johnson* v. *McNeil*, 278 Fed. App'x 866 (11th Cir. 2008); *Brock* v. *Sparkman*, 101 Fed. App'x 430 (5th Cir. 2004); *Petersen* v. *Midgett*, 140 F. Supp. 3d 490 (E.D.N.C. 2015). The one contrary case is *Boyett* v. *City of Washington*, 2006 WL 3422104 (D. Utah Nov. 28, 2006), where the court held a head injury that required sutures

[5] *See, e.g.*, *Caffey* v. *Maue*, 2017 WL 659349, at *1, *3 (7th Cir. 2017) (strike on the head resulting in pressure, ringing, and recurring pain, without a visible wound, is sufficiently serious); *Scarbro* v. *New Hanover County*, 374 Fed. App'x 366, 371 (4th Cir. 2010) (takedown resulting in a head injury); *Alston* v. *Wenerowicz*, 2015 WL 1400846, at *2 (E.D. Pa. Mar. 26, 2015) (assuming head and eye trauma is a serious medical need); *Woods* v. *Roberts*, 2013 WL 6473210, at *3 (S.D. Ill. Dec. 9, 2013) (head trauma causing constant headaches, among other injuries); *Barnett* v. *Luttrell*, 414 Fed. App'x 784, 788 (6th Cir. 2011) (fall down escalator resulting in head injury and headaches); *Koehl* v. *Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (visual deficiencies resulting from head trauma); *Browne* v. *Lange*, 1994 WL 30605, at *2 (N.D. Ill. Jan. 28, 1994) (head trauma resulting in bruising); *Price* v. *Bd. of Police Comm'rs of City of St. Louis*, 1996 WL 137305, at *1 (8th Cir. 1996) ("mild" head injury could be viewed as serious); *Ortiz* v. *City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989) (evidence of complications resulting from head injury); *Dace* v. *Solem*, 858 F.2d 385, 387, 388 (8th Cir. 1988) (head injury from being struck with a lead pipe).

did not qualify as a serious medical need. *Id.* at *17. That case is inconsistent with the weight of authority.

This Court has recognized that a range of medical needs are sufficiently serious to constitute a "serious medical need" as a matter of law. *See Morrison* v. *City of Atlanta*, 2014 WL 11460479, at *5 n.5 (N.D. Ga. Mar. 31, 2014) (collecting cases). Head trauma with externally manifested symptoms should now be included.

The summary judgment order should be vacated with instructions for the District Court to reassess the objective component and determine whether Mr. Harris's injuries constitute a serious medical need as a matter of law.[6]

II. THE DISTRICT COURT MISAPPLIED THE SUMMARY JUDGMENT STANDARD

In addition to applying the wrong substantive law, the District Court also misconceived the summary judgment standard itself. In doing so, it committed elementary procedural errors.

After his fall, during cursory examinations, and in the District Court, Mr. Harris has been dismissed and disbelieved. The disbelief at every turn "smacks of deliberate indifference." *Goebert*, 510 F.3d at

[6] *See supra* note 4.

1328. In the District Court, that disbelief manifested in an application of the summary judgment standard improperly favoring Dr. Neilds and Nurse Bunting, the movants.

The District Court applied incorrect legal standards, improperly credited testimony in favor of Dr. Neilds and Nurse Bunting over Mr. Harris's testimony, and construed all the evidence in the light most favorable to the defendants, contrary to its obligation under Federal Rule of Civil Procedure 56. The District Court also applied rare exceptions to the summary judgment standard in a case that did not warrant them. The order granting summary judgment should be vacated and the case remanded for jury trial.

A. Summary Judgment May Be Granted Only Where There Is No Genuine Dispute As To Any Material Fact

Summary judgment is appropriate only if there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). In determining whether a genuine dispute exists, district courts must assess the evidence, construe the facts, and draw all reasonable inferences in the light most favorable to the nonmovant. *Kuhne* v. *Fla. Dep't of Corr.*, 745

F.3d 1091, 1095 (11th Cir. 2014); *Moton* v. *Cowart*, 631 F.3d 1337, 1342 (11th Cir. 2011).

District courts cannot resolve factual disputes, weigh evidence, assess credibility, or manifest a belief that one side's version of a story is correct. *Lane* v. *Celotex Corp.*, 782 F.2d 1526, 1528 (11th Cir. 1986); *accord* 9B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2524, at 270-85 (2008) (collecting cases); *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). This is particularly true in cases where "motive, intent, subjective feelings, . . . and reactions are to be searched," or, as applied to this case, where pain, judgment, and subjective belief must be assessed. *Rogers* v. *Evans*, 792 F.2d 1052, 1059 (11th Cir. 1986).

