No. 22-30327

In The
United States Court of Appeals
For the Fifth Circuit

Larce Spikes
Plaintiff-Appellee

v.

Lesley Wheat, Nurse; Paula Stringer, Nurse; Robin Bowman, Nurse; Conrad McVea, III, also known as Chip McVea; Janet McVea Williams; Jacob O. McVea,
Defendants-Appellants

On Appeal from the United States District Court
For the Eastern District of Louisiana, No. 2:17-cv-08164-SM-JCW
Judge Susie Morgan

OPPOSITION BRIEF BY PLAINTIFF-APPELLEE

Larce Spikes

ELIZABETH CUMMING
MacArthur Justice Center
4400 S. Carrollton Ave.
New Orleans, LA 70119

HANNAH LOMMERS-JOHNSON
MacArthur Justice Center
4400 S. Carrollton Ave.
New Orleans, LA 70119

Counsel for Plaintiff-Appellee

October 17, 2022

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons 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 Honorable Court may evaluate possible disqualification or recusal.

Plaintiff - Appellee:

1. Larce Spikes, Plaintiff- Appellee

Counsel for Plaintiff-Appellee:

2. Elizabeth Cumming, Attorney for Plaintiff-Appellee

3. Hannah Lommers-Johnson, Attorney for Plaintiff-Appellee

Defendants-Appellants:

4. Casey McVea (deceased)
5. Conrad "Chip" McVea III, legal heir of original Defendant Casey McVea
6. Janet McVea Williams, legal heir of original Defendant Casey McVea
7. Jacob O. McVea, legal heir of original Defendant Casey McVea
8. Lesley Wheat
9. Paula Stringer
10. Wendy Seal
11. Robin Bowman

Counsel for Defendants-Appellants:

12. Jeff Landry, Attorney General
13. Andre Chastain, Assistant Attorney General
14. Phyllis Glazer, Assistant Attorney General
15. Christopher Neal Walters, Assistant Attorney General
16. Wm. David Coffey, Assistant Attorney General
17. Angela J. O'Brien, Assistant Attorney General

Non-Party:

18. Louisiana DPS&C, through Rayburn Correctional Center

Respectfully submitted,

/s/ Elizabeth Cumming
Elizabeth Cumming, LSBN 31685
Hannah Lommers-Johnson, LSBN 34944
MacArthur Justice Center
4400 S. Carrollton Ave.
New Orleans, LA 70119
Tel. 504.620.2259
Elizabeth.cumming@macarthurjustice.org
Hannah.lommersjohnson@macarthurjustice.org
Attorneys for Plaintiff – Appellee

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Cir. R. 28.2.4, the Plaintiff-Appellee, Larce Spikes, respectfully suggests that oral argument is not necessary in this case because this case does not present any novel or complex issues of law. In reviewing an interlocutory appeal of a denial of qualified immunity, this Court will "consider only whether the district court erred in assessing the legal significance of the conduct the district court deemed sufficient to overcome qualified immunity."[1] Further examination regarding whether genuine issues of material fact exist can be decided based on review of the record alone. If the Court determines that oral argument is necessary, Plaintiff-Appellee will participate to aid in the Court's adjudication of the matter.

[1] Autin v. City of Baytown, 174 F. App'x 183, 184 (5th Cir. 2005) (citing Kinney v. Weaver, 367 F.3d 337, 348 (5th Cir. 2004)).

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C §1331, as this action, which arose under the Constitution and laws of the United States, specifically 42 U.S.C. §1983 and the Eighth Amendment. The District Court first partially denied Defendants' motion for summary judgment on December 27, 2018. Defendants appealed the District Court's decision. and Defendants filed their notice of appeal. Defendants claim appellate jurisdiction to review the District Court's denial of qualified immunity pursuant to 28 U.S.C. §1291 and the collateral order doctrine.[2] As this Court has often explained, under this doctrine, "Our jurisdiction is significantly limited, however, for it extends to such appeals only to the extent that the denial of summary judgment turns on an issue of law."[3]

[2] Mitchell v. Forsyth,472 U.S. 511, 530 (1985); Kinney v. Weaver, 367 F.3d 337, 346 (5th Cir. 2004).
[3] Kinney, 367 F.3d at 346 (internal quotations omitted).

STATEMENT OF THE ISSUES PRESENTED

1. Whether this Court has jurisdiction to consider this non-final summary judgment on appeal.
2. Whether the law of the case, with respect to qualified immunity as previously determined by this Court, forecloses any question of law regarding Defendants' entitlement to summary judgment on qualified immunity.
3. Whether the District Court erred in holding that genuine issues of material fact preclude a grant of summary judgment as to:
    a. Paula Stringer's failure to timely refer Spikes to a physician despite her knowledge of Spikes' symptoms of a serious medical condition;
    b. Robin Bowman's failure to timely refer Spikes to a physician despite her knowledge of Spikes' symptoms of a serious medical condition;
    c. Lesley Wheat's interference with Spikes' access to medical care and failure to refer Spikes to a physician despite her knowledge of Spikes' serious medical condition;
    d. Dr. Casey McVea's failure to timely evaluate Spikes at the time he became aware of Spikes' serious medical need.

STATEMENT OF THE CASE

I. Plaintiff-Appellee Spikes' suffered with a broken hip for six weeks before receiving responsive treatment

This case involves the denial of necessary medical care to a prisoner who sought treatment for a fractured hip for close to a month and half. Spikes broke his hip on June 30, 2016.[4] For six weeks, Plaintiff-Appellee Larce Spikes was unable to walk or move his leg.[5] Spikes sought care from Defendant-Appellants Nurses Stringer, Bowman, and Wheat, and Dr. McVea for the intense pain in his hip, groin and leg at least six times.[6] Each of these Defendants knew that Spikes' had a serious injury causing pain and immobility for weeks.[7] Yet, during this time, he did not receive treatment beyond ibuprofen, balm, and access to crutches.[8] Instead, he was punished with a disciplinary write-up for continuing to seek care for the excruciating pain caused by the hip fracture.[9] By the time Spikes finally received the surgery he needed to treat his hip fracture, in mid-August, the bone had started to heal and surgeons had re-break his hip to set it.[10] Defendant-Appellants' repeated disregard of Spikes' serious medical need is detailed below.

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[4] ROA 22-30327.5444 (Spikes 50:1-10), 5333, 6117.
[5] ROA 22-30327.5326, 5328–33, ROA 22-30327.5444 (Spikes 50:1-10), ROA 22-30327.5473–4 (Spikes 79:16-80:11), 6117.
[6] ROA 22-30327.5328–5333, ROA 22-30327.6117.
[7] ROA 22-30327.5728-5730 (McVea 143:21-145:18).
[8] ROA 22-30327.5328–5333.
[9] ROA 22-30327.6160-2, 5466–5468 (Spikes 72:9-74:3).
[10] ROA 22-30327.6239-41 (ORIF Surgical Notes), 6283 (noting subacute fracture).

On June 30, 2016, while exercising outside, Spikes experienced a sudden excruciating pain in his right hip area that felt like he had been "hit with a hammer."[11] He was not able to move his right leg or get to the dorm without assistance.[12] He filed an emergency sick call and was brought to the infirmary via wheelchair, where he was seen by LPN Paula Stringer.[13] At Rayburn, filing an emergency sick call is the equivalent of going to the emergency room.[14]

When he came up to the infirmary, Spikes did not know what was causing the intense pain he was experiencing.[15] Spikes told Nurse Stringer that he did not know what was wrong and reported his symptoms to her—he could not walk on his leg, and it was "just killing" him.[16] Nurse Stringer did not include any of this information in her note.[17] In both the patient symptom reporting and the objective nurses' assessment sections of her note, Nurse Stringer only documented "pulled muscle in R groin" and "muscle strain" respectively.[18] Spikes never told Nurse Stringer that he had pulled a muscle.[19]

[11] ROA 22-30327.5445–8 (Spikes 51:21-54:14).
[12] ROA 22-30327.5445–8 (Spikes 51:21-54:14).
[13] ROA 22-30327.5445–8 (Spikes 51:21-54:14), ROA 22-30327.5333.
[14] ROA 22-30327.6886–94, ROA 22-30327.5650 (McVea 65:14-21).
[15] ROA 22-30327.5453–64 (Spikes 59:15-60:5).
[16] ROA 22-30327.5452 (Spikes 58:2-10).
[17] ROA 22-30327.5333.
[18] ROA 22-30327.5333.
[19] ROA 22-30327.5857 (Stringer 40:2-14), 5333, 5453–4 (Spikes 59:15-60:15).

Under the standing orders from Dr. McVea,[20] Nurse Stringer ordered an analgesic balm for Spikes to rub on his hip area and gave him ibuprofen.[21] When Dr. McVea reviewed this note on July 5, 2016, he signed off on this treatment plan.[22]

Also on July 5, 2016, five days after the first encounter with Nurse Stringer, Spikes filed another emergency sick call due to the continuing pain that was expanding to his lateral thigh.[23] Spikes had taken the ibuprofen and used the analgesic balm for those five days without any improvement in his symptoms.[24] He was again brought to infirmary in a wheel chair.[25] Despite his arrival at the infirmary in a wheel chair, and his report that attempting to walk caused him increased pain, Nurse Stringer directed Spikes to walk to the scale and marked in her notes that he was able to do so without assistance.[26] This was a falsehood.[27]

As Spikes testified,[28] the nurse did not actually look at him after ordering him walk to the scale.[29] The scale was approximately five feet away and Spikes

[20] ROA 22-30327.6098–6100.
[21] ROA 22-30327.5333.
[22] ROA 22-30327.5333, 5711 (McVea 126:3-6), 5713 (McVea 128:16-24).
[23] ROA 22-30327.5332.
[24] ROA 22-30327.5456 (Spikes 62:19-22).
[25] ROA 22-30327.5460 (Spikes 66:18-22), 5332.
[26] ROA 22-30327.5332.
[27] ROA 22-30327.5443–5487 (Spikes 50-93), ROA 22-30327.5479 (Spikes 85:14-18).
[28] ROA 22-30327.5443–5487 (Spikes 50-93).
[29] ROA 22-30327.5479 (Spikes 85:14-18).

