IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GERALD J. LINDSLY	:	**CASE NO. C-1-09- cv-375**
Plaintiffs	:	**Judge Beckwith** **Magistrate Judge Hogan**
vs.	:	
MICHAEL WORLEY	:	**DEFENDANTS MICHAEL WORLEY'S AND WILLY DALID'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS**
and	:	
WILLY DALID	:	
Defendants	:	

Now comes Defendants Michael Worley and Willy Dalid, through Counsel, who moves this Court to grant Defendants Summary Judgment as provided in Federal Civil Rule 56 for reasons set out in the attached memorandum, the affidavits of Jeff Eiser, Sharon King, Deputy Poole, Chief Deputy Donovan, Steve Overberg, Stephen Kerkhoff and the depositions filed with the Court.

Respectfully submitted,

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MEMORANDUM

A. Introduction

This case involves an inmate, Plaintiff Lindsly, who spat on the floor and wall of the Hamilton County Justice Center. When ordered by corrections officer to wipe it up, the inmate used a towel to swipe at the spittle. In the same motion as the swipe at the spittle, the inmate threw the towel with the spit on it toward the corrections officers, Defendants Worley and Dalid. Plaintiff Lindsly then dropped to the floor and was pulled along the floor and placed into a holding cell by Defendants Worley and Dalid. Later, when other corrections officers removed Plaintiff Lindsly from the holding cell, he was found to have an orbital fracture of the right eye and a bloody nose. Plaintiff Lindsly has a history of attempting to injure himself by banging his head on doors, a desk, and windows in the Hamilton County Justice Center. Deputy Wickman witnessed Plaintiff Lindsly banging his head on the holding cell door about an hour after the interaction in which Defendants Worley and Dalid were involved.

The only defendants in this case are corrections officers Worley and Dalid. Both assert that (1) they are protected by qualified immunity and (2) that they did not cause the injury to Plaintiff Lindsly's eye or face, and (3) that Plaintiff Lindsly failed to follow the administrative procedures required by the Prison Litigation Reform Act.

Judge Spiegel dismissed the Plaintiff Lindsly's claims without prejudice on May 4, 2009 in case C:1-07-cv-588. The Affidavit of Steven Kirkoff demonstrates that Plaintiff Lindsly's criminal insanity proceedings were dismissed November 13, 2007.

B. The Facts

There are two distinct theories presented in the evidence in this case as to when and how the injuries to Plaintiff Lindsly's face occurred. Neither theory demonstrates that either Defendant Worley or Defendant Dalid caused the injuries or violated Plaintiff Lindsly's rights.

1. The Medical Records

The undisputed medical evidence comes from the treating emergency room physician, Dr. Joseph. Dr. Joseph has no recollection of the condition or treatment of Plaintiff Lindsly and testified based solely upon the medical records, Plaintiff's Exhibit CC. (Joseph Depo. p. 22). Based upon those medical records, Dr. Joseph testified that Plaintiff Lindsly had orbital fractures of the right eye and a broken nose. (Joseph Depo. p. 13). Dr. Joseph found no injuries or bruising to Plaintiff Lindsly's neck, back, chest, or abdomen. (Joseph Depo. p.11). The history given by Plaintiff Lindsly and reported in Exhibit CC, the University Hospital Medical Records, was that Plaintiff Lindsly suffered no nausea, vomiting, or neck pain. (Joseph Depo. p.9). He did not lose consciousness. (Joseph Depo. p.9). Plaintiff Lindsly also had bipolar disorder. (Joseph Depo. p.9).

Dr. Joseph explained that the injuries to Plaintiff Lindsly's face could have been caused by one blow or multiple blows. (Joseph Depo. p.22). The type of facial injuries to Plaintiff Lindsly's face were consistent with "a car accident, motorcycle accident, a fall from a height . . . a punch, a knee . . " (Joseph Depo. p.20). The injuries could also have been self-inflicted by Plaintiff Lindsly hitting his head on a hard object. (Joseph Depo. p. 24).

Significantly, the injuries to Plaintiff Lindsly's nose would have caused bleeding "almost immediately." (Joseph Depo. p. 25). The orbital fracture would cause the right eye to swell as depicted in the photograph of Plaintiff Lindsly, Defendants' Exhibit 140. (Joseph Depo. p.24).

