Case No.: 22-11252

In the United States Court of Appeals for the Fifth Circuit

HOLSTON BANKS, III,
PLAINTIFF – APPELLANT

V.

JOHN H. SPENCE,
DEFENDANT – APPELLEE

Direct Appeal from the United States District Court for the Northern District of Texas, Abilene Division, No. 1:19-cv-00217-H, the Honorable James Wesley Hendrix, presiding.

Appellant's Opening Brief

NILES S. ILLICH
SCOTT H. PALMER, P.C.

15455 Dallas Parkway, Suite 540
Addison, Texas 75001
Direct: (972) 204-5452
Fax: (214) 992-9900
Email: Niles@scottpalmerlaw.com

ATTORNEY FOR APPELLANT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. **Holston Banks, III**, (Plaintiff/Appellant);

2. **Niles Illich**, Scott H. Palmer, P.C. 15455 Dallas Parkway, Suite 540, Addison, Texas 75001 (Attorney for Appellant on appeal);

3. **Scott H. Palmer**, Scott H. Palmer, P.C., 15455 Dallas Parkway, Suite 540, Addison, Texas 75001 (Attorney for Appellant at trial);

4. **Breanta Lashay Boss**, Scott H. Palmer, P.C., 15455 Dallas Parkway, Suite 540, Addison, Texas 75001 (Attorney for Appellant at trial);

5. **James Roberts**, Scott H. Palmer, P.C., 15455 Dallas Parkway, Suite 540, Addison, Texas 75001 (Attorney for Appellant at trial);

6. **Carmen Jo Rejda-Ponce**, Germer, PLLC, 2929 Allen Parkway, Suite 2900, Houston, Texas 77019 (Attorney for Appellee on trial/appeal);

7. **Kelli Burris Smith,** Germer, PLLC, 550 Fannin Street, Suite 400, Beaumont, Texas 77701 (Attorney for Appellee on appeal);

8. **The Honorable James Wesley Hendrix** (United States District Court Judge).

/s/ Niles Illich
Niles Illich
Attorney of Record for Appellant Holston Banks, III.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Appellant does not request oral argument. The sole issue presented is whether the district court abused its discretion in refusing to allow Appellant to amend his pleadings. The standard for amending pleadings under Rules 15 and 16 of the Rules of Civil Procedure are well developed. There is no question that this Court must analyze the issue under Rule 16 and then if successful remand for the district court to consider in the first instance under Rule 15. Thus the only question presented is whether the district court erred in denying relief under Rule 16. Appellant does not believe this argument necessitates oral argument. Instead the issue presented can be resolved through the briefing.

Counsel for Appellant appreciates that this Court grants oral argument relatively freely. Should this Court or should Appellee prefer to submit this case on oral argument, then counsel for Appellant will be pleased to participate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HOLSTON BANKS, III,
Plaintiff - Appellant

v.

JOHN H. SPENCE
Defendant - Appellee

STATEMENT OF JURISDICTION

1. The jurisdiction of the United States District Court for the Northern District of Texas was founded upon 18 U.S.C. § 3231.
2. The jurisdiction of the United States Court of Appeals for the Fifth Circuit is founded upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and is based upon the following particulars:

   I. Date of Judgment: **December 14, 2022**; ROA.1045.

   II. Filing of notice of appeal: **December 27, 2022**. This notice of appeal was timely. FED. R. APP. P. 4(b)(2). ROA.1046-1047.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

ISSUE PRESENTED: The district court abused its discretion in refusing to allow Appellant to make a technical amendment to his pleadings. Appellee anticipated the amended pleading and addressed it in his motion and the allegations in the proposed-amended petition did not change. Yet the district court dismissed the entire case instead of allowing a technical amendment. Did the district court err?