rolled to it in his wheelchair, and then dragged his body onto it.[30] He testified, "I couldn't walk. They tried to get me to weigh myself. I dragged myself to the weight – to weigh myself. I dragged myself and hold onto the thing. I jumped up there on one leg because this leg is literally just, like, dead."[31]

Nurse Stringer could not recall or describe Spikes walking based on her note or from her memory of the interaction.[32] Nurse Stringer noted a full range of motion to right lower extremity, but could not recall and could not tell from her note how she had reached the conclusion that Spikes had a full range of motion to his right leg.[33]

Nurse Stringer again noted muscle strain as the assessment and referred the chart to the medical doctor.[34] She noted on Spikes' chart that the "current treatment" of muscle rub and ibuprofen should continue.[35] Nurse Stringer did not seek to place Spikes on the schedule for doctor call-out at this point.[36]

Dr. McVea reviewed Nurse Stringer's note on July 6, 2016.[37] Dr. McVea confirmed that he could not tell from Nurse Stringer's note how well or poorly Spikes was walking or how Nurse Stringer determined Spikes had full range of

[30] ROA 22-30327.5479 (Spikes 85:10-18).
[31] ROA 22-30327.5479 (Spikes 85:1-6)
[32] ROA 22-30327.5865 (Stringer 48:3-9).
[33] ROA 22-30327.5864–65 (Stringer 47:24-48:2).
[34] ROA 22-30327.5332.
[35] ROA 22-30327.5332.
[36] ROA 22-30327.5332, 5373–5376.
[37] ROA 22-30327.5333, 5721 (McVea 136:1-22).

motion based on her note.[38] Dr. McVea also confirmed that information regarding how the range of motion assessment was conducted would have been useful in determining treatment.[39] Dr. McVea had a mechanism for requesting additional information.[40] Dr. McVea simply chose not to seek any additional information as to Spikes' condition. Instead, he ordered current treatment to continue and prescribed ibuprofen for three months.[41]

Dr. McVea is clear that although he wrote "muscle strain" in the provider notes section of Spikes' chart, muscle strain was not a diagnosis because at that point he had not actually seen Spikes.[42] However, based on the medical records, it was this notation of muscle strain that determined that Spikes would not receive medical treatment for his broken hip for the next five weeks.[43]

On July 6, 2016, the day after seeing Nurse Stringer, Spikes filed another emergency sick call.[44] Again, Spikes was transported to the infirmary via wheelchair.[45] Nurse Williams documented that Spikes could not walk on his leg and described pain in his right hip radiating down to his right knee.[46] In the

[38] ROA 22-30327.5716–17 (McVea 131:22-132:5).
[39] ROA 22-30327.5717–9 (McVea 132:23-134:2).
[40] ROA 22-30327.5717–9 (McVea 132:23-134:2).
[41] ROA 22-30327.5332, 5721 (McVea 136:1-22).
[42] ROA 22-30327.5332, 5721–2 (McVea 136:1-137:5).
[43] ROA 22-30327.5326, 5329–5331.
[44] ROA 22-30327.5331.
[45] ROA 22-30327.5331.
[46] ROA 22-30327.5331.

complaint section, Nurse Williams notes "pulled muscle 6-30-16."[47] Nurse Williams discussed the treatment plan with Dr. McVea, and he directed that it remain unchanged—ibuprofen and muscle balm.[48] Dr. McVea also placed Spikes on regular duty with restrictions, specifically a bottom bunk assignment and access to crutches.[49]

That day, Spikes was finally ordered for a routine call out with the doctor for the first time.[50] When patients are ordered for a routine call out they typically do not see the doctor for four to six weeks.[51] Individuals ordered for urgent call outs are not seen for a week to four weeks.[52] Spikes would not see the doctor until over a month.

Although Dr. McVea was subjectively aware that Spikes had been experiencing pain in his right groin and leg for a week that was not responding to treatment with ibuprofen and analgesic balm, Dr. McVea took no steps to see Spikes on a more expedited basis. He also did not take any steps to order any X-ray or other diagnostic testing.[53]

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[47] ROA 22-30327.5331.
[48] ROA 22-30327.5331.
[49] ROA 22-30327.2977, 5331, 5726–7.
[50] ROA 22-30327.2977, 5331, 5726–7, ROA 22-30327.5373–5376. These scheduling documents suggest that Spikes was not actually placed on the doctor call out list for close to two weeks, on July 19, 2016.
[51] ROA 22-30327.5642 (McVea 58:7-12).
[52] ROA 22-30327.5642 (McVea 58:3–6), 5948 (Wheat 12:1-3).
[53] ROA 22-30327.5331, 5721–2 (McVea 136:1-137:5), ROA 22-30327.6116–6117, ROA 22-30327.6121.

Spikes filed a non-emergency, routine sick call on July 14, 2016, complaining that he could not stand on his right leg.[54] Spikes again came to the infirmary in a wheel chair and reported an increase in pain during the physical examination when Licensed Practical Nurse[55] Bowman pressed on Spikes' hip.[56] Two weeks after the initial complaint of pain, Nurse Bowman noted possible swelling to the hip, that Spikes had made four previous sick calls, experienced increased pain during the exam, and that he was not improving in response to ibuprofen or analgesic balm.[57] Spikes did not appear to have a doctor's call-out scheduled at the time Nurse Bowman saw Spikes.[58] Rather than alert a healthcare practitioner competent to diagnose Spikes as to his continuing and spreading pain, Nurse Bowman continued the same treatment that had been ineffective for the last two weeks.[59] She ordered a routine call-out. A nurse, possibly Nurse Bowman, did change Spikes to a temporary no duty status through July 19, 2016.[60] Once again, the nurse sent the medical chart to the medical doctor and muscle rub was again ordered.[61] Dr. McVea reviewed Nurse Bowman's note on July 18, 2016 and

[54] ROA 22-30327.5330.
[55] ROA 22-30327.5890 (Bowman 7:11-20).
[56] ROA 22-30327.5919 (Bowman 36:12-16).
[57] ROA 22-30327.5330.
[58] ROA 22-30327.5372–5376.
[59] ROA 22-30327.5330.
[60] ROA 22-30327.5323, 5734–35 (McVea 149:22-150:24).
[61] ROA 22-30327.5323, 5330, 5734–35 (McVea 149:22-150:24).

again confirmed a routine call out for Spikes and no other changes to the treatment.[62]

On July 19, 2016, Spikes again filed a routine sick call and was again brought to the infirmary in a wheelchair.[63] He requested that his no duty status be extended due to the significant, unabated pain and his inability to walk without crutches.[64] Again, Nurse Bowman saw Spikes and was told that Spikes could not stand on or bend his leg despite nearly three weeks of "treatment" with ibuprofen and analgesic balm.[65] Nurse Bowman again took no action other than to send the chart to doctor without any urgent flag.[66] She similarly did not elevate the urgency of the doctor's call-out. Nurse Bowman told Spikes that a routine appointment had already been scheduled and did nothing to expedite that appointment.[67] Dr. McVea reviewed the chart on July 20, 2016 and only noted that an appointment was already scheduled.[68] Although Spikes had been in extreme pain and unable to walk for nearly three weeks at this point, Spikes' appointment was not until August 11, 2016—three weeks later.[69]

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[62] ROA 22-30327.5330.
[63] ROA 22-30327.5329.
[64] ROA 22-30327.5329.
[65] ROA 22-30327.5330.
[66] ROA 22-30327.5330.
[67] ROA 22-30327.5330.
[68] ROA 22-30327.5329.
[69] ROA 22-30327.5373–5376.

On July 20, 2016, Spikes was seen again for an emergency sick call. He was again brought to the infirmary via wheel chair.[70] Nurse Wheat noted Spikes had made repeated complaints about right groin pain.[71] Nurse Wheat noted that Spikes was given crutches for one week and advised not to participate in sports or lifting.[72] Dr. McVea declined to extend Spikes' no duty status and instead placed him on regular duty with a note that he could continue to use crutches.[73] No other relief was offered to Spikes.[74]

The same day, Nurse Wheat issued a disciplinary report, or "write up," to Spikes accusing him of "malingering" because he filed multiple sick calls in his effort to receive care.[75] As a result of this disciplinary report, Spikes lost a month of yard time privileges.[76] This write up prevented Spikes from continuing to seek medical care through the sick call system. He did not file another sick call requesting treatment for his broken hip after this write up.[77]

On August 9, 2016, an assistant Warden spoke with Andrea Spikes, Spikes' sister about concerns regarding her brother's pain.[78] He advised her that he was

[70] ROA 22-30327.5328.
[71] ROA 22-30327.5328.
[72] ROA 22-30327.5328.
[73] ROA 22-30327.5322.
[74] ROA 22-30327.5328.
[75] ROA 22-30327.6160–2.
[76] ROA 22-30327.5467 (Spikes 73:13-19).
[77] ROA 22-30327.5467 (Spikes 73:13-19).
[78] ROA 22-30327.5327.

scheduled to see the medical doctor on August 11, 2016.[79] Despite Spikes obvious continuing pain and difficulty walking, multiple sick calls for the same condition, and the concerns expressed by his family, none of the Defendants made any effort to have Spikes assessed and diagnosed by Dr. McVea earlier than August 11th, six weeks after Spikes' serious hip pain began.[80]

On August 11, 2016, a full month and a half after he first reported the injury, Spikes saw Dr. McVea on a doctor's call.[81] Dr. McVea noted Spikes reported he could not stand or bend his right leg.[82] Dr. McVea ordered an X-ray and ordered Spikes on to limited duty status, with assignment to a bottom bunk and two crutches.[83] The X-ray revealed that Spikes had a fracture to his right proximal femur, i.e., a fracture to his right hip.[84] Spikes was transferred to University Medical Center New Orleans (UMC) on August 11, 2016.[85]

At UMC, Spikes was admitted to the hospital directly from the Emergency Department for surgery.[86] Days later he had a four-and-a-half hour open reduction and internal fixation (ORIF) surgery.[87] Because there was a delay of one month

[79] ROA 22-30327.5327.
[80] ROA 22-30327.5321–5333.
[81] ROA 22-30327.5326.
[82] ROA 22-30327.5326.
[83] ROA 22-30327.5326, 5321.
[84] ROA 22-30327.5326, 5321, 5324.
[85] ROA 22-30327.5326, 5321, 5324.
[86] ROA 22-30327.6240 (ORIF Surgical Notes).
[87] ROA 22-30327.6240–43.