That swelling would occur within a period of not less than 20 minutes nor more than 3 hours after the injury. (Joseph Depo. p.25). The eye injury in some cases can cause pain. (Joseph Depo. p.20). Plaintiff Lindsly was given one Percoset upon arrival at the emergency room, but received no prescription for ongoing pain killers. (Joseph Depo. p. 25, 26).

2. Plaintiff Lindsly's Testimony

Despite telling Dr. Joseph that he did not lose consciousness, the only sworn testimony by Plaintiff Lindsly is that he did lose consciousness and has no recollection as to what happened or how his eye was injured. (Lindsly Depo. p. 112, 120). Perhaps this, along with Plaintiff Lindsly's mental illness, explains the series of contradictions in statements made by him after his eye was injured. (Lindsly Depo. p. 122, 123).

For instance, Plaintiff Lindsly told Deputy Wickman, who took him to medical on the morning of August 4, 2006, that the police injured him during his arrest the night before. (Wickman Depo. p. 24- Plaintiff's Exhibit W). Plaintiff Lindsly told the medical staff at the Hamilton County Justice Center that he had been injured last evening. (Tudor Depo. p. 94, Defendants' Exhibit 142).

Undoubtedly, Plaintiff Lindsly will cite other unsworn statements by Plaintiff Lindsly to Lt. Tudor and others in an attempt to tie one of the defendants to the right eye injury. Since we now know that Plaintiff Lindsly lost consciousness and has no memory of how his injury occurred, no rational trier of facts can credit these unsworn statements. In light of Plaintiff's sworn testimony that he lost consciousness and does not know how or who injured him, no reasonable trier of facts could credit any of Plaintiff Lindsly's unsworn statements.

2. The Gentry Version of the Events

The first theory of how Plaintiff Lindsly's right eye was injured and his nose broken is given by the testimony of inmate Gentry. Inmate Gentry testified that he witnessed the event in which Plaintiff Lindsly was injured and that within one minute he saw that Plaintiff Lindsly's eye was swollen and nose was bleeding. (Gentry Depo. P. 42, 43, 44). Inmate Gentry's theory is unreasonable because the medical testimony showed that eye right injury had to have occurred at least 20 minutes before corrections officers Worley and Dalid slid Lindsly into the cell. (Joseph Depo. p.25).

Inmate Gentry testified that it was Deputy Lally, who is not a defendant in this case, that intentionally struck Plaintiff Lindsly in the face with his knee causing the eye and nose injuries. (Gentry Depo. p. 29, 40, 41, 43). Previously, in a statement to Lt. Tudor, inmate Gentry misidentified Defendant Worley as the one who kneed Plaintiff Lindsly in the face. However, Lt. Tudor did not show inmate Gentry the video of the incident and did not use a photographic array that included Deputy Lally in the identification process. (Gentry Depo. p. 45, 47, 48). This led to the misidentification by inmate Gentry in the unsworn statement by Inmate Gentry to Lt. Tudor. The only sworn testimony by inmate Gentry is that Deputy Lally, not Defendant Worley, caused the injury to Plaintiff Lindsly's eye and nose. At no time was Defendant Dalid alleged to have caused any injuries to Plaintiff Lindsly.

The testimony of Deputy Lally tends to support the testimony of inmate Gentry in that he testified that the back of Plaintiff Lindsly's skull came in contact with the outside of Deputy Lally's left knee. (Lally Depo. p. 18). This contact came about midway through the incident at pictures labeled Exhibits 101 and 102. (Lally Depo. p. 49, 50). Deputy Lally saw no blows struck against Plaintiff Lindsly. (Lally Depo. p. 53, 54).

3. Sequence of Events Demonstrating Lindsly's Injuries to Have Been Self Inflicted and that Neither Defendant Worley or Defendant Dalid Used Excessive Force.

The other theory, supported by all of the other witnesses, is that the injuries to Plaintiff Lindsly were self-inflicted. It is the only theory consistent with Dr. Joseph's testimony.

A. The Prologue to the Event

On August 3, 2006, Plaintiff Lindsly walked away from a mental health facility in a psychotic state. (Lindsly depo. p. 89, 90). After breaking a window with an ADT sign, Cincinnati Police arrived and tased him several times for his own safety. (Lindsly depo. p. 98, 101). Plaintiff Lindsly collapsed to the ground, falling forward. (Lindsly depo. p. 102). Plaintiff Lindsly lost consciousness for a short time after being tased. (Lindsly depo. p. 102). Plaintiff Lindsly was handcuffed, put in the back of a cruiser, and taken to the Hamilton County Justice Center. (Lindsly depo. p. 102, 103). During the confrontation, Plaintiff Lindsly lost control of bowels and deficated in his clothing. (Lindsly depo. p. 104). His only recollection of arrival at the Justice Center is getting cleaned up and being given a new jail uniform. (Lindsly depo. p. 104).