STATEMENT OF THE CASE

In 2013, Howard county officers assaulted Mr. Banks and fractured his knee.[1] The F.B.I. investigated and the officers involved in the assault on Mr. Banks were fired.[2]

In October 2017, Mr. Banks was back in custody in Howard County and was due in Court. When Mr. Banks' parents, Pastor and Mrs. Banks, arrived in Court, they saw their son with a bloody face and a nose that was then bleeding.[3]

Mr. Banks' face was bleeding because of the transportation officer Joseph Spence.[4] Mr. Spence decided to use his personal vehicle to transport Mr. Banks.[5] Mr. Spence placed Mr. Banks in handcuffs and leg irons and threatened to take him to the state prison in Huntsville, Texas.[6] When Mr. Banks got into the car, he saw Mr. Galindo, another inmate, whose face was bloody.[7] In the front seat of the car, Mr. Spence had his wife, Susana Spence.[8] Susana had no affiliation with the Howard County Sherriff's office, but she had a gun on her lap.[9] Mr. Banks was concerned and yelled for help.[10] In response, Mr. Spence punched Mr. Banks in the face,

[1] ROA.13.
[2] ROA.13.
[3] ROA.16.
[4] ROA.13-14.
[5] ROA.14.
[6] ROA.14.
[7] ROA.13.
[8] ROA.15.
[9] ROA.15.
[10] ROA.15.

covered Banks' nose and mouth to make breathing impossible, and then drove the approximately forty miles to the courthouse.[11] When Mr. Banks arrived in court, his parents saw his bloodied face.

Banks filed suit in October 2019.[12] The suit alleged (in pertinent part) a claim of excessive force brought under the Fourteenth Amendment.[13] Initially, Spence represented himself.[14] Spence secured counsel in March 2022.[15] New counsel for Spence moved for additional time to file dispositive motions.[16] The district court denied this motion, but agreed to amend the scheduling order.[17] Under new counsel, Spence filed an amended answer in May of 2022; the amended answer does not challenge the applicability of the Fourteenth Amendment.[18] Four months after filing the amended answer and six months after appearing, Spence's new attorney filed a motion for judgment on the pleadings.[19] This motion was the first time the defendant challenged the applicability of the Fourteenth Amendment.

[11] ROA.15.
[12] ROA.12-34.
[13] ROA.25-26.
[14] ROA.61-67.
[15] ROA.268-270.
[16] ROA.279-282.
[17] ROA.287, 305
[18] ROA.309-342.
[19] ROA.370-380. The motion was filed on September 30, 2022.

Almost immediately after Spence filed for judgment on the pleadings, Appellant moved to amend the pleadings.[20]Appellant included a proposed amended pleading with his motion for leave to amend.[21]

The parties continued to litigate the case and in December 2022, the district court denied Appellant's motion to amend and granted judgment on the pleadings.[22] This appeal follows.[23]

[20] ROA.384-394.
[21] ROA.395-409.
[22] ROA.1024-1045.
[23] ROA.1046-1047.

SUMMARY OF THE ARGUMENT

Appellant's petition confused the Eighth Amendment and the Fourteenth Amendment. The allegations did not change. Appellant maintained that when Appellee put Appellant in Appellee's personal vehicle:

- there was another inmate in the vehicle with a bloody face;
- Appellee covered Appellant's mouth and nose to prevent him from breathing;
- Appellee caused Appellant's face to bleed due to violence; and
- Appellee had his wife (with no law enforcement affiliation) in the front seat with a gun.

Instead, Appellant alleged these violated his rights under the Eighth Amendment instead of the Fourteenth Amendment. Even Appellee understood the claim was likely to be made under the Eighth Amendment and his counsel addressed the Eighth Amendment in her dispositive motion.

The district court did not follow this Court and instead followed other district court opinions. Had the district court followed this Court's opinions (albeit unpublished ones) then the Court should have granted relief and allowed the technical amendment. By following opinions from other district courts, the district court in this case erred. This appeal follows.

ARGUMENT

Appellant's Issue Presented for Appeal

In his issue, Appellant contends the district court erred in denying Appellant's motion to amend the pleadings.