and a half between the facture and the surgery, the bones in Spikes' hip had started to heal together without proper setting.[88] The surgeon was forced to re-break Spikes' hip in order to properly set the hip and place the Dynamic Hip Screw ("DHS") and plate.[89]

Upon his return to Rayburn, Spikes did not receive medically necessary care.[90] As a result he developed Rhabdomyolysis, and he could not walk without the assistance of a straight cane for an extended period of months.[91] Spikes was only able to relinquish the cane in March 2017.[92] The extensive delays in providing Spikes with appropriate care caused Spikes months of unnecessary, excruciating pain and immobility and have contributed to lingering symptoms from the hip fracture.[93]

II. This Court Remanded to the District Court For the Limited Issue of Ensuring an Individualized Analysis of Each Defendants' Action in Light of Clearly Established Law Defined By This Court.

a. First Appeal

Spikes filed his claim regarding the extended delay in treating his serious medical need in August 2017. After a discovery period, Defendants filed a timely

[88] ROA 22-30327.6240, 6283.
[89] ROA 22-30327.6240, 6283.
[90] ROA 22-30327.5334-5352, 5377–5391.
[91] ROA 22-30327.5336, 5334–5352, ROA 22-30327.5377–5391.
[92] ROA 22-30327.5370, 5542 (Spikes 149:4-10).
[93] ROA 22-30327.6116–6121.

motion for summary judgment which Spikes opposed.[94] On December 27, 2018, the District Court denied Defendants' motion for summary judgment as to McVea, Wheat, Stringer, and Bowman's failure to provide adequate medical care to Spikes prior to his surgery – Count Three in Plaintiff's first amended complaint.[95] Defendants appealed this denial in 2019.[96] After full briefing, a panel of this Court affirmed the District Court's ruling in a published opinion.[97]

Defendants filed a petition for rehearing en banc.[98] This Court denied the petition for rehearing en banc, but granted a petition for panel rehearing.[99] In doing so, the original panel did not vacate its original panel opinion.[100] This panel only vacated the opinion of the District Court below and remanded for further proceedings to ensure that "the inquiry of qualified immunity not rest on the collective action of the medical staff, but on the role of each participant."[101] Plaintiff moved for rehearing,[102] noting the individualized analysis already undertaken by the District Court. The Court denied Plaintiff's motion, reiterating

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[94] ROA 22-30327.7658.
[95] ROA 22-30327.7658. As the District Court and this Court have held which Defendants do not dispute, these are the only claims before this Court.
[96] ROA 22-30327.7659.
[97] Spikes v. McVea, 8 F.4th 428, 440 (5th Cir. 2021).
[98] Spikes v. McVea, 12 F.4th 833 (5th Cir. 2021); ROA 22-30327.7660. Defendants filed for hearing en banc after filing a suggestion of Death with this Court on August 20, 2021, but before any substitution of Dr. McVea as Defendant could be made.
[99] Spikes, 12 F.4th.
[100] Id.; See also discussion infra at 32.
[101] Id.; ROA 22-30327.7660.
[102] Spikes v. McVea, No. 19-30019, 2021 WL 4978586 (5th Cir. Oct. 13, 2021) (ECF No. 00516013624).

the purpose of the remand, "While we recognize that there may be some repetition in the district court's analysis of whether each defendant is entitled to qualified immunity, it is imperative that the court engage in this analysis on an individualized basis."[103]

b. Second Appeal

On remand, the District Court sought supplemental briefing from the parties only as to Count Three of Plaintiff's Amended Complaint.[104] The District Court then issued a thirty-six page opinion detailing the evidence, taken in the light most favorable to plaintiff, that McVea, Wheat, Bowman, and Stringer each violated clearly established law by failing to provide Spikes with constitutionally adequate medical care.[105] This opinion is consistent with the Fifth Circuit's directive on remand.

Defendants appealed the District Court's second supplemental denial of motion for summary judgment, which forms the basis for this appeal.[106]

SUMMARY OF THE ARGUMENT

The District Court's supplemental denial of summary judgment should be affirmed. The District Court identified and detailed the individualized factual

[103] Id.; ROA 22-33027.7660.
[104] ROA 22-30327.7662. Prior to either parties' supplemental briefing, Plaintiff moved for and the District Court ordered Dr. McVea's legal heirs be substituted for Dr. McVea in the action. ROA 22-30327.7524-7550.
[105] ROA 22-30327.7658-7693.
[106] ROA 22-30327.7694-5.

disputes material to the question of qualified immunity as to each defendant, which must be resolved by the finder of fact.

The District Court correctly defined the rights and clearly established law at issue, relying on this Court's first appellate panel holding, that it was clearly established that "delays in treatment, marked by plainly unresponsive care, rise to the level of deliberate indifference."[107]

The District Court identified myriad fact disputes underlying the ultimate question of what each Defendant knew of Spikes' symptoms and the reasonableness of each Defendant's response to those symptoms. As required at this stage, the District Court resolved these factual disputes in favor of Spikes and found that a reasonable jury could find that Defendants' conduct was objectively unreasonable and violated clearly established law.

The District Court's denial of summary judgment should be affirmed and remanded. Factual disputes material to the question of whether Defendants violated clearly established law remain, precluding summary judgment based on qualified immunity. Any question of law has already been decided by the original panel opinion. Accordingly, this Court does not yet have jurisdiction to decide the

[107] Spikes, 8 F.4th at 440, on reh'g, 12 F.4th 833 (5th Cir. 2021), reh'g denied, No. 19-30019, 2021 WL 4978586 (5th Cir. Oct. 13, 2021); ROA 22-30327.569-570.

question of qualified immunity as to the Defendant-Appellants because these material factual disputes must first be resolved by the fact finder.

ARGUMENT

I. All questions of law have been decided by this court in the first appeal, and this Court does not have jurisdiction to resolve the factual disputes identified by the District Court.

Summary judgment is only proper "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law."[108] Summary judgment can only be granted if the inferences drawn from the underlying facts have been viewed in a light most favorable to the non-moving party.[109] A genuine dispute as to a fact is one that could permit a reasonable jury to enter a verdict in the non-moving party's favor.[110] A material fact is a fact that could affect the outcome of the suit, and is determined by substantive law.[111]

In the normal course of litigation, the appellate court only reviews a final decision of the district court.[112] However, this Court may review a denial of a motion for summary judgment based on qualified immunity under the collateral

[108] Fed. R. Civ. P. 56(a).
[109] Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).
[110] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).
[111] Id. at 248.
[112] 28 U.S.C. §1291.

order doctrine.[113] This doctrine limits appellate review to the questions of law.[114] As such, this Court's jurisdiction is limited to a review of the materiality of the factual disputes identified, not determining whether each factual dispute is genuine.[115]

The qualified immunity analysis requires a two-step approach to determine (1) if Spikes has alleged a violation of his constitutional right; and (2) whether Spikes' constitutional right was clearly established at the time of Defendants' misconduct.[116]

In the qualified immunity context, this Court's jurisdiction is limited to the "purely legal question whether a given course of conduct would be objectively unreasonable in light of clearly established law. . . . That is, we have jurisdiction only to decide whether the district court erred in concluding as a matter of law that

[113] Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); Kinney, 367 F.3d.
[114] Johnson v. Jones, 515 U.S. 304, 319 – 320 (1995) (holding interlocutory appeal of denial of summary judgment is not available when the record establishes guanine issues of fact); Behrens v. Pelletier, 516 U.S. 299, 312 – 12 (1996) (holding appellate review available only as to issues of law decided by district court).
[115] Naylor v. State of Louisiana, Dept. of Corrections, 123 F. 3d 855, 857 (5th Cir. 1997) (per curiam) (holding that district court rulings based on sufficiency of evidence are not appealable); Johnson v. Johnson, 694 Fed. Appx. 945, 947 (5th Cir. 2017) (per curiam) (holding that when factual disputes bear on question of deliberate indifference, the factual disputes must be resolved in order to make the qualified immunity determination and the appellate court lacks jurisdiction.); Cole v. Carson, 14-10228, 2019 WL 3928715, at *2 (5th Cir. Aug. 20, 2019), as revised (Aug. 21, 2019) (en banc) (re-affirming that collateral order doctrine limits appellate jurisdiction to materiality of factual disputes).
[116] Pearson v. Callahan, 555 U.S. 232 (2009); Saucier v. Katz, 553 U.S. 194, 200 (2001); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

officials are not entitled to qualified immunity on a given set of facts."[117] An order is only immediately appealable if the district court's denial of summary judgment is "predicated on conclusions of law, and not if a genuine issue of material fact precludes summary judgment on the question of qualified immunity."[118] Thus, this Court "lack[s] jurisdiction to review the genuineness of a fact issue on interlocutory appeal of a denial of summary judgment based on qualified immunity,"[119] but only considers the district court's assessment of the materiality or legal significance of the conduct. As to this narrow question, the Court reviews the District Court opinion de novo.[120]

II. This Court has already determined the clearly established law applicable to this case.

In making its ruling the District Court engaged in a systematic, fact intensive, individualized analysis that identified a series of specific, genuine factual disputes with regard to each Defendant. This Court's previous rulings establish the materiality of these genuine issues of fact identified by the District Court.[121]

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[117] Kinney, 367 F.3d at 347 (citing Behrens, 516 U.S. at 312–13).
[118] Palmer v. Johnson, 193 F.3d 346, 351 (5th Cir. 1999).
[119] Cole v. Carson, 14-10228 at *9 (concurrence) (emphasis in original) (quoting Melton v. Phillips, 875 F.3d 256, 261 (5th Cir. 2017) (en banc) (quoting Allen v. Cisneros, 815 F.3d 239, 244 (5th Cir. 2016)); Kinney, 367 F.3d at 341, 346–47.
[120] Id. at 349.
[121] This Court's original panel opinion defines the clearly established law applicable to this case, and the District Court provided an individualized analysis of the role of each participant in relation to the law the original panel's ruling as instructed by this Court in ruling on rehearing. Spikes, 8 F.4th at 440, on reh'g, 12 F.4th 833 (5th Cir. 2021), reh'g denied No. 19-30019, 2021 WL 4978586 (5th Cir. Oct. 13, 2021).