Indeed, even if a district court believes "'the actual facts of the matter may be significantly different from'" the plaintiff's account and "'more in keeping with'" the defendants' version, summary judgment remains inappropriate. *Kuhne*, 745 F.3d at 1097 (quoting *Steele* v. *Shah*, 87 F.3d 1266, 1270 (11th Cir. 1996)); *accord Edwards* v. *Shanley*, 666 F.3d 1289, 1295 n.3 (11th Cir. 2012) ("we explicitly recognize that a jury is free to make its own fact determination about the length of the

dog attack" and remain "mindful that a jury will have the opportunity to test the evidence presented by both sides in our time-honored adversarial tradition").

In short, district courts ultimately "cannot substitute [their] judgment of the evidence or the facts for that of the jury, since ascertaining the facts is within the exclusive province of the latter." 9B WRIGHT & MILLER, *supra*, § 2524, at 289-97 (collecting cases). Rather, "'[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Reeves*, 530 U.S. at 151 (citation omitted).

Applied to Mr. Harris's constitutional claims, these elementary summary judgment principles required the District Court to adopt Mr. Harris's version of the facts. *Scott* v. *Harris*, 550 U.S. 372, 378 (2007); *Kuhne*, 745 F.3d at 1094.[7] It did not.

[7] When considering a motion for summary judgment, the complaint and pleadings of a *pro se* party must be construed liberally. *Moton*, 631 F.3d at 1340 n.2; *Harris* v. *Ostrout*, 65 F.3d 912, 915 (11th Cir. 1995). Additionally, summary judgment should be denied even on the basis of circumstantial evidence, *Damon* v. *Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1366 (11th Cir. 1999), or a verified complaint's allegations, *Perry* v. *Thompson*, 786 F.2d 1093, 1095 (11th Cir. 1986).

B. To Avoid The General Summary Judgment Standard, The District Court Applied Four "Exceptions," None Of Which Applied Here

The District Court's findings must be framed within the legal principles applied to make those findings. In this case, the District Court utilized four "exceptions" to the summary judgment standard, which purportedly allowed it to weigh evidence, disregard evidence presented by Mr. Harris, and make findings of fact in Dr. Neilds's and Nurse Bunting's favor. *See* Doc. 90 at 7, 8, 10, 11. The "exceptions" are:

- Unsupported conclusory allegations that a plaintiff suffered a constitutionally cognizant injury are insufficient to withstand a motion for summary judgment. Doc. 90 at 7.
- When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for summary judgment. Doc. 90 at 8.
- A plaintiff's allegations cannot be credited to the extent that they lack medical documentation or support. Doc. 90 at 10.
- Self-serving statements by a plaintiff do not create a question of fact in the face of contradictory, contemporaneously created medical records. Doc. 90 at 11.

None of these exceptions applied in this case, and the District Court should not have used them to grant summary judgment.

1. The First Exception Did Not Apply Because Mr. Harris's Allegations Of Constitutional Injury Were Not Unsupported Or Conclusory

First, the District Court reasoned that "[u]nsupported conclusory allegations that a plaintiff suffered a constitutionally cognizant injury are insufficient to withstand a motion for summary judgment." Doc. 90 at 7 (citing *Bennett* v. *Parker*, 898 F.2d 1530, 1532–34 (11th Cir. 1990)). But *Bennett* does not apply here because Mr. Harris's allegations of injury were neither unsupported nor conclusory.

The plaintiff in *Bennett* alleged "long-lasting" pain and "serious" injury, but his medical records, which were created by independent, nonparty witnesses, contained no evidence of a head injury or any efforts to seek medical treatment.[8] *Bennett*, 898 F.2d at 1533. The district court's decision to grant the defendants summary judgment was not based just on Bennett's conclusory allegations of injury; his claim was "unsupported by any physical evidence, medical records, or the corroborating testimony of witnesses." *Id.* at 1534.

[8] *Bennett* also requires the prisoner to demonstrate "severe injuries" in order to present a constitutional claim for excessive force. *Bennett*, 898 F.2d at 1533. That is not the standard for a claim alleging deliberate indifference to a serious medical need.

Bennett does not apply to this case for several reasons. First, the medical records cited by the District Court in granting summary judgment were created *by the defendants*, unlike those in *Bennett*, which were created *by independent, nonparty witnesses*. Relying on Dr. Neilds's and Nurse Bunting's medical records as objectively correct essentially conferred on them an unassailable status, making it impossible for Mr. Harris to challenge their stories. The District Court made it *impossible* for Mr. Harris to create a genuine dispute of material fact, and essentially refused to believe Mr. Harris's story because Dr. Neilds and Nurse Bunting were medical professionals and Mr. Harris was not.

Second, unlike *Bennett*, Mr. Harris placed in the record sworn testimony, sworn allegations, and verifiable medical evidence of a serious medical need and efforts to seek medical care immediately following his fall. His allegations were hardly "unsupported," especially had the District Court construed the evidence in his favor.