I. Standard of Review

This Court reviews a district court's decision on a motion to amend for an abuse of discretion.[24]

II. Rules for Amending a Petition

A. General Rules

This Court has held "that Rule 16(b) governs amendment of pleadings after a scheduling order deadline has expired."[25] A scheduling order "may be modified only for good cause and with the judge's consent."[26] The good cause standard requires a showing by the movant that "the deadlines cannot reasonably be met despite the diligence of the party needing the extension."[27] It is "[o]nly upon the movant's demonstration of good cause to modify the scheduling order [that] the more liberal standard of Rule 15(a) appl[ies] to the district court's decision to grant or deny leave."[28]

---

[24] *Olivarez v. T-mobile U.S., Inc*., 997 F.3d 595, 602 (5th Cir. 2021) (citing *S&W Enters., L.L.C. v. SouthTrust Bank of Alabama, NA*, 315 F.3d 533, 535 (5th Cir. 2003)).
[25] *Id*.; *S&W Enters.*, 315 F.3d at 536.
[26] FED. R. CIV. P. 16(b)(4).
[27] *S&W Enters*., 315 F.3d at 535 (quotation omitted).
[28] *Id*. at 536.

Rule 15 provides a more lenient standard for amending a petition.[29] Specifically, Rule 15(a)(2) provides "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."[30]

B. Case Examples

S&W Enterprises, L.L.C. v. SouthTrust Bank of Alabama, N.A.: *S&W Enterprises* establishes that Rule 16(b) governs instead of Rule 15(b)(2). This Court wrote: "Rule 16(b) governs amendment of pleadings after a scheduling order deadline has expired. Only upon the movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave."[31] This case concerned the untimely supplementation of expert reports.[32] This Court wrote:

> The district court denied S&W leave to amend because its motion was untimely and because of potential prejudice to SouthTrust or, alternatively, unnecessary delay of the trial. The court premised its denial also on its conclusion that S&W offered no adequate explanation for its failure to comply with the scheduling order. As the district court noted, the same facts were known to S&W from the time of its original complaint to the time it moved for leave to amend. S&W could have asserted interference with contract from the beginning, but fails to explain why it did not. S&W's explanation for its delayed analysis of Sturges—inadvertence—is tantamount to no explanation at all.[33]

---

[29] FED. R. CIV. P. 15.
[30] FED. R. CIV. P. 15(a)(2).
[31] *S&W Enterprises*, 315 F.3d at 536.
[32] *Id*.
[33] *Id*.

This Court then announced a four-part test to be used "[i]n the context of allowing untimely submission of expert reports."[34]

Olivarez v. T-mobile USA, Incorporated: *Olivarez* concerned an effort to amend a complaint and is an example of why many efforts to invoke Rule 16 do not succeed.[35] In *Olivarez* the district court granted leave, Olivarez amended the petition, and the trial court granted the defendant's motion to dismiss.[36] In response to the motion to dismiss, Olivarez filed for a motion for reconsideration under Rule 59(e) and for leave to amend the petition again.[37] This time the district court denied the motion for leave to amend, but provided only minimal explanation.[38] Olivarez appealed. This Court wrote:

> The district court's scheduling order set a deadline of March 13, 2020 for amendments with leave of court. Olivarez requested leave to amend the First Amended Complaint on February 12, 2020. After denying the defendants' initial motions to dismiss, the court allowed Olivarez to file a Second Amended Complaint on April 16, 2020. The court then granted the defendants' second motions to dismiss on April 30, 2020.
>
> Olivarez filed a motion to submit a Third Amended Complaint on July 7, 2020—well after the court's March 13 deadline. Accordingly, the district court was correct to apply the good cause standard of Rule 16(b). And Olivarez failed to meet that standard. There is no explanation for the five-month delay before pleading the facts and allegations in the Third Amended Complaint. Nor is there any

[34] *Id*.
[35] *Olivarez*, 997 F.3d at 599.
[36] *Id*.
[37] *Id*.
[38] *Id*. at 599 & 602.