Defendants Exhibit 149, the folder used by the Sheriff's Department for Plaintiff Lindsly, shows that he arrived at the Justice Center at 8:12 p.m. on August 3, 2006. (Kilday depo. p. 39). The folder indicates that on August 3, 2006, Plaintiff Lindsly was uncooperative and was not fingerprinted and photographed upon admission to the Justice Center. (Kilday depo. p. 39, 40-Plaintiff's Exhibit EE). Plaintiff Lindsly spent the night in a cell in Lincoln 21, pod F in the Justice Center. (Kilday depo. p. 40).

On the morning of August 4, 2006, Deputy Kilday was the security officer for the identification section of the Justice Center where inmates are photographed and fingerprinted.

(Kilday depo. p. 6,7). Plaintiff Lindsly was uncooperative, loud and aggressive. (Kilday depo. p. 7). He was using foul language and the "N" word around other black inmates and the black fingerprint technicians. (Kilday depo. p. 7). Plaintiff Lindsly was refusing to follow instructions, to be quiet, and was causing the other people around him to become upset. (Kilday depo. p. 7, 8). Because of the commotion, Defendant Dalid came into the identification section and was asked by Deputy Kilday to take Plaintiff Lindsly back to the large court holding cell which contained numerous other inmates. (Kilday depo. p. 9, 10). As Lindsly was being brought back from the identification section, the inmates in the large holding cell pleaded that Plaintiff Lindsly not be put in the large holding cell with them. (Worley Depo. p. 34, 35; Lally depo. p. 27, Plaintiff's Exhibit X, p. 2). The decision was made to put Plaintiff Lindsly into cell AH5, which is used for inmates that need to be separated from other inmates for various reasons. (Worley Depo. p. 34, 35; Dalid Depo. p.46, 47, 48).

Defendant Worley joined Defendant Dalid in escorting Plaintiff Lindsly to the cell designated AH5. (Worley Depo. p. 35). Deputy Lally followed a short distance behind. (Lally Depo. p. 35). Plaintiff Lindsly then turned his abusive babblings toward Defendant Worley, calling him cancerous and saying that Worley made him sick, that he – Lindsly– was G.I.Joe, and works for NASA and the CIA. (Worley Depo. p. 34, 35; Dalid Depo. p.50). As they approached cell AH5, Plaintiff Lindsly spit a large, green piece of phlegm on to the floor. (Worley Depo. p. 34, 35; Dalid Depo. p.50; Lally Depo. p. 35- Plaintiff's Exhibits I, P, and Y). Either Deputy Lally or Defendant Worley told Plaintiff Lindsly that he will have to clean up what Defendant Dalid described as a "big lugar." (Worley Depo. p. 35; Dalid Depo. p.50; Lally Depo. p. 36).

B. The Video[1]

Virtually the entire event, from this point forward, is captured on the security cameras of the Justice Center. The images from the security cameras show Defendant Dalid and Plaintiff Lindsly approaching AH5. (Defendants Exhibits 1 through 20). Defendant Worley then enters the scene and a discussion begins with Plaintiff Lindsly. (Defendants Exhibits 21 through 27). Defendants Worley and Dalid have a verbal exchange as there is pointing at the floor and toward inmate Gentry who hands a towel to Defendant Dalid. (Defendants Exhibits 28 through 67). Plaintiff Lindsly is handed the towel, appears to swipe at something, and, in the same motion, throws the towel in the direction of Defendants Worley and Dalid. (Defendants Exhibits 68 through 79).

The trajectory of the towel cannot be seen on the security cameras. It lands in front of inmate Gentry, between Defendants Worley and Dalid. The security camera images show that Defendants Worley and Dalid are looking at Plaintiff Lindsly, not inmate-porter Gentry. So it can be inferred that they did not know inmate-porter Gentry's exact location.