2. The Second Exception Did Not Apply Because Mr. Harris's Narrative Was Not "Blatantly Contradicted" By The Record

Next, the District Court repeated part of the Supreme Court's analysis in *Scott* v. *Harris*: "When opposing parties tell two different

stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for summary judgment." 550 U.S. 372, 380 (2007). What the District Court missed is *Scott*'s instruction that the contradiction between the record and the disbelieved party must be "so *utterly discredited* by the record that no reasonable jury could have believed him." *Scott*, 550 U.S. at 380 (emphasis added).

To start, *Scott* is an anomaly that rarely applies.[9] The Supreme Court considered a clear videotape of the entire incident, which so "utterly discredited" Scott's story that no reasonable jury could have believed him. *Id.*

Despite allowing summary judgment in the face of conflicting evidence, *Scott* "did not tinker with the summary judgment standard." *Morton* v. *Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013). Rather, district courts may discard a party's narrative only when it is "inherently

[9] *Scott* is "situation specific." 550 U.S. at 386 (Ginsburg, J., concurring). The video made such a difference in the disposition that the Court took the unusual step of posting it on its website, and Justice Breyer issued a concurrence urging the reader to watch it because it "makes clear the highly fact-dependent nature of this constitutional inquiry." *Id.* at 387 (Breyer, J., concurring). Justice Stevens, dissenting alone, found viewing the video usurped the jury's fact-finding function. *Id.* at 395 (Stevens, J., dissenting).

incredible" and cannot create reasonable inferences in favor of the party. *Id.* (quoting *Riley* v. *City of Montgomery*, 104 F.3d 1247, 1251 (11th Cir. 1997)). A party's testimony is not inherently incredible just because another party's story seems more likely.

For example, in *Morton*, this Court refused to disregard a party's story as incredible even though it was contrary to forensic evidence. *Id.* And this Court recently reversed a district court's grant of summary judgment based on self-serving declarations and medical records from the day of an incident—i.e., the same type of evidence offered against Mr. Harris. *Joassin* v. *Murphy*, 661 Fed. App'x 558, 559-60 (11th Cir. 2016); *see also Perez* v. *Suszczynski*, 809 F.3d 1213, 1221 n.5 (11th Cir. 2016) (deputies' version of events did not utterly discredit the plaintiff's); *Reeder* v. *Chitwood*, 595 Fed. App'x 890, 896 (11th Cir. 2014) (videotaped statement did not unequivocally establish the record).

There is no video, or similarly objective evidence, that "utterly discredited" Mr. Harris's sworn allegations and the medical evidence in his favor. In fact, none of the evidence is anywhere near as conclusive as the forensic evidence rejected as insufficient for summary judgment in *Morton*. This case is closer to *Joassin and Morton* than it is to *Scott*.

The District Court erred when it treated Dr. Neilds's and Nurse Bunting's self-serving declarations and medical records as sacrosanct. By calling Mr. Harris's evidence "self-serving," but not characterizing the defendants' evidence the same way, the District Court revealed its refusal to apply the summary judgment standard. The District Court simply chose to believe Dr. Neilds and Nurse Bunting over Mr. Harris. That is not how summary judgment works.

3. The Third Exception Did Not Apply Because Medical Documentation Or Support Is Not The End-All, Be-All Of Deliberate Indifference Claims

Third, the District Court refused to "credit Plaintiff's allegations to the extent that they lack medical documentation or support," citing once again to *Bennett*. Doc. 90 at 10. Initially, this assumed Mr. Harris had absolutely no medical evidence to support his allegations, which was not the case. Setting that aside, the District Court essentially said, "I credit Defendants' contentions because they are made by medical professionals. Plaintiff is not a medical professional, so his evidence is not to be believed." That cannot be permissible under the Seventh Amend-

ment or the summary judgment rubric: a medical professional's word is not worth more than Mr. Harris's.[10]

If this standard were regularly applied in deliberate indifference claims, plaintiffs would never prevail against medical professionals. The defendants would need only temper their medical records with statements favorable to their story, and then submit consistent, self-serving declarations. A prisoner's allegations and sworn testimony would never suffice because it would necessarily "lack medical documentation or support" compared to a defendant's.

Furthermore, courts around the country, including this Court, have held that prisoner's may prevail on deliberate indifference claims by alleging long-lasting pain left untreated. *See McElligott*, 182 F.3d at 1257 (collecting cases). That type of case would require a jury to believe the prisoner's allegations over medical records created by a defendant.

[10] *Cf. Baylis* v. *Travellers' Ins. Co.*, 113 U.S. 316, 321 (1885) (reversing entry of judgment against plaintiff who demanded trial by jury when district court ruled "on its own view of the evidence, without the intervention of a jury" because procedure was contrary to the Seventh Amendment, which the Supreme Court "has always guarded with jealousy" (citations omitted)).