> suggestion that any of those facts were unavailable when filing the previous three complaints. Nor did Olivarez request an opportunity to replead in response to the second motion to dismiss. In sum, there is no good cause here to justify further amendment to the complaint. The district court accordingly did not abuse its discretion in denying further leave to amend.[39] (cleaned up, emphasis added).

Marable v. Department of Commerce: In this case, the appellant sought to amend his pleadings under Rule 16.[40] This Court denied relief and wrote:

> the district court did not abuse its discretion by denying Marable's request to amend his complaint. In accord with Federal Rule of Civil Procedure 16 (b)(3)(A), the district court issued a scheduling order that limited the time to join other parties and amend the pleadings. Once issued, such an order can only be modified with the judge's consent and for good cause. Good cause generally requires a demonstration that deadlines cannot reasonably be met despite the diligence of the party needing the extension. Marable waited until fifteen months after the scheduling order deadline to attempt to amend his complaint. He offers nothing on appeal to demonstrate good cause beyond an assertion that he has been diligently prosecuting his case. With nothing more, we cannot conclude that the district court abused its discretion in denying Marable's request to amend his complaint. (cleaned up, emphasis added).[41]

Texas Indigenous Council v. Simkins: In *Simpkins*, an unpublished opinion, this Court found the district court correctly denied relief to add a new claim, but the district court erred in denying leave to modify an existing claim.[42] Specifically, in *Simpkins* this Court denied relief on the effort to amend to add a new cause of action

[39] *Id*. at 602.
[40] *Marable v. Dep't of Commerce*, 857 Fed. Appx. 836, 838 (5th Cir. 2021).
[41] *Id*.
[42] *Tex. Indigenous Council v. Simpkins*, 544 Fed. Appx. 418, 420 (5th Cir. 2013).

for wrongful arrest but granted relief on the effort to explicitly invoke § 1983.[43] This Court explained its finding of good cause and wrote:

> Diaz's request to amend his complaint to invoke § 1983, however, presents a different question. We have long held that "[m]ere technical defects in a pleading do not provide a basis for dismissal." *Jones v. Louisiana*, 764 F.2d 1183, 1185 (5th Cir.1985). Instead, the federal rules "permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading." *Id*. (quoting *Dussouy v. Gulf Coast Inv. Corp*., 660 F.2d 594, 598 (5th Cir.1981)). Diaz's failure to specifically cite § 1983 was at best an unintentional, technical pleading mistake, which the officers did not raise until after it was too late for Diaz to cure the defect. Once made aware of the error, Diaz sought leave to amend, confirming what the parties had known all along—that Diaz intended to assert a constitutional violation via § 1983. The officers would have suffered little, if any, prejudice if the amendment were allowed as they had prepared their case under § 1983, asserting the qualified immunity defense associated with such a claim. By contrast, denying leave to amend determined the outcome of the case. Under these circumstances, Diaz established good cause under Rule 16 to justify extending the deadlines of the scheduling order.[44]

III. Facts

The district court entered a scheduling order under Rule 16.[45] Counsel for appellant appeared on March 31, 2022.[46] The district court issued two orders amending the scheduling order.[47] Ultimately, the district court moved the deadline to amend pleadings to May 25, 2022[48] and for dispositive motions to October 31,

[43] *Id*. at 420-421.
[44] *Id*. at 421.
[45] ROA.256.
[46] ROA.268.
[47] ROA.8 (docket entry 54), 305, 369.
[48] ROA.305.