Accordingly, the only remaining questions as to Defendants' liability require evidence to be submitted to and evaluated by the finder of fact.

a. The law of the case as decided by this Court has resolved all legal questions, including that the law was clearly established.

Any antecedent question of law regarding the materiality of the genuine issues of fact has already been answered by this Court.[122] This Court's previous opinion defined the contours of the constitutional right at issue: "this Court has made clear delays in treatment, marked by plainly unresponsive care, rise to the level of deliberate indifference. In light of these precedents, Defendants had 'fair warning' that their delay in treating Spikes' fractured hip beyond the most cursory care violated his Eighth Amendment Rights."[123] This Court's holding decided upon the rule of law which now governs in subsequent stages of this case.[124]

The Fifth Circuit has long recognized the doctrine of law of the case, which "generally prevents reexamination of issues of law or fact decided on appeal 'either by the district court on remand or by the appellate court itself on a

[122] Spikes, 8 F.4th at 434 (defining jurisdiction to only the narrow inquiry of assessing the legal significance of the conduct.); clearly established law at the time of the underlying actions.); See also, e.g., Austin v. Johnson, 328 F.3d 204, 207 (5th Cir. 2003) (finding this Court had jurisdiction over district court's denial of summary judgment "because the court determined plaintiff's allegations made out the violation of a clearly established constitutional right; the denial of qualified immunity did not rest on the sufficiency of evidence as to whether the alleged conducted occurred.")
[123] Spikes, 8 F.4th at 440.
[124] Musacchio v. United States, 577 U.S. 237, 244-5 (2016).

subsequent appeal.'"[125] Additionally, "[i]t is well established that an appellate court decision establishes "the law of the case" which must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court…."[126] This general rule also fits in the context of this Court's strict stare decisis treatment of prior panel decisions even outside law of the case doctrine, "it is the firm rule of this circuit that one panel may not overrule the decisions of another."[127]

An appellate court's prior opinion is law of the case when it "covers issues [the appellate court] ha[s] decided expressly and by necessary implication, reflecting the 'sound policy that when the issue is once litigated and decided, that should be the end of the matter.'"[128] This Court has distinguished law of the case from res judicata, "unlike res judicata, the law of the case doctrine applies only to issues that were actually decided, rather than all questions in the case that might have been decided, but were not."[129]

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[125] Bigford v. Taylor, 896 F.2d 972, 974 (5th Cir.1990) (quoting Todd Shipyards Corp. v. Auto Transp., S.A.,763 F.2d 745, 750 (5th Cir.1985)).
[126] Williams v. Riley, 392 Fed.Appx. 237, 240 (5th Cir. 2010). See also Morrow v. Dillard, 580 F.2d 1284, 1290 (5th Cir.1978); Bigford, 896 F.2d at 974.
[127] United States v. Taylor, 933 F.2d 307, 313 (5th Cir.1991) (citing United States v. Fields, 923 F.2d 358, 360 n. 4 (5th Cir.1991); see also F.D.I.C. v. Abraham, 137 F.3d 264, 268 (5th Cir.1998).
[128] United States v. Lee, 358 F.3d 315, 320 (5th Cir.2004) (citing Crowe v. Smith, 261 F.3d 558, 562 (5th Cir. 2001)) (quoting United States v. United States Smelting Ref. & Mining Co., 339 U.S. 186, 198 (1950)); see also Med. Ctr. Pharmacy v. Holder, 634 F.3d 830, 834 (5th Cir. 2011).
[129] Alpha/Omega Ins. Servs., Inc. v. Prudential Ins. Co. of Am., 272 F.3d 276, 279 (5th Cir. 2001) (citing Morrow, 580 F.2d at 1290).

An appellate court's prior opinion is only considered non-binding law of the case when "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to such issue, or (3) the prior decision was clearly erroneous and would work manifest injustice."[130] None of these limited exceptions to the law of the case doctrine is applicable in the case at bar.

In this case, the original panel opinion was never vacated. The original panel treated Defendants' petition for rehearing en banc as a petition for panel rehearing.[131] The panel granted the petition for rehearing, observing McVea's death "makes it all the more important that the inquiry of qualified immunity not rest on the collective action of the medical staff, but on the role of each participant."[132] The panel then vacated the judgment below, i.e., that of the District Court, and remanded.[133] The original panel opinion was left intact. In other cases, when a panel has intended to vacate its opinion, it has explicitly outlined what if any portions of the original opinion are vacated.[134] Here, the panel's silence with

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[130] Williams, 392 Fed.Appx. at 240 (citing EEOC v. Int'l Longshoremen's Assoc., 623 F.2d 1054, 1058 (5th Cir. 1980) (citations omitted). See also Alpha/Omega Ins. Servs., Inc, 272 F.3d at 279; Browning v. Navarro,887 F.2d 553, 556 (5th Cir. 1989)).
[131] Spikes, 12 F.4th, reh'g denied, No. 19-30019, 2021 WL 4978586 (5th Cir. Oct. 13, 2021).
[132] Id.
[133] Id.
[134] See, e.g. Jenkins v. McDermott, Inc., 742 F.2d 191, 192 (5th Cir. 1984) (noting explicitly which aspects of the panel opinion were vacated and remanding to District Court); Robinson v. Kimbrough, 558 F.2d 773, 774 (5th Cir. 1977) (detailing which aspects of a prior panel opinion were vacated and remanding); Satcher v. Honda Motor Co., 993 F.2d 56, 57 (5th Cir. 1993)

regard to its opinion did not vacate its opinion.[135] According to the rules and the practice of this Court, without any specific directive, the original panel opinion remains intact and controlling on this case.

Finally, neither this Court nor the Supreme Court have issued any opinions in the intervening year and half to alter the original panel's ruling. Given the clearly established nature of the constitutional right,[136] no manifest injustice would result from adhering to the law of the case and allowing a fact finder to determine Defendants' liability. Because there is no applicable exception to this Court's law of the case doctrine, the District Court and this Court are bound by the definition of clearly established law in this Court's published original panel opinion.[137] This Court has already resolved the legal questions applicable at this stage of the case.

b. Defendants' attacks on the authority setting out the clearly established law relied upon by this Court and the District Court are without merit.

(granting panel rehearing and explicitly vacating the entirety of the original panel opinion); Ibarra v. Stephens, 723 F.3d 599, 600 (5th Cir. 2013) (vacating portions of a prior panel opinion in accordance with a recent case but "in all other respects, the majority and dissenting opinions remain in effect.).

[135] Local and Federal Rules of Appellate Procedure do not provide that a panel rehearing results in an automatic vacatur of the original panel opinion. Vacatur only occurs automatically only when the full court has voted to take a case en banc. Fifth Circuit Rule 41.3. Here, the case never went en banc.

[136] See discussion infra at 34-39.

[137] Only an en banc court may overrule this published opinion. United States v. Taylor, 933 F.2d at 313 (citing United States v. Fields, 923 F.2d at 360 n. 4 (holding "it is the firm rule of this circuit that one panel may not overrule the decisions of another."); see also F.D.I.C. v. Abraham, 137 F.3d at 268.

The original panel's opinion permissibly relies on both published and unpublished cases in holding the law was clearly established that disregard for medical need "may be evidenced by a medical professional's decision to administer 'easier and less efficacious treatment' without exercising professional judgment. So too may delays in treatment caused by non-medical reasons."[138]

This Court and the Supreme Court have long held that clearly established means "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right,' although it is not necessary for controlling precedent to have held that the official's exact act was unlawful."[139] Rather than offer a precise factual analogue, "the law can be clearly established despite notable factual distinctions between the precedents relied on and the case then before the Court..."[140] as long as the precedent "clearly establish[es] the rule."[141] The question is "whether the official has fair warning that his conduct violates a constitutional right."[142] This question is "determined by

[138] Spikes, 8 F.4th at 435 (citing Estelle v. Gamble, 429 U.S. 97, 104, n. 10 (1976); Delaughter v. Woodall, 909 F. 3d 130, 138 n.7 (5th Cir. 2018) and Hanna v. Corrections Corp. of America, 95 F. App'x 531, 532 (5th Cir. 2004) (unpublished)).
[139] Delaughter, 909 F.3d at 139–40 (citing Brown v. Miller, 519 F.3d 231, 236–37 (5th Cir. 2008) quoting Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 256 (5th Cir. 2005), abrogated on other grounds by Kingsley v. Hendrickson, 576 U.S. 389 (2015)) (emphasis added).
[140] Easter v. Powell, 467 F.3d 459, 465 (5th Cir. 2006) (internal quotation marks omitted) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)); See also Kinney, 367 F.3d at 350 (quoting Hope v. Pelzer, 536 U.S. 730, 740 (2002).
[141] Austin, 328 F.3d at 207.
[142] Id. (Citing Cooper v. Brown, 844 F.3d 517, 524 (5th Cir. 2016).

"controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity."[143]

The Supreme Court and Fifth Circuit established more than four decades ago that when a prison medical provider is deliberately indifferent to the serious medical needs of a prisoner, the medical provider has violated the prisoner's Eighth Amendment right.[144] Because individual prisoners rely completely on prison authorities for medical treatment, delayed response to a serious medical need resulting in pain and suffering constitutes an unnecessary and wanton infliction of pain in violation of the Eighth Amendment.[145]

This Court has long recognized that responding to a prisoner patient's reports of severe pain and requests for emergency medical attention with only non-emergent referrals and cursory examinations constitutes deliberate indifference.[146]

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[143] Delaughter, 909 F.3d at 139–40 (citing Morgan v. Swanson, 659 F.3d 359, 371–72 (5th Cir. 2011).

[144] Estelle, 429 U.S. at 104.

[145] In articulating the Eighth Amendment standard, this Court continues to hold, "[u]nnecessary and wanton infliction [ ] of pain' provides the lodestar for Eighth Amendment analysis." Coleman v. Sweetin, 745 F.3d 756, 764 (5th Cir. 2014) (citing Hope, 536 U.S. at 737); Easter, 467 F.3d at 465 (declining to extend qualified immunity to medical professional who delayed treatment of prisoner patient, specifically noting "severe chest pain he suffered during the period of time Powell refused to treat him" stated a claim); Alderson v. Concordia Par. Corr. Facility, 848 F. 3d 415, 422 (5th Cir. 2017) (holding pain suffered by a prisoner caused by delay in medical care supports an award of damages).