4. The Fourth Exception Did Not Apply Because The Contradictory Medical Records Were Created By The Defendants, Not Independent, Non-Party Witnesses

The fourth exception is a companion of the third. To buttress its conclusion that the defendants performed more than a cursory examination on Harris (and necessarily rejecting Mr. Harris's testimony), the District Court quoted (Doc. 90 at 11) *Whitehead* v. *Burnside*: "Self-serving statements by a plaintiff do not create a question of fact in the face of contradictory, contemporaneously created medical records." 403 Fed. App'x 401, 403 (11th Cir. 2010) (per curiam). Along with *Whitehead*, the District Court cited three other cases in seeming support.

The most striking mistake here was the District Court's characterization of Mr. Harris's sworn testimony as self-serving, but its failure to recognize that the defendants' declarations (in Nurse Bunting's case, executed without any memory of the event) were equally, if not more, self-serving.

Setting that aside, *Whitehead* and its three companion cases did not support the District Court's application of the "exception" to medical records created by a *defendant*. In the first three cases, this Court considered *objective*, independent, nonparty medical records that contra-

dicted the plaintiff's *unsupported* allegations. *See Whitehead*, 403 Fed. App'x at 403 (contradictory evidence derived from affidavits, contemporaneous medical records, and opinions of three independent, non-party physicians); *Smith* v. *Sec'y, Dep't of Corr.*, 524 Fed. App'x 511, 513 (11th Cir. 2013) (contradictory evidence created by independent, nonparty physician immediately following the incident, supported by later medical exams by independent nonparties); *Brown* v. *Smith*, 813 F.2d 1187, 1189 (11th Cir. 1987) (contradictory evidence derived from 20-minute exam by nonparty and plaintiff's own actions and words). In none of the three cases did this Court rely on records created by a defendant.

The fourth case, *Logan* v. *Smith*, 439 Fed. App'x 798 (11th Cir. 2011), supports Mr. Harris's position, not the defendants'. With a disregard similar to that shown to Mr. Harris, the physician "walked into the room, looked at Logan, asked why Logan was there, immediately declared him 'normal,' and left the room." *Id.* at 802. The court refused to credit the physician's testimony that Logan suffered no injuries and ruled the trial court should not have granted summary judgment. *Id.* In particular, *Logan* noted that two independent, nonparty witnesses observed possible injuries after the defendant's cursory examination, and

Logan's own conduct suggested he had been injured. *Id.* Once again, this Court did not rely on corroborating evidence from a defendant, choosing to credit Logan's allegations and testimony equally because they were supported by independent, nonparty testimony and evidence.

As revealed by *Whitehead*, *Smith*, *Brown*, and *Logan*, this Court has allowed contemporaneously created medical records to supplant a plaintiff's version of the facts only if the records were created by independent, nonparty medical professionals. The District Court, on the other hand, disregarded Mr. Harris's story and evidence in favor of the records and testimony supplied by the defendants.

In sum, the District Court reached for summary judgment principles that allowed it to dispose of Mr. Harris's claims because it chose to believe the defendants over Mr. Harris. That is error, as is the District Court's application of the basic summary judgment standard. The District Court's feelings about Harris's complaints, even if it felt them mundane or quotidian, cannot be taken into consideration. *See Washington* v. *Dugger*, 860 F.2d 1018, 1021 (11th Cir. 1988).

C. Liberally Construing The Record Evidence In Mr. Harris's Favor, A Question Of Fact Existed As To Each Component And Element Of A Claim For Deliberate Indifference To A Serious Medical Need

In addition to misapplying the summary judgment rubric, the District Court also failed to recognize genuine disputes of material fact in the record evidence as to each element of Mr. Harris's claim for deliberate indifference to a serious medical need. His sworn allegations, his deposition transcript, the medical records submitted by Mr. Harris and the defendants, and even the defendants' self-serving declarations, when fairly construed, created issues of fact for the jury.

The District Court concluded no dispute of fact existed based entirely on the declarations submitted by Dr. Neilds and Nurse Bunting. *See* Doc. 90 at 11-12. Nevertheless, the District Court considered only evidence favorable to the defendants and disregarded as not credible evidence favoring Mr. Harris. Balancing the evidence and assessing credibility in this way misled the District Court to draw several inaccurate factual conclusions:

- The contemporaneous medical records reflected that Mr. Harris had minor swelling and bruising, but no broken bones or any significant injury as a result of his fall. Doc. 90 at 10.