2022.[49] Appellee filed his motion for judgment on the pleadings on September 30, 2022—six months after counsel appeared in the case.[50] Appellant promptly filed a motion for leave to amend his petition.[51] The district court explained the original and amended complaints were almost identical.[52] The Court elaborated and explained Appellant converted his Fourteenth Amendment claim to an Eighth Amendment claim but that "each relies largely—if not entirely—on the same facts, discovery, and accusations regarding Spence's treatment of Banks before transporting him on October 19, 2017."[53] Relying on Rule 16, the district court denied Appellant relief to amend.[54]

IV. Application of Law to Fact

The district court entered a Rule 16 scheduling order.[55] When the court entered the scheduling order, Appellee was pro-se.[56] Appellee secured counsel on March 31, 2022; six months later Appellee filed his motion for judgment on the pleadings and Appellant promptly filed a motion to amend.[57] The amended pleadings asserted nearly the same facts and merely rephrased the Fourteenth Amendment

[49] ROA.369.
[50] ROA.370-383.
[51] ROA.384-394.
[52] ROA.1038.
[53] ROA.1038.
[54] ROA.1028-1045.
[55] ROA.256.
[56] ROA.268-270.
[57] ROA.384-394.

issue to an Eighth Amendment issue.[58] The substance of the allegations remained unchanged.[59]

The district court denied the motion, but in so doing erred. The district court addressed the issue under Rule 16(b) and Appellant does not challenge that decision.[60] Instead, Appellant challenges the application of the rule.

The district court relied, predominately, on decisions from other district courts.[61]

A. Banks provided a sufficient explanation for his motion to amend

First, the district court determined Appellant's motion to amend was untimely. ("Banks cannot provide a sufficient explanation for his untimely motion to amend").[62] Yet Rule 16, on its face, does not limit a motion to amend to the dates within the scheduling order.[63] Rather, Rule 16(b)(4) provides "[a] schedule may be modified only for good cause and with the judge's consent."[64] This rule does not limit the time in which a party may ask for leave to amend the petition. Yet the district court titled the first section of its analysis "Banks cannot provide a sufficient explanation for his untimely motion to amend."[65] Therefore, to the degree the district

[58] ROA.384-409, 1038.
[59] ROA.384-409, 1038.
[60] ROA.1028; *Olivarez*, 997 F.3d at 602; *S&W Enters., L.L.C.*, 315 F.3d at 535.
[61] ROA.1030-1040.
[62] ROA.1030.
[63] *See* FED. R. CIV. P. 16(b)(4).
[64] *Id*.
[65] ROA.1030.

court found that the motion to leave itself (as opposed to the amendment itself) was untimely, the district court erred.[66]

B. Contrary to the District Court's Order, Appellant can establish good cause under Rule 16

The district court relied on cases from the Northern District of Texas for the proposition that a lack of awareness of an error in pleadings does not constitute good cause under Rule 16.[67] The district court first cited to *Valcho*.[68] *Valcho* cited to other cases from the same district court that found similarly.[69] Thus *Valcho* does not reflect any reasoning from this Court nor can it be said to reflect the collective reasoning of a consensus of district court judges. Instead, *Valcho* illustrates only how one district court judge interprets Rule 16.

The district court relied on other cases from the Northern District, including decisions from Judges Lindsay and Cummings, but the district court did not rely on

---

[66] FED. R. CIV. P. 16(b)(4).
[67] ROA.1031.
[68] ROA.1031.
[69] *Valcho v. Dallas Cnty. Hosp. Dist*., 658 F. Supp. 2d 802, 815 (N.D. Tex. 2009) ("This court has frequently found prejudice when a party seeks leave to amend after the opposing party has filed a motion for summary judgment. *See, e.g., Home Depot U.S.A., Inc. v. Nat'l Fire Ins. Co. of Hartford*, 2007 WL 2592353, at *3 (N.D.Tex. Sept. 10, 2007) (Fitzwater, J.) (denying motion for leave to amend after summary judgment motion filed); *AMS Staff Leasing, NA, Ltd. v. Associated Contract Truckmen, Inc*., 2005 WL 3148284, at *11 (N.D.Tex. Nov. 21, 2005) (Fitzwater, J.) (same). And, as the Fifth Circuit has recognized, "'[t]o grant ... leave to amend is potentially to undermine [a party's] right to prevail on a motion that necessarily was prepared without reference to an unanticipated amended complaint .... A party should not, without adequate grounds, be permitted to avoid summary judgment by the expedient of amending its complaint.'" *Overseas Inns S.A. P.A. v. U.S*., 911 F.2d 1146, 1151 (5th Cir.1990) (quoting this court's opinion below), aff'g, 685 F.Supp. 968 (N.D.Tex.1988) (Fitzwater, J.)).

opinions from this Court. The district court could have relied on cases like *Ward* and *Simpkins* from this Court.