[146] See Harris v. Hegmann, 198 F.3d 153, 154–55; 159-160 (5th Cir. 1999) (holding prisoner patient stated a claim for deliberate indifference when nurse failed to emergently refer patient and doctor failed to conduct thorough evaluation of patient requesting emergency medical attention for extreme jaw pain); Loosier v. Unknown Med. Doctor, 435 Fed.Appx. 302, 306, 2010 WL 7114192 at *2 (5th Cir. June 1, 2010) (unpublished) (finding doctor deliberately indifferent when she failed to provide medical care although she was aware of prisoner patient's

Further, this Court has repeatedly held that pain suffered by a patient during a delay in providing care caused by deliberate indifference is a significant harm.[147]

Consistent with this long-held precedent, the original panel cited to multiple sources of binding published authority for the rule that cursory responses causing a delay in responsive medical treatment is a violation of the Eighth Amendment. For example, in Delaughter v. Woodall, this Court held that in 2010 it was a clearly established violation of the Eighth Amendment, "if the prison official knows that the inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[148] Over twenty years ago, in Harris v. Hegmann, this Court held that a cursory examination and reliance on previously scheduled appointment in the face of repeated and continuous complaints of excruciating pain state a claim for a violation of a plaintiff's Eighth Amendment rights.[149] In Austin v. Johnson, this Court held that minimal care

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extreme pain, shoulder numbness, and neck brace even where initial X-ray tech reported no injury); Perez v. Anderson, 350 Fed.Appx. 959, 961–62, 2009 WL 3461292, at *2 (5th Cir. Oct. 28 2009) (unpublished) (finding allegations that doctor and nurse failed to order X-rays or offer meaningful pain relief to prisoner patient for months constituted deliberate indifference.); Ledesma v. Swartz, 1997 WL 811746, at *1 (5th Cir. Dec. 16, 1997) (unpublished) (finding doctor's response to swollen jaw, severe pain and trauma with only Motrin, and his failure to schedule X-ray for five days was deliberate indifference); Hughes v. Noble, 295 F.2d 495 (5th Cir. 1961) (finding deliberate indifference for thirteen-hour delay in treating broken, dislocated cervical vertebrae).

[147] See e.g., Alderson, 848 F.3d at 442; Easter, 467 F.3d at 464-465 (holding pain suffered during a delay in treatment can constitute substantial harm and form basis for award of damages).

[148] Delaughter, 909 F.3d at 140 (citing Mendoza v. Lynaugh, 989 F. 2d 191, 195 (5th Cir. 1993). See also Gobert v. Caldwell, 463 F. 3d 339, 346 (2006).

[149] Harris at 160.

causing a two-hour delay before calling an ambulance for an unconscious and vomiting boot camp attendee was a violation of clearly established Eighth Amendment rights in 1999.[150] In each of these cases, medical personnel were aware of serious, ongoing symptoms but took less efficacious actions without a clinical basis.[151] As the original panel held, the rule articulated in these cases gave the Defendants' fair warning that delaying medical care by continuing ineffective measures to which a patient's condition was clearly unresponsive rises to the level of deliberate indifference.

Beyond this litany of controlling cases, the original panel opinion also referenced a catalogue of persuasive authority. This Court has also long held "[t]o determine whether state officials had 'fair warning' that their conduct was unconstitutional, we consider the status of the law both in our circuit and in our sister circuits at the time of the defendants' actions."[152]

Further, while unpublished cases may not be binding authority, these cases are persuasive authority[153] which can and do provide a signpost for the state of

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[150] Austin, 328 F.3d at 210.

[151] The original panel also explicitly defined unresponsive treatments as ignoring, refusing to treat or intentionally treating incorrectly. Spikes, 8 F.4th at 439 (citing Domino v. Texas Dep't of Criminal Justice, 239 F. 3d 752, 756 (5th Cir. 2001)). See also, Gobert, 463 F. 3d at 346.

[152] Kovacic v. Villarreal, 628 F.3d 209, 214 (5th Cir. 2010); see also McClendon v. City of Columbia, 305 F.3d 314, 329 (5th Cir. 2002) (holding "we must consider both this court's treatment of the state-created danger theory and status of this theory in our sister circuits in assessing whether a reasonable officer would have known at the time of [defendant's] actions").

[153] See e.g., Reyes v. Bridgwater, 362 F. App'x 403, 408 (5th Cir. 2010) (citing to an unpublished opinion to define the contours of a Fourth Amendment right, "[a]lthough unpublished opinions

clearly established law at the time of the event giving rise to the appeal.[154] In this Court's published Delaughter opinion, the Court looked to only three other unpublished opinions to inform its articulation of clearly established law in 2010.[155]

Here, the original panel considered and analyzed five unpublished opinions[156] and three opinions from its sister circuits,[157] all holding that cursory treatment in the face of a serious medical need is a violation of the Eighth Amendment. Coupled with the published opinions the original panel considered, this extensive body of persuasive authority is a strong foundation for the original panel's articulation of clearly established law.[158]

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are not precedent, we cite this decision for its persuasive value under similar facts); Joseph on behalf of Est. of Joseph v. Bartlett, 981 F.3d 319, 341 (5th Cir. 2020) (confirming clearly established law in looking to published and unpublished opinions released after date of the event at issue.)

[154] Marks v. Hudson, 933 F.3d 481, 486 (5th Cir. 2019)(holding Certainly, though, to the extent any of those opinions are restating what was clearly established in precedents they cite or elsewhere, the unpublished opinions can properly guide us to such authority.); see also Joseph on behalf of Est. of Joseph, 981 F.3d at 341 (accord); Delaughter, at 140 (looking to three unpublished cases along with published cases in articulating clearly established law). Defendants' insistence on ignoring unpublished opinion not only ignores this Court's long standing approach to determining clearly established law, it also threatens to dispense with a vast resource of judicial scholarship entirely unnecessarily.

[155] Delaughter at 140.

[156] Spikes, 8 F.4th at 428-440 (citing Hanna, 95 F. App'x at 532 (unpublished) (per curiam); Dauzat v. Carter, 670 F. App'x 297, 298 (5th Cir. 2016) (unpublished) (per curiam); Galvan v. Calhoun Cty., 719 F. App'x 372, 374-375 (5th Cir. 2018) (unpublished); Rodrigue v. Grayson, 557 F. App'x 341, 342, 346 (5th Cir. 2014) (unpublished) (per curiam); Ledesma, No. 97-10799, 1997 WL 811746 (unpublished).

[157] Id. (citing Mandel v. Doe, 888 F. 2d 783, 789 (11th Cir. 1989); Cesal v. Moats, 851 F. 3d 714, 723 (7th Cir. 2017); Petties v. Carter, 836 F. 3d 722, 730 (7th Cir. 2016)).

[158] Defendants' efforts to suggest that opinions rendered after 2016 could not determine clearly established law is without merit. The controlling question is whether the events at issue occurred

The District Court relies on the original panel opinion's statement of clearly established law[159] and the cases cited that determine the clearly established law at the time, recognizing "an official is deliberately indifferent to a prisoner's serious medical needs when the official delays treatment with responses so cursory or minimal that they cause unnecessary suffering."[160] Defendants' suggestion that the District Court "totally failed to identify clearly established law" is plainly without merit.

This Court has already determined the relevant antecedent legal questions by issuing its holding as to the clearly established law in place during the events of this case. This Court remanded to the District Court exclusively to conduct an individualized analysis of the issues of fact in the context of this Court's holding on clearly established law.[161] The District Court followed this Court's ruling and engaged in an individualized analysis of the genuine issues of material fact, finding significant genuine issues of material fact which must be presented to the jury.

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before or around 2016, not the date of the decision. See e.g., Joseph on behalf of Est. of Joseph, 981 F.3d at 341 (finding "further confirmation that we have correctly ascertained the clearly established law as of February 7, 2017, because a number of our opinions released after February 7, 2017, conclude that these principles were the clearly established law by 2013."). Each of the unpublished opinions this Court cited all considered clearly established law governing events prior to 2016.

[159] ROA 22-30327.7659-7660.

[160] ROA 22-30327.7674,7680,7692 (citing Galvan, 719 F. App'x at 374-375 (unpublished); Rodrigue, 557 F. App'x at 342, 346 (unpublished) (per curiam); Ledesma, No. 97-10799, 1997 WL 811746 (5th Cir. 1997)(unpublished); Mandel, 888 F. 2d at 789; Cesal, 851 F. 3d at 723; Harris, 198 F.3d at 160; Austin, 328 F.3d at 210.

[161] Spikes, 12 F.4th at 833.

III. The District Court identified a myriad of factual disputes, which precludes summary judgment on behalf of Defendants Stringer, Bowman, Wheat, and McVea.

The District Court systematically identified a Defendant-by-Defendant catalogue of material factual disputes, which when analyzed in the light most favorable to Plaintiff, establish that each Defendant's behavior was objectively unreasonable under clearly established law, and violated Spikes' Eighth Amendment Rights.[162] The collateral order doctrine confines an appellate court's jurisdiction only to those issues of law decided by the District Court.[163] Thus, this Court's review is confined to legal significance of the factual disputes the District Court identified as precluding summary judgment.[164]

a. Subjective knowledge is a question of fact to be resolved by the fact finder.

As detailed below, for each of the Defendants, the factual disputes go directly to the two questions central to subjective deliberate indifference analysis: what each Defendant-Appellant knew, and whether each responded reasonably.

With regard to what each Defendant-Appellant knew, this Court and the Supreme Court have held "[w]hether a prison official has the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways,

[162] ROA 22-30327.7667-7693.
[163] Behrens, 516 U.S. at 313; Kinney, 367 F. 3d at 348.
[164] Kinney, 367 F.3d at 348.

including inference from circumstantial evidence."[165] Because what each Defendant-Appellant knew is a question fact, it must be resolved in favor of Spikes at this stage.[166]

Fact disputes going to each Defendant-Appellants' subjective deliberate indifference will be examined in turn as required. [167]

b. The District Court correctly found Nurse Stringer's conduct was objectively unreasonable when she failed to adequately document and timely refer Spikes to physician competent to diagnose and treat symptoms of hip fracture.