- The medical records reflected more than a cursory examination. Doc. 90 at 11.
- Mr. Harris did not have an emergent issue requiring immediate diagnostic testing. Doc. 90 at 11.
- Mr. Harris admitted that the delay in testing did not cause any physical pain and alleged only that the delay caused psychological pain. Doc. 90 at 12-13.

Evidence in the record contradicted these factual conclusions, creating genuine disputes of material fact for each element of Mr. Harris's claim.

1. Even If Mr. Harris's Head Trauma Were Not A Serious Medical Need As A Matter Of Law, Construing The Medical Evidence In His Favor Created A Question of Fact

Setting aside the great weight of authority establishing that Mr. Harris's injury was a serious medical need as a matter of law, the question is ordinarily one of fact, unless the serious medical need is established by case law, as here. *Morrison*, 2014 WL 11460479, at *5 (citing *Aldridge* v. *Montgomery*, 753 F.2d at 970, 973 (11th Cir. 1985)).

The District Court ruled Mr. Harris "did not have a serious medical issue," but at least four corrections officers disagreed. Sergeant Allen took Mr. Harris to the emergency room immediately after his fall, and three more corrections officers considered Mr. Harris's injuries significant enough to declare a medical emergency, summon Nurse Bunt-

ing to examine Mr. Harris, and express additional concern to Nurse Bunting after he refused to treat Mr. Harris. Doc. 23 ¶¶ 26, 34, 36, 38, 39. Their concern alone was sufficient to create an issue of fact as to whether Mr. Harris had a serious medical need. *See Mann*, 588 F.3d at 1307.

Not only did the four corrections officers perceive an emergent issue, but the medical records created by the defendants and independent medical professional reflected a genuine dispute as to Mr. Harris's condition, despite what Dr. Neilds's and Nurse Bunting's declarations said. The District Court's conclusion that Mr. Harris suffered only "minor swelling and bruising" was wrong: a reasonable juror could easily conclude lacerations, a sizeable knot above the eye, still the size of a "jawbreaker" 20 days after the incident, and noticeable swelling to the arm and hand were not "minor." Doc. 23 ¶ 45; Doc. 81-3 at 5, 13. Dr. Neilds's own records reflected an obvious contusion to the head, swelling over Mr. Harris' right eye, and complaints of pain, dizziness, and impaired vision. Doc. 23 ¶ 27; *see* Doc. 81-3 at 1, 2.

This evidence raised a genuine issue as to whether Mr. Harris suffered from a serious medical need. *See Caffey*, 2017 WL 659349, at *1,

*3; *Woods*, 2013 WL 6473210, at *3; *Koehl*, 85 F.3d at 88; *Price*, 1996 WL 137305, at *1; *Murphy*, 51 F.3d at 719; *Browne*, 1994 WL 30605, at *2. And a reasonably jury could reach that conclusion.

Further discounting Mr. Harris's narrative, the District Court divined that Mr. Harris's injuries and the delay in treatment "did not cause any physical pain," finding Mr. Harris "admits" this fact. Doc. 90 at 12. He did not. Indeed, his deposition testimony reflected continuing "suffering," "dizziness," and "pain."[11] And MRIs revealed nerve damage, supporting Mr. Harris's allegations of pain. Docs. 23 ¶¶ 55, 56; 81-3 at 58. Pain is, of course, subjective. So, it is unclear how the District Court could reach this conclusion without reference to Mr. Harris's own sworn allegations.

The District Court also ruled Mr. Harris could not have had a serious medical need because the defendants saw him and determined he "did not have an emergent issue." Doc. 90 at 11. In *Goebert*, this Court rejected that basis for finding against a plaintiff due to the inherent log-

[11] *See* Doc. 81-1 at 19:7-8 ("it hurt more than anything else in other words"), 19:23 (Mr. Harris was dizzy), 28:6-8 ("I was feeling dizzy, and I still had severe, you know, pain in my neck and hand. I was still hurting."), 61:1 (noting "four days of suffering"), 61:6-7 ("I'm in pain [when] I go to the medical center in Hamilton three, four days later"), 62:19-20 ("I was in more pain. The pain increase.").

ical fallacy: "The fact that Goebert had been seen by Dr. Brown does not mean that a layman could not tell that she had a serious medical need," no matter what Dr. Brown may have said. 510 F.3d at 1327. Goebert's contention, like Mr. Harris's, was that medical staff had observed her, but not attended to her serious medical needs. *Id.*

If Dr. Neilds or Nurse Bunting likewise "saw" Mr. Harris, but failed to attend to his medical needs (as Mr. Harris alleges), a reasonable jury could still conclude Mr. Harris had a serious medical need.

Abundant evidence contradicted the District Court's conclusion that Mr. Harris did not suffer a "serious medical need," "significant injury," or "emergent issue." The District Court improperly withdrew those issues from the jury and erred in granting summary judgment.