At this point the images show that Defendants Dalid and Worley reach for Plaintiff Lindsly an instant before Deputy Lally reaches Plaintiff Lindsly. (Defendants Exhibit 80). That image shows Defendant Worley's right hand to be open as if to block spit that might be projected in his direction. Image 80 shows Defendant Worley's left hand reaching for the right hand of

[1]The storage system for these images collect 18 images per second from 16 cameras. The video system selects the camera with the most movement to have more saved images than the cameras with less movement. Defendants' Exhibits 1 through 139 are all of the images saved from camera location 7 showing the interaction between Plaintiff Lindsly, Deputy Lally, Defendant Worley, and Defendant Dalid. The "video" referred to in the various depositions spans 8:00 a.m. to 10:00 a.m. on August 4, 2006 from cameras 6 and 7. (Joint Exhibit I. Affidavit of Steven A. Overberg).

Plaintiff Lindsly. Deputy Lally's right arm is inches from Plaintiff Lindsly's right shoulder. The view of Defendant Dalid is somewhat obstructed but he appears to be reaching for Plaintiff Lindsly's left arm. At the same moment two other deputies, Gutierrez and Petrie, are exiting the elevator.

The next image shows Defendants Worley and Dalid standing and Plaintiff Lindsly no longer in the picture. Defendant Dalid's hands are not touching anyone. Plaintiff Worley's hands are reaching toward the location where Plaintiff Lindsly had been standing. (Defendants Exhibit 81). The next the images show Defendants Worley and Dalid and Deputy Lally leaning over Plaintiff Lindsly. Deputies Petrie and Gutierrez are watching. Deputy Harper walks to the door of AH and holds it open. (Defendants Exhibits 82 through 100).

At this point, Plaintiff Lindsly appears to sprawl backwards, with his feet going into the air. His upper body is not visible. Deputy Lally, and Defendants Worley and Dalid go out of camera view. Defendant Worley walks around to Plaintiff Lindsly's feet. Defendant Dalid has Plaintiff Lindsly's upper body. Deputy Lally is standing a few steps behind Plaintiff Lindsly. Deputy Gutierrez is still watching the events. (Defendants Exhibits 101 through 116).

Defendants Worley and Dalid slide Plaintiff Lindsly along the floor and into AH5. Defendant Dalid leaves the cell first followed by Defendant Worley. Deputy Harper shuts the door. (Defendants Exhibits 117 through 139). Throughout the entire episode, Defendant Dalid holds on to papers in his left hand. It takes only 29 seconds from the initial contact in image 80 to Defendant Worley stepping out of the AH5 in image 133.

C. Expert Evaluation of the Video

Two experts in the use of force by law enforcement officers evaluated the video. Captain McGuffey is the use of force training officer for Hamilton County Sheriff's Department. She is

certified as a trainer by the State of Ohio. (McGuffey Depo. p. 8, 99 though 102). Herb Hood is also a use of force trainer certified by the State of Ohio. (Hood Depo. p. 6 though 22, 122, 123). Both explained the concept of the continuum of force and that, in this instance, Defendants Worley and Dalid would have been justified in using various techniques, beyond verbal commands, in the continuum of force because of Plaintiff Lindsly's aggressive stance and non-compliance with previous verbal orders. (McGuffey Depo. p. 53; Hood Depo. p. 80). Both experts also concluded that while Defendants Worley and Dalid would have been justified in using various pain compliance techniques upon Plaintiff Lindsly, the video shows that they did not use any of those types of techniques. (McGuffey Depo. p. 45; Hood Depo. p. 80).

The Sheriff's use of force training officer, Captain McGuffy, testified that the actions of Defendants Worley and Dalid in the incident comported with their training. Both use of force experts who testified opined that the actions of the defendants comported with Sheriff Department policies, Ohio Peace Officer Training standards, and did not violate Plaintiff Lindsly's constitutional rights.

D. The Condition of Plaintiff Lindsly after being put into AH5.

Deputies Harper, Kilday, Lally, and Defendants Worley and Dalid testified that they observed Plaintiff shortly after he was put in to cell AH5 and that his face was not injured at that time. (Harper Depo. p. 43, 44, 56, 57, ; Kilday depo. p. 22- Plaintiff's Exhibit EE; Lally Depo. p. 27- Plaintiff's Exhibit Y; Worley Depo. p. 41- Plaintiff's Exhibit P; Dalid depo. p. 151). Significantly, Plaintiff Lindsly's attorney for the criminal case visited him about ten minutes after Plaintiff Lindsly was put into cell AH5. (Clark Depo. p. 15,). The only injury Attorney Clark saw was the scrape mark above Plaintiff Lindsly's left eye. (Clark Depo. p. 29, 57). Attorney Clark testified that there was no active bleeding of Plaintiff Lindsly's nose or discoloration of the

right eye. (Clark Depo. p. 15, 16, 29, 48, 57). Had Plaintiff Lindsly had the injuries depicted in Defendants' Exhibit 140, he would have notified someone to get medical attention for Plaintiff Lindsly. (Clark Depo. p. 16).