In *Ward*, this Court considered a case where the attorney admitted to a mistake and sought leave to amend.[70] This Court explained the good cause standard "requires the 'party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension.'"[71] Without careful explanation (in this unpecidential opinion) this Court determined the first prong of the good-faith analysis weighed against the appellant.[72] Ultimately this Court denied relief.[73]

In *Simpkins*, also an unpublished opinion, this Court found the appellant showed good cause.[74] This Court explained the district court correctly denied the motion to amend to add a new cause of action but erred in not allowing the requested amendment to invoke § 1983.[75] This Court emphasized that "mere technical defects in pleading" should not provide a basis for dismissal and then explained that then explained why the proposed amendment fit this requirement.[76]

This Court could rule based on *Ward* (and likely deny relief) or it could rule based on *Simpkins* (and likely grant relief). *Simpkins*, however, is the better case.

---

[70] *Ward v. CNH Am., L.L.C., Ind.*, 534 Fed. Appx. 240, 242 (5th Cir. 2013), as revised (July 23, 2013).
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] *Tex. Indigenous Council*, 544 Fed. Appx. 418 at 420.
[75] *Id*.
[76] *Id*. at 421.

Simpkins should apply because it provides a careful explanation of why leave should *and* should not be granted.[77] Here, as in *Simpkins*, the pleading failure was a technical one. The district court acknowledged this when it explained that Appellant's proposed amendment to change from the Fourteenth Amendment to the Eighth Amendment did not change the allegations, discovery, or accusations.[78] Instead the change was a technical change to specifically invoke the Eighth Amendment instead of the Fourteenth. Thus the proposed amendment did not add a new allegation (like the proposed amendment to include wrongful arrest in *Simpkins*) and instead simply corrected a technicality. *Simpkins* is a robust opinion that applies Rule 16 clearly, and Appellant urges this Court to apply the analysis from *Simpkins* to this case and to find Appellant should have been allowed to amend under Rule 16. By focusing on opinions from the Northern District of Texas and ignoring opinions (albeit unpublished opinions) from this Court, the district court erred and reached the wrong conclusion.

The facts of this case also distinguish it from cases like *Olivarez* or *Marable*. In those cases, there was nothing that identified the pleading deficiency as a mere technicality like the issue presented here. Appellant's amended pleading would have been a simple continuation of the case with only the most peripheral change. To

[77] *Id*.
[78] ROA.1038.

prevail on an excessive-force claim under the Fourteenth Amendment, a plaintiff must show that he suffered (1) "an injury" that (2) resulted "directly and only from" an officer's use of force that was "clearly excessive" and (3) "objectively unreasonable."[79] And to prevail on a claim of excessive force under the Eighth Amendment the question is whether the force was not applied "in a good faith effort to maintain or restore discipline" but rather "maliciously and sadistically for the very purpose of causing harm."[80] Thus the standards are substantively similar. Accordingly, the reasonings from *Olivarez* and *Marable* do not apply.

C. The District Court Correctly Determined the Importance of the Amendment Favors Banks

In considering the question of the importance, the district court correctly found the amendment important.[81] The district court concluded, "[b]ecause Banks' proposed amendment could make the difference between any recovery or none at all, the second factor of the good-cause analysis weighs in favor of permitting him to amend his complaint." Appellant agrees with the district court on this ground.

D. Prejudice and Continuance

---

[79] *Williams v. City of Greenwood*, No. 22-60192, 2023 WL 2733467, at *2 n.3 (5th Cir. Mar. 31, 2023) ("Given that Gianni's Fourteenth Amendment claim *pertains to his arrest by city law enforcement officers, we analyze it under the Fourth Amendment. See Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that "*all* claims that law enforcement officers have used excessive force ... should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (emphasis in original)).").