2. Dr. Neilds And Nurse Bunting Knew Of A Risk Of Serious Harm

The District Court did not address the first element of the subjective component of Mr. Harris's claim: whether Dr. Neilds and Nurse Bunting knew of a risk of serious harm to Mr. Harris. But clearly they did, because the medical records reflected externally manifested symptoms resulting from Mr. Harris's trauma.

Dr. Neilds's medical records noted these symptoms, and his derisive compliment to Mr. Harris for having a "thick skull" is ready evidence of knowledge of the risk of harm. Docs. 81-3 at 1, 2; 23 ¶ 29.

Nurse Bunting also had knowledge of a risk of serious harm, because he had to be pressed into examining Mr. Harris by corrections officials who were concerned about the injuries. Doc. 23 ¶¶ 34, 36-42. He cannot excuse his failure to examine Mr. Harris by claiming he lacked knowledge when laypeople around him noticed.

The record reflected, at the least, a genuine dispute whether Dr. Neilds and Nurse Bunting knew of a risk of serious harm to Mr. Harris.

3. Dr. Neilds And Nurse Bunting Disregarded A Risk Of Serious Harm To Mr. Harris By Conduct That Was "More Than Mere Negligence"

The District Court also misapplied the second and third elements of the subjective component when it concluded the medical records reflected more than a cursory examination by Dr. Neilds and Nurse Bunting. Doc. 90 at 11. This conclusion was, at its core, a factual conclusion that Mr. Harris could not satisfy the second and third elements of the subjective component of this claim: whether Dr. Neilds and Nurse Bunt-

ing disregarded a risk of serious harm to Mr. Harris by conduct that is more than mere negligence.

Setting aside the District Court's misapplication of the "more than gross negligence" standard to reach that conclusion, *see supra* Argument I.B-I.C, the evidence taken in the light most favorable to Mr. Harris demonstrated a genuine dispute of material fact as to whether those elements were met.

The District Court construed Mr. Harris's claim as one alleging Dr. Neilds and Nurse Bunting "should have provided diagnostic testing immediately, rather than have him seek such testing through the 'sick call' procedures." Doc. 90 at 11. The District Court found no liability because both defendants "as explained in both of their declarations" (but citing not at all to Mr. Harris's evidence) "made the determination that Plaintiff did not have an emergent issue requiring immediate diagnostic testing." Doc. 90 at 11. The District Court characterized the claim as a "dispute with Defendants' medical decisions," which must fail because Dr. Neilds and Nurse Bunting conducted more than a cursory examination. Doc. 90 at 11.

The District Court's reconstruction of Mr. Harris's allegations reflected its unwillingness to construe the allegations and evidence in the light most favorable to Mr. Harris. Reading the complaint in the manner required, Mr. Harris did not allege his treatment fell below a certain standard of care or quibble with treatment decisions; instead, he alleged the defendants did not provide care at all. The *McElligott* court recognized this distinction:

> Further . . . this case does not involve a claim that different treatment should have been provided, which is tantamount to a medical judgment call, but that the treatment provided was grossly inadequate, amounting to no treatment at all.

McElligott, 182 F.3d at 1259.

There was no conclusive evidence that Mr. Harris's visit with Dr. Neilds was anything more than cursory, and Mr. Harris's verified allegations aver the opposite. Doc. 23 ¶ 28; *compare* Doc. 81-2 ¶ 5, *with* Doc. 81-3 at 2. Dr. Neilds prescribed aspirin to treat head trauma (Docs. 23 ¶ 29; Doc. 81-3 at 1) and complimented Mr. Harris on his "thick skull" before dismissing him. Doc. 23 ¶ 29. That is it.

The visit with Nurse Bunting was worse. He flat-out refused to treat Mr. Harris. *Id.* ¶¶ 37, 38. When a corrections officer finally convinced him otherwise, Nurse Bunting conducted a perfunctory examina-

tion. *Id.* ¶ 42. All he did was take vital signs. Doc. 81-3 at 3-4. The exam sheet contained a notation of "normal neurological status" (Doc. 81-3 at 3), but there are no objective observations by Nurse Bunting related to neurological status and no symptoms are noted, not even the significant knot on Mr. Harris's forehead. *See* Doc. 81-3 at 3. Rather than treating Mr. Harris (Nurse Bunting indicated "no treatment required"), Nurse Bunting's records reflected exasperation. Doc. 81-3 at 3-4. Nurse Bunting threatened Mr. Harris with confinement and warned him not to "utilize sick call for non-emergency issues" in large block letters where Mr. Harris's treatment should have been prescribed. Doc. 23 ¶ 37. This evidence was hardly conclusive of "more than a cursory examination." Doc. 90 at 11.