E. Self Inflicted Injuries.

Deputy Wickman's function in the Justice Center is primarily to escort prisoners from the Intake and Court room areas to Admissions. (Wickman Depo. p. 6). As Deputy Wickman got off of the elevator directly across from cell AH5, he saw Plaintiff Lindsly take about a step and a half and ram his face into the door to the cell. (Wickman Depo. p. 6, 7- Plaintiff's Exhibit W). Deputy Wickman took his first set of inmates to admissions and returned about 10:15 to make a special trip to take Plaintiff Lindsly to Admissions with the help of Deputy Cotrell. (Wickman Depo. p. 7, 8) Upon arrival in Admissions, Deputy Wickman was directed to take Plaintiff Lindsly straight to the mental health unit. (Wickman Depo. p. 16).

At the time Deputies Wickman and Cottrell removed Plaintiff Lindsly from AH5, he was actively bleeding. (Wickman Depo. 23, 24; Cottrell Depo. p. 20, 21). Several years earlier, Plaintiff Lindsly had to be stopped from banging his head while being held in intake in the Justice Center. (Poole Affidavit). About a month after August 4, 2006, Plaintiff Lindsly was again found to be banging his head in the Mental Health Unit of the Justice Center. This incident resulted in Plaintiff Lindsly being put into a restaint chair and being given forced medications to control his self-destructive behavior. (King Affidavit).

F. Lt. Tudor and Internal Affairs

No evidence establishes the "why?" but Lt. Tudor conducted an internal affairs investigation in what can most charitably be considered an inept and incompetent manner. The ineptitude or incompetence of Lt. Tudor undoubtedly caused the initial lawsuit to be filed

because he concluded that Defendants Worley and Dalid used excessive force. After inmate Gentry's testimony that Lally, not Worley or Dalid cause the injury, continuation of the lawsuit is clearly frivolous.

To begin with, Lt. Tudor did not know of General Order 214 which sets out the manner in which he is to conduct investigations. (Donovan Affidavit; Tudor Depo. p. 175, 176). Lt. Tudor did not know of the existence of the Corrections Division supplement C.7 to General Order 208 on use of force. (Tudor Depo. p. 83- Plaintiff's Exhibit F). Lt. Tudor also admitted that despite the requirement that all deputies get annual use of force training, he excepted himself from this requirement for the last nine years. (Tudor Depo. p. 73, 74). Lt. Tudor admitted that he had no idea what Deputies are taught regarding use of force during their training. (Tudor Depo. p. 180). Lt. Tudor created his own "necessary in performance of duty exception" to the use of force policy. (Tudor Depo. p. 79, 80). Lt. Tudor was never a corrections officer, never trained as a corrections officer, and never taught use of force to law enforcement or corrections officers. (Tudor Depo. p. 69, 70, 71).

Since Lt. Tudor did not know of General Order 214, he did not give the required three day notice to Defendant Dalid that he was the subject of an investigation. (Tudor Depo. 164, 165, Donovan Affidavit, Exhibit A, 214.07.4). Since the allegation was that of excessive force, a thorough investigation was required. (Donovan Affidavit, Exhibit A, 214.03 and 214.04.2). Lt. Tudor, in his "thorough" investigation, deemed it unnecessary to talk to Deputies Harper, Petrie, and Gutierrez who witnessed the entire event. (Tudor Depo. p. 134, 162). He did not interview Deputies Wickman, Cotrell, or Kilday who wrote jail incident reports concerning the incident. (Tudor Depo. p.162- Plaintiff's Exhibits W, GG, EE). Lt. Tudor used a one photograph identification procedure which resulted in inmate Gentry misidentifying Worley as

having thrown a knee strike to Plaintiff Lindsly's face. (Gentry Depo.45). Finally, General Order 214.2.a.(4) requires that preliminary interviews be recorded. Lt. Tudor did not do this and lost forever the reason he determined that Dalid was a subject of the investigation after notifying Defendant Dalid that he was appearing merely as a witness. (Tudor Depo. 174- Defendants' Exhibit 144).