[165] Farmer v. Brennan, 511 U.S. 825, 842-43 (1994) (emphasis added); Hyatt v. Thomas, 843 F.3d 172, 178 (5th Cir. 2016) (engaging in close fact analysis to hold that defendant's awareness of history of depression, suicide attempts, intoxication, and decision to withhold certain items due to decedents' history could lead a reasonable jury to find defendant was subjectively aware of the substantial suicide risk); Hinojosa v. Livingston, 807 F.3d 657, 665 (5th Cir. 2015) (engaging in fact analysis including defendant's review of reports related to prisoner injuries and deaths to determine if they had requisite knowledge.); ROA 22-30327.7446.

[166] Significantly, a consensus of Fifth Circuit cases do not measure knowledge based on knowledge of the specific diagnosis, but the specific patient signs and symptoms they were aware of. Harris, 198 F.3d at 154–55; 159-160; Hyatt, 843 F.3d at 178 (engaging in close fact analysis to hold that defendant awareness of history of depression, suicide attempts, intoxication, and decision to withhold certain items due decedents' history could lead a reasonable jury to conclude that defendant was subjectively aware of the substantial risk that decedent would attempt suicide.); Rodrigue, 557 Fed.Appx. at 344–45 (unpublished); Loosier, 2010 WL 7114192 at *2 (unpublished) (finding doctor was deliberately indifferent when she failed to provide medical care although she was aware of prisoner patient's extreme pain, numbness in shoulder, and neck brace even where initial X-ray tech reported no injury); Perez, 2009 WL 3461292, at *2 (5th Cir. 2009) (unpublished) (finding that allegations that doctor and nurse failed to order X-rays or offer meaningful pain relief to prisoner patient for months constituted deliberate indifference.); Ledesma, 1997 WL 811746, at *1 (unpublished) (finding doctor's failure to respond to swollen jaw, severe pain and history trauma with nothing more than Motrin and not scheduling X-ray for five days was deliberate indifference).

[167] Lawson v. Dallas Cty., 286 F.3d 257, 262 (5th Cir. 2002) (holding "each individual's subjective deliberate indifference must be examined separately").

In its extended analysis of Nurse Stringer's conduct, the District Court identified multiple issues of material fact. Defendants' preference for separately analyzing each contact Nurse Stringer had with Spikes fundamentally misapprehends this Court's instructions to the District Court, the District Court's analysis, and the jurisprudence of this Court. This Court remanded the case to the District Court to separately analyze "the role of each participant", not to separately analyze the multiple contacts by each Defendant.[168] The District Court's analysis does precisely this. Over nine pages, the District Court reviews Nurse Stringer's conduct, including each encounter with Spikes, to illustrate genuine factual disputes as to Nurse Stringer's subjective knowledge of the gravity of Spikes' injury.[169] These genuine factual disputes include Plaintiff's level of pain and ability to walk on June 30, 2016, Plaintiff's level of pain and ability to walk on the following visit on July 5, 2016, whether Nurse Stringer actually assessed of Plaintiff's ambulation and range of motion on June 30, 2016 and July 5, 2016, whether Nurse Stringer impeded Spikes' access to appropriate medical care by relaying false or unverified information to Dr. McVea about Plaintiff's condition, and whether Nurse Stringer impeded Spikes' access to appropriate medical care by failing to call Dr. McVea to recommend he see Spikes urgently.

[168] Spikes, 12 F.4th at 833.
[169] ROA 22-30327.7667-7675.

Even if the June 30, 2016 visit did not rise to the level of deliberate indifference,[170] this earlier encounter with Spikes necessarily informs Nurse Stringer's subjective knowledge that Spikes' injury was not responding to the course of care. Defendants do not and cannot point to a single case from this Court or any other to support their extraordinary position that unless every single encounter meets the deliberate indifference standard, then the defendants should be granted qualified immunity.

Defendants' citation to Stewart v. Murphy[171] is inapposite. First, in that case, only multiple doctors, not the nurses, involved in the care of paraplegic prisoner patient who died from infected decubitus ulcers were sued as defendants. The doctor defendants admitted that they did not read notes from their nurses and other physicians, thus did not have subjective knowledge of what the others were doing. The holding in that case is limited to occasions when different independent actors did not have subjective knowledge of what other actors were doing.[172] Such a holding is inapplicable to this case. Here, we have a single nurse who saw a patient twice. Her subjective knowledge of the first visit must inform her clinical approach of the second. It is both proper and necessary for the court to consider

[170] This Court and District Court have both ruled that this visit did not rise to the level of deliberate indifference, but Plaintiff does not concede that Nurse Stringer's falsification of the medical record does not rise to deliberate indifference and a violation of Plaintiff's Eighth Amendment rights.
[171] Stewart v. Murphy, 174 F.3d 530, 537 (5th Cir. 1999).
[172] Id.

what each defendant subjectively knew when subjective deliberate indifference is an element of the legal test plaintiff must prove.

Defendants make much of the nurses' efforts to "diagnose" Spikes.[173] However, this argument misses the essential point that none of the LPNs diagnosed Spikes because none of the LPNs could diagnose Spikes.[174] The inescapable and material fact identified by the District Court is that Defendant Stringer actively prevented Spikes' from being able to access to a physician competent to diagnose him.

Finally, Defendants again miss the point in suggesting that the District Court's concern was exclusively speed of Defendant Stringer's response. The central issues of fact recognized by the District Court are that Nurse Stringer entirely failed to examine Spikes for his concern, then falsified records pertaining to the range of motion examination, and entirely failed to speak with McVea about whether further treatment was necessary. Stringer's actions present no evidence of any medical judgment, only an absolute failure to gather relevant medical information leading to a delay in care causing Spikes to suffer the pain of an untreated broken hip for six weeks.[175]

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[173] Brief of Defendants at 39.

[174] ROA 22-30327.5630–5631 (McVea 45:22-46:2), ROA 22-30327.5896-5897 (Bowman 13:7-20, 14:5-11), 5951 (Wheat 15:18),

[175] Unlike in Estelle v. Gamble, Spikes' six weeks of agony coupled with a more painful and complex surgical fix caused by the delay was entirely avoidable. Nothing in the facts of Estelle v. Gamble suggest that some other obvious course of treatment would have mitigated or

This failure is objectively unreasonable in light of Nurse Stringer's responsibilities as a gate keeper to the diagnosing physician.[176] Her job at Rayburn required "accurate documentation of offender complaint, assessment" and appropriate referrals.[177] Stringer's failure to do her job although she knew Spikes' pain had been present for a week and was getting worse is not a matter of medical judgment, it is objectively unreasonable at every level.

As this Court has already held in this case, the law is clearly established that taking the easier but less efficacious treatment route is tantamount to ignoring patient pain and a violation of the Eighth Amendment.[178] Resolving the identified fact

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shortened Gambles' pain from the back injury. In addition, Gamble was seen by a medical doctor competent to diagnose in the first instance, and then received follow up care from medical doctors who were competent to assess the reasonableness of the diagnosis and response to treatment. In other words, there was medical judgment at work. Here, Spikes was never seen by any medical professional competent to diagnose him until August 11, 2016, after he had suffered excruciating pain and immobility for six weeks. The failure to send Spikes a medical professional competent to diagnose his agonizing pain for six weeks is not a display of medical judgment, it is an infliction of pain.

[176] Rayburn had a system of prioritizing patients based on the urgency of the patient complaint. ROA 22-30327.6747–6749. Dr. McVea made the ultimate determination regarding the patient's level of urgency. ROA 22-30327.5643 (McVea 58:17-23). But Nurses were responsible for making recommendations regarding the urgency with which people could or should be seen on their assessment or direct conversation with Dr. McVea. ROA 22-30327.5644–45 (McVea 59:23-60:2, 60:7-11), ROA 22-30327.5902 (Bowman 19:14-19), ROA 22-30327.3632–32 (McVea 59:23-60:11). Nurse assessments are designed to be descriptions of what the nurse sees, rather than a statement about the underlying problem. ROA 22-30327.5950–52 (Wheat 14:5-22, 15:22-16:3).

[177] ROA 22-30327.6743–6745, ROA 22-30327.6750–51.

[178] Spikes, 8 F.4th at 435-440; Estelle, 429 U.S. at 105 (noting that even when a physician does not completely ignore a patient, the doctor's choice of an easier, less efficacious treatment may support a finding of deliberate indifference); Harris, 198 F.3d at 154–55; 159-160 (holding prisoner patient stated a claim for deliberate indifference when nurse failed to emergently refer patient and doctor failed to conduct thorough evaluation of patient complaining of extreme jaw pain and requesting emergency medical attention); Ledesma, 1997 WL 811746, at *1

disputes in favor of Spikes, Nurse Stringer violated this clearly established law and her conduct was objectively unreasonable. Under these facts, the District Court did not err in finding Nurse Stringer was not entitled to qualified immunity.

c. The District Court correctly found Nurse Bowman's conduct was objectively unreasonable by delaying Spikes' access to necessary medical care by failing to urgently refer him to a medical provider competent to diagnose and treat symptoms of hip fracture.

In its extended analysis of Nurse Bowman's conduct, the District Court identified multiple issues of material fact.[179] As with Nurse Stringer, Defendants' preference for separately analyzing each contact Nurse Bowman had with Spikes is illogical, and not grounded in law. The mistaken assertion that each contact made by an individual must be analyzed in a vacuum fundamentally misapprehends this Court's instructions to the District Court, the District Court's analysis, and the jurisprudence of this Court. This Court remanded the case to the District Court to

(unpublished) (finding doctor's failure to respond to swollen jaw, severe pain and history trauma with nothing more than Motrin and not scheduling X-ray for five days was deliberate indifference); Hughes, 295 F.2d 495 (5th Cir. 1961) (finding deliberate indifference for thirteen hour delay in treating broken and dislocated cervical vertebrae); See also, Loosier, 2010 WL 7114192 at *2 (unpublished); Berry v. Peterman, 604 F.3d 435, 441 (7th Cir. 2010) (finding "a significant delay in effective medical treatment also may support a claim of deliberate indifference, especially where the result is prolonged and unnecessary pain."); Perez, 2009 WL 3461292, at *2 (5th Cir. Tex. Oct. 28 2009) (unpublished) (finding that failure to order X-rays or offer meaningful pain relief to prisoner patient for months constituted deliberate indifference); Johnson v. Doughty, 433 F.3d 1001, 1013 (7th Cir. 2006) (stating that "medical personnel cannot simply resort to an easier course of treatment that they know is ineffective"); Greeno,414 F.3d at 655 (noting that persistence in a course of treatment "known to be ineffective" violates the Eighth Amendment); McElligott v. Foley,182 F.3d 1248, 1257 (11th Cir. 1999) (holding doctor and nurse could be liable for responding to patient's repeated complaints of stomach pain with only Tylenol and Pepto-Bismol).