These actions do not prove mere medical negligence or a difference in opinion, but rather a complete failure and refusal to provide treatment at all. *See McElligott*, 182 F.3d at 1255, 1258; *Lancaster* v. *Monroe County, Ala.*, 116 F.3d 1419, 1425 (11th Cir. 1997) ("An official acts with deliberate indifference when he or she knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate."), *overruled on other grounds, Manders* v.

Lee, 338 F.3d 1304 (11th Cir. 2003) (en banc).[12] Such evidence creates a dispute of fact as to whether Dr. Neilds and Nurse Bunting actually examined and treated Mr. Harris.

Even if the evidence revealed Dr. Neilds and Nurse Bunting did examine Mr. Harris, they could still be liable for a deliberate indifference. The defendants cannot escape summary judgment merely by arguing they provided medical care. *McElligott*, 182 F.3d at 1259. *McElligott* identifies at least five circumstances under which a medical professional may still be liable after providing a modicum of medical care:

- By "delaying the treatment of serious medical needs, even for a period of hours."
- By "a showing of grossly inadequate care."
- By making "a decision to take an easier but less efficacious course of treatment."
- When "the need for treatment is obvious, medical care which is so cursory as to amount to no treatment at all may amount to deliberate indifference."
- By "failing to treat an inmate's pain."

[12] As recognized in *Lake* v. *Skelton*, 840 F.3d 1334, 1337 (11th Cir. 2016).

Id. at 1255, 1257 (citing *Brown* v. *Hughes*, 894 F.2d 1533 (11th Cir. 1990)). The District Court erred by failing to consider whether any of these principles applied to Mr. Harris.

At the very least, Mr. Harris's evidence demonstrated (1) "medical care which is so cursory as to amount to no treatment at all"; and (2) a failure to treat his pain. *Id.* at 1255. A jury could reasonably conclude Dr. Neilds's treatment was perfunctory and insulting, and Nurse Bunting's exam was callous disregard. The District Court should have recognized this evidence and allowed a jury to determine whether the defendants disregarded a risk of serious harm through conduct that was more than mere negligence. *McElligott*, 182 F.3d at 1257; *accord Hammer* v. *Slater*, 20 F.3d 1137, 1143 (11th Cir. 1994) ("Whether such conduct is merely negligent or rises to the level of recklessness is an issue for the jury."); *West* v. *Keve*, 571 F.2d 158, 162 (3d Cir. 1978) (inmate stated claim for deliberate indifference where physician prescribed only over-the-counter medication to treat post-operative pain). In short, although Dr. Neilds and Nurse Bunting did not have to provide the best (or even good) medical care, they still had to provide care.

The District Court erred by characterizing Mr. Harris's allegations and evidence as a simple dispute with the quality of care he received. Viewing the evidence in a light most favorable to Mr. Harris, a jury could have found the defendants disregarded a risk of serious harm through conduct that was more than negligence.

4. Dr. Neilds's And Nurse Bunting's Deliberate Indifference Caused A Cognizable Constitutional Harm

According to the District Court, Mr. Harris "cannot point to, much less provide evidence of, any cognizable damages that might have resulted" from his claim, thus he cannot show "how Defendant's conduct caused a constitutional harm." Doc. 90 at 12-13. This factual conclusion was really three conclusions in one. First, the District Court found no evidence of a "constitutional" injury. Second, the District Court found no cognizable damages. And third, the District Court found no causal relationship between Mr. Harris's constitutional injury and the defendants' conduct. All three conclusions were incorrect.

a. The District Court Erred By Concluding Mr. Harris Failed To Present Evidence Of A Constitutional Injury

The District Court's conclusion that Mr. Harris failed to present evidence of a constitutional harm (Doc. 90 at 13) begged the question whether the defendants were deliberately indifferent to his serious medical need. If the defendants were deliberately indifferent, Mr. Harris suffered a constitutional injury. *See Brown*, 894 F.2d at 1438. The District Court conflated the concepts of "constitutional injury" and "cognizable damages" in its analysis, because a conclusion of "constitutional injury" is not independent, but relies on an analysis of all of the elements of a claim for deliberate indifference.

If the District Court meant, instead, that Mr. Harris suffered no physical harm at all, that was clearly inaccurate. Even though the District Court concluded Mr. Harris did not suffer from any pain, it never referred to Mr. Harris's own allegations. Indeed, his deposition testimony reflected continuing "suffering," "dizziness," and "pain."[13] And MRIs revealed nerve damage, which supported Mr. Harris's allegations of

[13] *See supra* note 11.

pain. Docs. 23 ¶¶ 55, 56; 81-3 at 58. The District Court improperly disregarded this evidence.