Lt. Tudor is not a witness to the event and not an expert on use of force. In short, he adds nothing, but confusion, to the facts in this case.

4. Failure to Comply With Prison Litigation Reform Act

The Affidavit of Jeffery Eiser establishes that Simon L. Leis, the Hamilton County Sheriff, has established a grievance procedure for his jail facilities. Plaintiff Lindsly admittedly did not file a grievance concerning his injuries while in the custody of the Hamilton County Sheriff. (Lindsly Depo. p. 121). Plaintiff Lindsly knew of the grievance procedure because he filed a grievance concerning church services. (Lindsly depo. p. 126). Having been found not guilty by reason of insanity, Plaintiff Lindsly was in state custody beyond the date that this suit was filed. (Affidavit of Stephen Kerkhoff, Opinion and Order, doc. 19 and Opinion and Order, doc. 26 in case C-1:07-cv-588).

C. Argument

Plaintiff Lindsly's claims against Defendant Dalid should have ended as soon as it became apparent that Lt. Tudor only found that Plaintiff Lindsly was touched without a verbal warning. Once it became clear that Lt. Tudor had no idea of what he was doing and the unrebutted testimony of two use of force experts established that Defendant Dalid's actions complied with his training, pursuit of claims against Defendant Dalid should have ended.

Plaintiff Lindsly's claims against Defendant Worley should have ended as soon as inmate Gentry identified Deputy Lally as the corrections officer who caused the injuries to Lindsly's eye

and nose. Once that fact was established, Defendant Worley is in the same position as Defendant Dalid.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c).* This Court must assume the truth of the non-moving party's evidence and construe all inferences from that evidence in the light most favorable to the non-moving party. *Id.* However, the United States Supreme Court has held that, when considering a motion for summary judgment by a law enforcement officer, Courts must view the facts in the light depicted by a video tape which captured the events underlying an excessive force claim. *Scott v.Harris* 127 S.Ct 1769, 1775 to 1777 (2007).

A genuine issue of material fact exists when there is sufficient evidence for a trier of fact to find for the non-moving party. A "mere scintilla" of evidence will not be enough for the non-moving party to withstand summary judgment. *Skousen v. Brighton High School*, 305 F.3d 520, 526 (6th Cir. 2002). Furthermore, the non-moving party may not rest on his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The evidence contained in the affidavits and depositions in this case, when construed in the light of the video and still pictures in conjunction with the undisputed medical testimony and facts favorable to Plaintiff Lindsly, do not support any claim that either Defendant Worley or Defendant Dalid caused the injuries to Plaintiff Lindsly. Both are protected by Qualified Immunity. Further, Plaintiff failed to comply with the Prison Litigation Reform Act when he filed this case.

1. Defendants Dalid and Worley are protected by Qualified Immunity

Corrections officers are entitled to qualified immunity unless their conduct violates "clearly established constitutional or statutory rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). It requires a two-step inquiry. First, the court must determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiff show that a constitutional violation occurred. If the answer is yes, then the court asks whether the violation involves "clearly established constitutional rights of which a reasonable person would have known." *Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir.1996). Qualified immunity is immunity from suit, not just immunity from damages. *Crockett v. Cumberland College*, 316 F.3d 571, 578 (6th Cir.2003).

The Supreme Court emphasized that it is not enough for a right to be "clearly established" as a general proposition; it must be "clearly established" in the "more particularized, relevant sense" of the "specific context of the case." *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. A plaintiff need not offer precedent with "materially similar facts," but the precedent must give "fair warning" that the action in question is unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 740-41, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

The most recent Sixth Circuit case dealing with "use of force" and pre-trial detainees is *Leary v. Livingston County* 528 F.3d 438, 443 (6th Cir. 2008) It explains that the Fourteenth Amendment's Due Process Clause, which "protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham v. Connor*, 490 U.S. 386, 395 n. 10, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). By contrast, convicted prisoners may bring excessive-force claims under the Eighth Amendment, see *Graham*, 490 U.S. at 395 n. 10, 109 S.Ct. 1865, and "free citizen[s]" may bring such claims under the Fourth Amendment, see id. at 394, 109 S.Ct. 1865.

Leary explains that "while there is room for debate over whether the Due Process Clause grants pretrial detainees more protections than the Eighth Amendment does, see *id*. at 395 n. 10, 109 S.Ct. 1865," the Sixth Circuit did not resolved that debate in *Leary*.