[80] *Hudson v. McMillian*, 503 U.S. 1, 6, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992); *Gray v. White*, 18 F.4th 463, 467 (5th Cir. 2021), cert. denied, 212 L. Ed. 2d 798, 142 S. Ct. 2741 (2022)

[81] ROA.1034-1035.

The district court considered the third and fourth prongs (prejudice and continuance to cure prejudice) together.[82] The Court explained "allowing Banks' amendment would prejudice Spence to a certain degree, and a continuance would cure some of that prejudice."[83] Ultimately, the district court explained these factors "do not materially affect the analysis."[84] The district court emphasized that Appellee's counsel had already anticipated this amendment and had briefed "his pending dispositive motions through the lens of an Eighth Amendment analysis."[85] Further the district court emphasized the similarities between the petitions and that each claim "relies largely—if not entirely—on the same facts, discovery, and accusations regarding Spence's treatment of Banks before transporting him on October 19, 2017."[86]

Ultimately, the district court found these two factors not to weigh one way or the other in determining whether Appellant established "good cause" to amend.[87]

Arguably, however, because Appellee had already briefed the Eighth Amendment issue in his motion for summary judgment, this factor should weigh in favor of Appellant.[88] The district court wrote "[e]ven more, Spence has already

[82] ROA.1036.
[83] ROA.1036.
[84] ROA.1039.
[85] ROA.1039.
[86] ROA.1038.
[87] ROA.1039.
[88] ROA.1039.

briefed his pending dispositive motions through the lens of an Eight Amendment analysis."[89] But the court went on and explained that Appellee 'would not need to 'restart' with responsive pleadings and motions because he has already extensively analyzed the issue."[90] Accordingly, this argument tilts toward Appellant.

E. District Court's Conclusion

Relying on issue one, the district court explained "Banks has failed to show the diligence necessary to establish good cause, so the Court denies him leave to amend his complaint."[91] This opinion, however, rests on the first issue. Appellant has shown the district court's analysis of the first issue is flawed by focusing on opinions from the Northern District of Texas and not from opinions from this Court. As the district court acknowledged the Eighth Amendment was already part of the analysis in this case. Allowing the amendment would have had a minimal consequence for the resolution of the case. Therefore, on balance, the district court abused its discretion in determining Appellant failed to show "good cause."

[89] ROA.1039.
[90] ROA.1039.
[91] ROA.1040.

CONCLUSION AND PRAYER

Appellant asks this Court to vacate the district court's order dismissing this case, to find the district court erred in denying relief under Rule 16, and to remand for consideration under Rule 15 in the first instance. Appellant asks for any other relief to which he might be justly entitled.

SCOTT H. PALMER, P.C.

/s/Niles Illich
NILES S. ILLICH
State Bar No. 24069969

15455 Dallas Parkway, Suite 540
Addison, Texas 75001
Telephone: 214.987.4100
Facsimile: 972.204.5452
niles@scottpalmerlaw.com
Attorney for Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2023, that an exact copy of Plaintiff-Appellant's Brief was served via ECF to counsel for the Defendant-Appellee. I further certify that: (1) all privacy redactions have been made pursuant to 5th Cir. Rule 25.2.13; and (2) the electronic submission is an exact copy of the paper documents pursuant to 5th Cir. Rule 25.2.1.

/s/Niles Illich
NILES ILLICH
SCOTT H. PALMER, P.C.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Rule 32(a)(7)(B) because:

- This brief contains 4,428 words when the exclusions under Rule 32(f) are accounted for;

This brief also complies with the typeface requirements of Rule 32(a)(5) and the type requirements of Rule 32(a)(6) because:

- This brief has been prepared in Times New Roman font, a proportionally-spaced typeface, using Microsoft Word 2010 with 14-point font for the text and 12-point font for the footnotes.

/s/Niles Illich
NILES ILLICH
SCOTT H. PALMER, P.C.