Moreover, Mr. Harris alleged that the defendants conducted such cursory examinations that they amounted to no examinations at all. Without an adequate medical evaluation contemporaneous with the original incident, the District Court should not have concluded Mr. Harris did not suffer an injury. *See Logan*, 439 Fed. App'x at 802 ("with no medical evaluation, we cannot conclude that Logan suffered no injuries to those parts of his body").

b. The District Court Erred By Concluding Mr. Harris Failed To Present Evidence Of Damages Arising Out Of His Constitutional Injury

The District Court also concluded Mr. Harris had not presented evidence of "any cognizable damages." Doc. 90 at 12. The District Court cited 42 U.S.C. § 1997e(e) and *Hughes* v. *Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003), for the principle that psychological pain alone is insufficient to support a constitutional claim. Doc. 90 at 12-13. That general proposition is accurate (so long as there was no physical injury), but Mr. Harris presented evidence of more than mere psychological harm. As this Court recognized in *Brown*, a delay in the treatment of pain or oth-

er symptoms is sufficient harm to give rise to a constitutional claim. 894 F.2d at 1438. And this brief has recounted at length the physical harm and pain suffered by Mr. Harris as a result of being left untreated.

But even if the District Court could have concluded that Mr. Harris could not establish actual damages, summary judgment was still not appropriate. Nominal damages are available for constitutional claims, even if the plaintiff cannot prove an injury sufficient to entitle him to compensatory damages. *Hughes*, 350 F.3d at 1162. In fact, *Hughes* reversed an order dismissing a constitutional claim because the district court had not considered whether the plaintiff's complaint "could be liberally construed to request nominal damages." *Id.* (citing *Leal* v. *Ga. Dep't of Corr.*, 254 F.3d 1276, 1280 (11th Cir. 2001)).

The District Court undertook no such inquiry. If Mr. Harris can present adequate evidence to sustain a claim for deliberate indifference to a serious medical need, he should be permitted to present his claim to a jury, whether for actual or nominal damages.

c. The District Court Erred By Granting Summary Judgment Because Mr. Harris Could Not Demonstrate How The Defendants' Conduct Caused A Constitutional Harm

Finally, the District Court erred by concluding that no harm "resulted" from Mr. Harris's claims. Essentially, the District Court found, as a matter of law, that Mr. Harris could not prove causation.

To prove causation in an Eighth Amendment deliberate indifference claim, Mr. Harris need only show "personal participation in the constitutional violation." *Goebert*, 510 F.3d at 1327; *accord Melton*, 841 F.3d at 1226. There can be little doubt here that Dr. Neilds and Nurse Bunting personally participated in the constitutional violation alleged and demonstrated by Mr. Harris. The District Court failed to consider this standard.

Even if the District Court had some doubt as to causation, it was not appropriate to grant summary judgment. Proof of causation in a constitutional claim is almost always a question of fact reserved for the jury. *E.g.*, *Allen* v. *Autauga County Bd. of Educ.*, 685 F.2d 1302, 1305 (11th Cir. 1982) ("Proof of causation under the *Mt. Healthy* test is a question of fact."); *Charles H. Wesley Educ. Found., Inc.* v. *Cox*, 408

F.3d 1349, 1352 (11th Cir. 2005) ("Causation in the standing context is a question of fact unrelated to an action's propriety as a matter of law."); *Beckwith* v. *City of Daytona Beach Shores, Fla.*, 58 F.3d 1554, 1560 (11th Cir. 1995) ("issues of causation in a [First Amendment] retaliatory discharge claim present questions of fact"); *Jackson* v. *Sauls*, 206 F.3d 1156, 1168 (11th Cir. 2000) ("jury issues" existed whether an illegal stop caused deadly gunfight).

The defendants may argue their deliberate indifference cannot be causally connected to Mr. Harris's back surgery required to alleviate pain in his back, neck, and right arm. But that question is one for the jury. Mr. Harris was wheelchair-bound with degenerative nervous condition. Doc. 23 ¶ 18; Doc. 81-3 at 62. It is possible that these preexisting conditions were exacerbated and surgery necessitated by the defendants' failure to examine and treat Mr. Harris.

Although the District Court found that surgery did not logically follow from the allegations, a jury could find that Mr. Harris's preexisting conditions make the connection more likely. That is the longstanding "eggshell skull" rule of tort law and causation: "If a tortfeasor inflicts a graver loss on his victim than one would have expected because

the victim had some preexisting vulnerability, that is the tortfeasor's bad luck; you take your victim as you find him." *Schmude* v. *Tricam Indus., Inc.*, 556 F.3d 624, 628 (7th Cir. 2009).

The District Court erred by finding no causation as a matter of law. This question is also one for the jury.

CONCLUSION

The Court should vacate the judgment entered in favor of Dr. Neilds and Nurse Bunting and remand for further proceedings, including a jury trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 10,740 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

March 15, 2017

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 15th day of March, 2017, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 15th day of March, 2017, to:

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