Under either constitutional guarantee, an excessive-force claimant must show something more than *de minimis* force. In *Leary*, supra at 443 the Sixth Circuit described the *de minimis* injury as "Leary, to start with, did not suffer any objectively verifiable injury from the blow. There was no hospital visit after the encounter, no doctor's visit, no bruise, nothing in short to indicate that the encounter rose above a 'negligible [use of] force' or caused anything more than a 'trifling injury.'" *Leary*, supra at 444, goes on to explain that the point of the *de minimis* rule is to make it clear that the Constitution does not become a "font of tort law" that the federal courts "superimpose[ ] upon whatever systems" the States already have. *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Otherwise, every minor touching would become actionable, blurring the lines between the state courts' enforcement of their tort laws and the federal courts' enforcement of the Constitution. Whatever else non-actionable *de minimis* force may be, it must include a touching that neither "hurt" nor threatened the individual."

Finally, in assessing a claim of qualified immunity, the Sixth Circuit has consistently held that damage claims against government officials from alleged violations of constitutional rights must be proven, with particularity, by facts that demonstrate what each individual defendant did to violate the asserted constitutional right. *Lanman v. Hinson* 529 F.3d 673, 684 (2008).

a. Deputy Dalid is protected by Qualified Immunity

No witness described Deputy Dalid as ever administering any blows to Plaintiff Lindsly. He was found by Lt. Tudor to have laid hands on Plaintiff Lindsly without first giving a verbal warning. Dr. Joseph and the medical records from University Hospital show that there were no injuries other than to Lindsly's face. Inmate Gentry, if he is to be credited by a trier of fact,

establishes that it was Deputy Lally who delivered the knee strike to Plaintiff Lindsly's face. The mere touching of an inmate is a *de minimus* injury which is not actionable as a constitutional violation.

b. Deputy Worley is protected by Qualified Immunity.

Plaintiff Lindsly pursued his claims against Defendant Worley because Lt. Tudor, in amateurish attempt at an investigation, coaxed inmate Gentry into misidentifying Defendant Worley as the Deputy who, according to Gentry, intentionally struck Plaintiff Lindsly in the face with his knee. Once inmate Gentry viewed the video of the incident, it was clear to him that it was Deputy Lally who delivered the blow to Plaintiff Lindsly. This leaves no evidence that Defendant Worley did anything, but – if Lt Tudor "expertise?" is believed – touch Plaintiff Lindsly without a verbal warning.

Plaintiff Lindsly, in an attempt to keep Defendant Worley in the case, may point to a statement by Deputy Lally that Worley said he "threw a knee strike." Deputy Lally, in his only sworn testimony on the subject, stated that he had no recollection of such a conversation. Defendant Worley said he may have inadvertently made contact with Plaintiff Lindsly with his knee during the incident.

Even if both of these statements are admissible and credited, they establish no constitutional violation. Dr. Joseph's examination of Plaintiff Lindsly was that Lindsly had no injuries, other than the ones to his face. The only evidence about those injuries is they that were either (1) self inflicted (Wickman testimony) or (2) caused by Lally (Gentry Testimony). No evidence shows any injury from the inadvertent contact by Worley's knee.

Further, negligence and deliberate indifference are irrelevant to a claim of excessive force in violation of the Eighth Amendment. Such a claim requires proof that force was applied maliciously and sadistically to cause harm. See *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). The

Ninth Circuit has explained that even pretrial detainees, who are protected by the Due Process Clause and not the Cruel and Unusual Punishments Clause, must show conduct so reckless or wanton as to be tantamount to a desire to inflict harm and therefore is equivalent to a deliberate choice. See *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir.1991) (en banc). Negligence is not actionable under § 1983 even outside of the prison context. See *County of Sacramento v. Lewis*, 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

Deputy Worley's inadvertent contact is not actionable in a 42 *USC 1983* context. Defendant Worley is protected by qualified immunity.

2. Defendants Worley and Dalid are entitled to Summary Judgment with regard to the eye and facial injuries to Plaintiff Lindsly.

There is no evidence that either Defendant Worley or Defendant Dalid caused the injuries to Plaintiff Lindsly's eye or nose. Both are entitled to Summary Judgment as to this element of Plaintiff Lindsly's damage claims. If Plaintiff Lindsly is in some way able to distinguish *Leary* and show that mere touching can be a constitutional claim, the evidence concerning the injuries to Plaintiff Lindsly's eye and face cannot be considered. No evidence shows that those injuries can be attributed to the actions of Defendants Worley and Dalid.