[179] ROA 22-30327.7675-81.

separately analyze "the role of each participant," not each individual contact.[180] The District Court's analysis does precisely this.

Over seven pages, the District Court reviews Nurse Bowman's conduct including each encounter with Spikes to illustrate genuine factual disputes as to Nurse Bowman's subjective knowledge of the gravity of Spikes' injury.[181] These genuine factual disputes include Nurse Bowman's subjective knowledge that Plaintiff suffered more than a pulled muscle and the objective unreasonableness of continuing plainly ineffective treatment without seeking a diagnosis from the doctor. As the District Court observed, the record evidence is clear that Nurse Bowman was aware of the seriousness of Spikes' condition, most notably his extreme pain, his inability to walk, and the fact that he had been experiencing these symptoms for weeks when she first saw him.[182] Despite this knowledge, Nurse Bowman only recommended a routine doctor call out for Spikes to see Dr. McVea, delaying Spikes' access to a doctor and diagnosis for weeks.[183]

When Spikes returned five days later with the same inability to walk on his leg, Nurse Bowman did nothing to expedite his access to a doctor.[184] The District Court did not err in considering what Nurse Bowman knew at each encounter with

[180] Spikes, 12 F.4th at 833.
[181] ROA 22-30327.7675-81.
[182] ROA 22-30327.5330, 3895, 3903, 3917 (Bowman 24:24-25, 32:3-8, 46:16-22).
[183] ROA 22-30327.5925 (Bowman 43:14-24), 5330, 5375.
[184] ROA 22-30327.5329.

Spikes to determine that Nurse Bowman had subjective knowledge that Spikes faced a risk of harm. Defendants do not and cannot point to a single case from this Court or any other to support their extraordinary position that a defendants' prior encounters cannot be considered in assessing the reasonableness of the defendant's actions. As detailed above, Defendants' citation to Stewart v. Murphy[185] is inapposite and does not support this proposition.

Defendants' suggestion that the claim is disagreement with Nurse Bowman's incorrect diagnosis[186] again misses the essential point that none of the LPNs could diagnose Spikes.[187] Again, the District Court identified genuine issues of fact she actively impeded his access to a physician competent to diagnose him.[188]

Finally, Defendants again miss the point in suggesting that Nurse Bowman's failure to take the steps available to her to have Spikes seen more quickly by Dr. McVea did not amount to a wanton infliction of pain. Her failure to affirmatively alert McVea to Spikes' serious injury is objectively unreasonable in light of Nurse Bowman's responsibilities as a gatekeeper to the diagnosing physician.[189] Although McVea made the ultimate determination regarding the level of urgency with which a patient was seen, this system, for better or worse, heavily depended

[185] Stewart, 174 F.3d at 537.
[186] Brief of Defendants at 45.
[187] ROA 22-30327.5630–5631 (McVea 45:22-46:2), ROA 22-30327.5896–5897 (Bowman 13:7-20, 14:5-11), 5951 (Wheat 15:18),
[188] ROA 22-30327.7675-7681.
[189] See footnote 176 for detail on Rayburn's system of prioritizing patients.

on nurses picking up the phone and directly alerting McVea if a patient needed to be seen more quickly.[190] Nurse Bowman chose not to do so here. The fact that Bowman failed to alert the doctor competent to diagnose that Spikes presented urgent symptoms and needed to be seen more quickly, condemned Spikes to three more weeks of agonizing pain and immobility. This delay resulted in an extremely painful procedure that required re-breaking Spikes' hip and re-setting it. Bowman's failure to do her job despite her subjective knowledge that Spikes had been in pain, unable to walk and seeking care for weeks was a moving cause of Spikes entirely unnecessary and avoidable pain. This failure is not a matter of medical judgment; it was objectively unreasonable at every level.

As this Court has already held in this case, the law is clearly established that taking the easier but less efficacious treatment route is tantamount to ignoring patient pain and a violation of the Eighth Amendment.[191] Resolving the identified fact disputes in favor of Spikes, Nurse Bowman violated this clearly established law and her conduct was objectively unreasonable. Under these facts, the District Court did not err in finding Nurse Bowman was not entitled to qualified immunity.

d. The District Court correctly found Nurse Wheat's conduct was objectively unreasonable by impeding Spikes' access to medical care by disciplining him for seeking care for his fractured hip.

[190] ROA 22-30327.7678, 3632-45 (McVea 59:23-60:11, 60:7-11), 5902 (Bowman 19:12-19).
[191] Spikes, 8 F.4th at 435-440.

In its extended analysis of Nurse Wheat's conduct, the District Court identified multiple issues of material fact.[192] These genuine factual disputes include that Nurse Wheat was subjectively aware that Spikes had been seeking care for his fractured hip since June 30, 2016, and that "treatment" had not been working.[193] She specifically noted "repeated c/o or right groin pain" in a note that does not include any other detail of Spikes' symptoms or inability to move.[194] Instead of taking the steps necessary to allow Spikes' access to a doctor competent to assess the injury to his leg, Defendant-Appellant Wheat, initiated a disciplinary action against him.[195] At the time Spikes was requesting help from Nurse Wheat, his doctor's appointment was still close to three weeks away. Nurse Wheat effectively impeded Spikes from seeking care for his hip fracture; Spikes did not file any sick calls seeking treatment for his fractured hip after this receiving this write-up.[196]

Nurse Wheat noted that Spikes should receive crutches for one week.[197] Addressing the mobility limitations caused by the untreated broken hip is not a reasonable response to repeated and prolonged reports of pain and inability to

[192] ROA 22-30327.7681-7685.
[193] ROA 22-30327.6071 (Wheat 135:7-24).
[194] ROA 22-30327.5328.
[195] ROA 22-30327.6160, 6051 (Wheat 135:7-24).
[196] ROA 22-30327.5321 – 5333, ROA 22-30327.5373–5377, ROA 22-30327.5392–403, ROA 22-30327.5568–70 (Spikes 174:9-176:6).
[197] ROA 22-30327.5328.

walk. In fact, Fifth Circuit jurisprudence suggests that evidence of nurses' inadequate interventions may go to establish subjective awareness of Spikes' serious medical need.[198]

Finally, Defendants again miss the point in suggesting that Nurse Wheat's failure to take steps available to her to have Spikes seen more quickly by McVea did not amount to a wanton infliction of pain. First, Nurse Wheat actively impeded Spikes ability to access to medical care by subjecting him to disciplinary actions for his efforts to seek medical care.[199] Her efforts to actively discourage Spikes from seeking care for his serious medical need is objectively unreasonable in light of Nurse Wheat's responsibilities as a gate keeper to diagnosing physician.[200] Although McVea made the ultimate determination regarding the level of urgency with which a patient was seen, this system, for better or worse, heavily depended on nurses picking up the phone and directly alerting McVea if someone needed to be seen more quickly.[201] The fact that Wheat not only failed to do her job in this system and send Spikes to a doctor competent to diagnose, but also took steps to

[198] Hyatt, 843 F.3d at178 (holding that evidence a defendant withheld certain items due to decedent's history of depression and suicide attempts could lead a reasonable jury to conclude that defendant was subjectively aware of the substantial suicide risk).
[199] The fact that Spikes was disciplined for seeking medical care is distinct from the disciplinary action taken against Gamble in Estelle v. Gamble, 429 U.S. 97. The medical professionals responsible for Gamble's care were not the ones seeking disciplinary action against him, rather he was disciplined for a violation of the prison's security side rules separate and apart from medical care. Here, Spikes was disciplined for his efforts to access care for his broken hip.
[200] See footnote 176 for detail on Rayburn's system of prioritizing patients.
[201] ROA 22-30327.3632-45 (McVea 59:23-60:11, 60:7-11), 3890, (Bowman 19:12-19).

discourage him from seeking medical care responsive to his concern condemned Spikes to three more weeks of agonizing pain and immobility.

As this Court has already held in this case, the law is clearly established that taking the easier but less efficacious treatment route is tantamount to ignoring patient pain and a violation of the Eighth Amendment.[202] Resolving the identified fact disputes in favor of Spikes, Nurse Wheat violated this clearly established law and her conduct was objectively unreasonable. Under these facts, the District Court did not err in finding Nurse Wheat was not entitled to qualified immunity.

e. The District Court correctly found Dr. McVea did not exercise medical judgment in unreasonably delaying Spikes' medical care, which caused unnecessary pain and suffering in violation of clearly established law.

Finally, the District Court engaged in a proper and thorough analysis of Dr. McVea's individual and subjective knowledge and his refusal to treat Spikes.[203]

From July 5 until August 11, 2016, Dr. McVea was subjectively aware that on at least six successive occasions, Spikes remained in significant pain and continued to request medical care for his hip because the "treatment" was not working.[204] Dr. McVea also knew that a muscle strain should have started to

[202] Spikes, 8 F.4th at 435-440.
[203] ROA 22-30327.7685-7692.
[204] ROA 22-30327.5327–33, ROA 22-30327.5331, ROA 22-30327.5721 (McVea 136:1-137:5), ROA 22-30327.5728 (McVea 143:8-10), 5373-5376, 5331.

improve within a week or two.[205] Prior to the doctor call-out on August 11, 2016, Dr. McVea did not order an X-ray or re-evaluate Spikes treatment although it had been completely ineffective for six weeks.[206]

Defendants admit that McVea ignored and refused to treat Spikes over this time.[207] Without citation, Defendants take the extraordinary position that "a defendants' refusal to treat a patient on one occasion does not mean he refused to treat a patient on other occasions. A physician may ignore a complaint on one occasion, but not another."[208] Nothing in Fifth Circuit jurisprudence suggests that just because McVea eventually ordered an X-Ray, after Spikes had been seeking medical care for six weeks, that McVea is entitled to qualified immunity for the extended period of time he ignored Spikes and delayed his treatment.