3. Plaintiff Lindsly failed to comply with the Prison Litigation Reform Act.

Plaintiff Lindsly failed to exhaust all administrative remedies available to him as required prior to the commencement of a lawsuit pursuant to the Prison Litigation Reform Act of 1996 ("PLRA") *42 U.S.C.S. §1997e(a).*

Prisoners must exhaust their administrative remedies before challenging prison conditions. 42 U.S.C. § 1997e. "There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." *Jones v. Bock*, 127 S.Ct. at 918-19. "Failure to exhaust is an affirmative defense under the PLRA, and [ ] inmates are not required to specially plead

or demonstrate exhaustion in their complaints." Id. at 921. Most recently this Court in *Jordan v. Hamilton County Justice Center*, Case No. C-1-06-73, dismissed a prisoner lawsuit for failing to exhaust the administrative remedies available in the Hamilton County Justice Center.

Defendants raised the failure to comply with the Prison Litigation Reform Act in their Amended Answer. The Hamilton County Sheriff's Department has a formal grievance procedure. Plaintiff Lindsly knew how to file formal grievances and, in fact, filed one regarding religious services. He did not, however, file a grievance regarding the events on the morning of August 4, 2006 involving Deputy Lally, Defendant Worley and Defendant Dalid, or the eye and nose injuries. As such, Plaintiff has not met the exhaustion requirement of the PLRA.

Judge Spiegel dismissed case number 1:07-cv-588 because Plaintiff Lindsly failed to comply with the prison litigation reform act. Undoubtedly, citing *Cox v. Mayer* 332 F.3d 422 (6th Cir. 2003), Plaintiff Lindsly will argue that his release from the mental hospital will allow him to avoid the exhaustion requirement of the PLRA. Footnote 3 of *Cox* specifically declines to decide this issue.

The United States Supreme Court in *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378 (2006) explained the exhaustion requirement of the PLRA as follows:

> Respondent's remaining arguments regarding the interpretation of 42 U.S.C. § 1997e(a) are unconvincing. Relying on the use of the term "until" in the phrase "until such administrative remedies as are available are exhausted," respondent contends that "[t]he use of the temporal word 'until' ... conveys a timing requirement: it assumes that the question to be answered is simply whether the prisoner can file suit now or must wait until later." Brief for Respondent 11. *100 Likewise, according to respondent, the use of the present tense ("such administrative remedies as are available," § 1997e (a) (emphasis added)), requires "a focus on whether any administrative remedies are presently available." Id., at 12. **But saying that a party may not sue in federal court until the party first pursues all available avenues of administrative review necessarily means that, if the party never pursues all available avenues of administrative review, the person will never be able to sue in federal court.** Thus, § 1997e(a)'s use of the term "until" and the present tense does not support respondent's position.

(Emphasis added). The District Courts, since *Woodford* have held that failure to use the greivance procedure during a period of incarceration forever precludes litigation after release from the facility where the events being raised as civil rights case in the Federal District Court occurred. Compare: *Shembo v. Bailey* 2009 WL 129974 (W.D. North Carolina, 2009); *Lester v. Hadley* 2009 WL 856698 (S.D. Alabama, 2009); *Allen v. Vaughner* 2009 WL 857000 (N.D. Alabama, 2009).

Since Plaintiff Lindsly has not pursued his administrative remedies when they were available, he will never be able to file suit in Federal Court. Defendants are entitled to Summary Judgment and Plaintiff Lindsly's Complaint should be dismissed.

4. State law causes of action

Since Plaintiff Lindsly's federal claims are without merit, this Court should not maintain pendant jurisdiction over Plaintiff Lindsly's state tort claims or the defendants' state law counter claims. *Musson Theatrical, Inc. v. Federal Exp. Corp*., 89 F.3d 1244, 1254-55 (6th Cir. 1996); see also *Brandenburg v. Housing Authority of Irvine*, 253 F.3d 891, 900 (6th Cir. 2001).

D. Conclusion

This Court should grant the Defendant Worley's and Defendant Dalid's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2009 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which constitutes service.

/s/ Christian J. Schaefer
Christian J. Schaefer
Assistant Prosecuting Attorney