Again, Defendants point to Stewart v. Murphy to suggest that if one encounter (the August 11, 2016 encounter) does not rise to the level of deliberate indifference, then the claim for deliberate indifference must be dismissed. But as detailed above, Stewart does not permit a physician to occasionally ignore or refuse to treat a patient. Further, Stewart is entirely inapposite because McVea did review nurses' notes.

[205] ROA 22-30327.5729 (McVea 142:5-11).
[206] ROA 22-30327.5321–33, ROA 22-30327.5373–77, 5392–3, ROA 22-30327.5701–12 (McVea 116:21-117:3), ROA 22-30327.5622 (McVea 37:8-16), ROA 22-30327.6119.
[207] Brief of Defendants at 49.
[208] Brief of Defendants at 51.

The District Court's ruling engages in a detailed analysis of each date McVea had subjective knowledge of Spikes debilitating pain and McVea's failure to act on each occasion.[209]

Further, Defendants' suggestion that the District Court's ruling relies on some sort of misdiagnosis or medical judgment misses the mark. The issue the District Court correctly identified is not that McVea misdiagnosed Spike, the issue is that McVea did not see Spikes at all for weeks despites McVea's personal subjective knowledge that Spikes could not walk. Defendant McVea offers no clinical justification for his acknowledged refusal to treat Spikes for six weeks.[210] Here, the District Court's finding that Dr. McVea, the person responsible for prioritizing patient care,[211] failed to respond to Spikes' serious medical need even when it was

[209] ROA 22-30327.7688-7692.

[210] Delays in medical treatment not based on medical judgment "evince a wanton disregard for serious medical needs." Delaughter, 909 F.3d at 138 (reversing District Court's grant of summary judgment to medical administrator on claim that medically necessary surgery was delayed for non-medical reason) (citing Thibodeaux v. Thomas, 548 F. App'x 174, 175 (5th Cir. 2013) (per curiam) (concluding Thibodeaux stated a colorable deliberate indifference claim where his surgery was delayed because prison officials sent him to the wrong facility and failed to file appropriate paperwork)); Reed v. Cameron, 380 F. App'x 160, 162 (3d Cir. 2010) (per curiam) (noting the deliberate indifference standard is satisfied when a prison official delays necessary medical treatment based on a non-medical reason); Blackmore v. Kalamazoo Cty., 390 F.3d 890, 899 (6th Cir. 2004) ("When prison officials are aware of a prisoner's obvious and serious need for medical treatment and delay medical treatment of that condition for non-medical reasons, their conduct in causing the delay creates the constitutional infirmity"); See also Loosier, 2010 WL 7114192 at *2 (unpublished) (finding plaintiff stated claim for deliberate indifference because doctor failed to treat patient's extreme pain and shoulder numbness because of his prisoner status); Hanna, 95 F. App'x at 532 (holding "denial or delay of necessary medical treatment for financial or other improper motives not based on medical reasons may constitute an Eighth Amendment violation.") (citing Chance v. Armstrong,143 F.3d 698, 704 (2d Cir. 1998) and Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 704 (11th Cir. 1985)).

[211] ROA 22-30327.5643 (McVea 58:17-22).

obvious Spikes was suffering from something more serious than muscle strain, is well-grounded, proper, and entirely correct.

Dr. McVea was aware that Nurse Stringer's July 5th note lacked critical detail regarding how Spikes was ambulating and how Nurse Stringer determined the range of motion on his right lower extremity. However, Dr. McVea did not seek out this missing information.[212] As of July 6th, Dr. McVea was aware that a week of treatment with ibuprofen and analgesic balm had not alleviated Spikes' pain.[213] He also knew that Spikes had filed three emergency sick calls in the course of a week.[214]

Dr. McVea knew that prisoners would file an emergency sick call for the same sorts of health emergencies for which they would have gone to the emergency room if not in prison.[215] Dr. McVea was also aware that the posted policy made clear that prisoners were at risk of disciplinary action each time they filed an emergency sick call if a nurse deemed an emergency sick call was without medical basis.[216] It also cost a prisoner twice as much to file an emergency sick call as a routine sick call.[217] Thus, Dr. McVea was aware that Spikes essentially paid double in order to submit

[212] ROA 22-30327.5717–5719 (McVea 132:23-134:2).
[213] ROA 22-30327.5332.
[214] ROA 22-30327.5331–5333.
[215] ROA 22-30327.5650 (McVea 65:14-21).
[216] ROA 22-30327.6886–6887.
[217] See e.g., ROA 22-30327.5328, 5331–33. Access fee noted on emergency sick calls is six dollars as opposed to three dollars.

his request to go to the emergency room three times in one week.[218] Further, he did so each time despite the risk of being disciplined.[219]

On July 18, Dr. McVea was subjectively aware that Nurse Bowman noted possible swelling to Spikes leg on July 14, but never took no action to evaluate Spikes until the scheduled routine call out on August 11.[220]

Dr. McVea knew it was unreasonable to rely on the nurses' "muscle strain" notation to guide treatment for six weeks.[221]

Dr. McVea testified that evaluating a treatment was critical:

> Well, you have to -- you write the orders. You have to assess the patient to see if you're -- what you are doing is helping or not. If it's not, you need to re-evaluate your treatment plan. Possibly you can order different testing or refer them to somebody that has more expertise in that particular situation than you. So it's an ongoing thing. You treat -- you prescribe a treatment. Evaluate the response. Modify the plan, and move on and so forth.[222]

Even after initial treatment began, Dr. McVea was clear that physical examination was critical part of evaluating the patient:

> Then I would probably have the person in for an exam. I would look at the joint. I would check the range of motion in the joint. Palpate the joint and see if there is any, you know, crepitus or deformity that might not be showing,

[218] ROA 22-30327.5328, 5331–5333.
[219] ROA 22-30327.5328, 5331–5333.
[220] ROA 22-30327.5330.
[221] ROA 22-30327.5729 (McVea 142:5-11).
[222] ROA 22-30327.5622 (McVea 37:8-16).

> and I may at that time order an X-ray depending on what I find (indicating).[223]

Dr. McVea also understood that anything the nurse noted was not a diagnosis and could not guide treatment for six weeks when symptoms were unresponsive to this "treatment":

> But it's -- you know, I'm trying to – the thing is even -- what I'm saying is even though if it's a -- you know, even if the nurse put down sprained wrist, I know that that's not a diagnosis, okay? I know that's her assessment that it was a sprained wrist because I know I'm the one that makes diagnoses. …
> And then you have to figure out an effective testing routine that would tell you to rule in or rule out your differential diagnoses. So you have to have a differential to form your thought process, okay. And a lot of that is due to what the patients tell you because actually there's an old saying in medicine if you listen to the patient carefully enough, they'll tell you what's wrong with them.[224]

Dr. McVea's own articulation of appropriate medical care requires that the physician must 1) actually examine a patient and 2) assess and re-evaluate a treatment plan if it is ineffective.[225] Dr. McVea took neither of these steps in the six weeks Spikes suffered with his broken hip.

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[223] ROA 22-30327.5626–7 (McVea 42:6-10; 41:1-5). On July 18, Dr. McVea was subjectively aware that Nurse Bowman noted possible swelling to Spikes leg on July 14, but still took no action to evaluate Spikes. ROA 22-30327.5330.
[224] ROA 22-30327.5631–31 (McVea 45:22–46:22) (emphasis added).
[225] ROA 22-30327.5622 (McVea 37:8-16), 5622 (McVea 42:6-10).

Spikes told the nurses, and by extension Dr. McVea, loud and clear for six weeks that something was very wrong with his right hip and that the treatment was not working.[226] As Spikes testified:

> Q Okay. Do you believe that Dr. McVea knew that you had a broken bone?
> A He's the doctor. If someone come that many times with something for their leg or something, you should know something is terribly wrong with them.[227]

That Dr. McVea continued to order the same ineffective treatment for six weeks without acting to further investigate or examine Spikes[228] was contrary to Dr. McVea's own medical judgment. As this Court has already held in this case, the law is clearly established that taking the easier but less efficacious treatment route is tantamount to ignoring patient pain and is a violation of the Eighth Amendment.[229]

Resolving the identified fact disputes in favor of Spikes, Dr. McVea violated this clearly established law. He was aware that Spikes' serious pain had not abated after six weeks of taking ibuprofen and using entire tubes of analgesic balm, but failed to even examine him. The District Court correctly identified factual disputes material to qualified immunity, and did not err in denying qualified immunity.

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[226] ROA 22-30327.5327–33.
[227] ROA 22-30327.5503 (Spikes 109:12-17).
[228] ROA 22-30327.5503 (Spikes 109:12-17).
[229] Spikes, 8 F.4th at 435-440.

Accordingly, the District Court's partial denial of summary judgment should be affirmed.

CONCLUSION

The District Court correctly denied Defendant-Appellant's Motion for Summary Judgment. The District Court thoroughly and systematically identified material fact disputes that, when resolved in favor of Spikes, establish that each Defendant had subjective knowledge that Spikes' was experiencing continuous, painful and immobilizing symptoms of a broken hip for weeks but failed to adequately respond to this serious medical need. Accordingly, the District Court's supplemental denial of summary judgment should be affirmed.

Respectfully submitted,

/s/ Elizabeth Cumming
Elizabeth Cumming, LSBN 31685
Hannah Lommers-Johnson, LSBN 34944
MacArthur Justice Center
4400 S. Carrollton Ave.
New Orleans, LA 70119
Tel. 504.620.2259
Elizabeth.cumming@macarthurjustice.org
Hannah.lommersjohnson@macarthurjustice.org

Attorneys for Plaintiff – Appellee

CERTIFICATE OF SERVICE

I certify that the foregoing was electronically filed on October 31, 2022 using the Court's CM/ECF system which will provide notice of electronic filing to all counsel of record. I further certify that to the best of counsel's knowledge, information, and belief, all parties to this appeal are represented by CM/ECF participants.

/s/Elizabeth Cumming
Elizabeth Cumming

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12855 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

/s/ Elizabeth Cumming *October 31, 2022*
Elizabeth Cumming **Date**
Attorney for Plaintiff-Appellee