

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

DEMETRIUS HILL,)	
)	Case No. 7:08-cv-00283
Plaintiff,)	
)	<u>MEMORANDUM OPINION</u>
v.)	<u>AND ORDER</u>
)	
TERRY O'BRIEN, et al.)	By: James C. Turk
)	Senior United States District Judge
)	
Defendants.)	

This case is set for jury trial on October 6 and 7, 2011, in the Big Stone Gap division. Before the Court are a number of pretrial motions: Defendants' Timothy Crum and William Taylor's Motion for Summary Judgment (ECF No. 114), Plaintiff Demetrius Hill's Motion to Strike (ECF No. 123), Plaintiff's Motion to Continue Trial (ECF No. 125), to which Defendants filed an Opposition (ECF No. 153), and the Defendants' Motion to Compel (ECF No. 119). A hearing was held on September 27, 2011, whereupon the Court denied Plaintiff's Motion to Continue Trial. The Court took the remainder of the motions under advisement, and they are now ripe for decision.

Having reviewed the arguments of the parties, the Defendants' Motion for Summary Judgment is **DENIED**. The Defendant's Motion to Compel is **GRANTED**. The Plaintiff's Motion to Strike is **DISMISSED** as moot.

I. Background and Procedural History

This prisoner civil rights action has travelled a long road, and as such merits at least brief discussion of its procedural history. The Plaintiff filed his initial complaint on April 9, 2008

(ECF No. 1), and filed amended complaints shortly thereafter (ECF Nos. 6 & 7). This Court dismissed all but three of Hill's claims pursuant to 28 U.S.C. § 1915 (ECF No. 10). The remaining Defendants filed their first Motion for Summary Judgment on August 27, 2008, arguing that the Plaintiff had (1) failed to exhaust his administrative remedies, (2) failed to state a claim for excessive force, (3) failed to state a claim for inadequate medical care, and (4) the defendants were entitled to qualified immunity. *See* Def.'s Mot. to Dismiss or in the Alt., Mot. for Summ. J., Aug. 27, 2010 (ECF No. 35). This Court granted the motion, dismissing all of Plaintiff Hill's claims. Plaintiff appealed (ECF No. 42). While this case was on appeal, the Supreme Court decided Wilkins v. Gaddy, 130 S.Ct. 1175 (2010), in which it abrogated the Fourth Circuit's holding in Norman v. Taylor, 25 F.3d 1259 (4th Cir. 1994). The Fourth Circuit subsequently vacated this Court's judgment on the excessive force claims and remanded it for reconsideration in light of Wilkins. *See* Hill v. O'Brien, 387 F. App'x. 396 (4th Cir. July 12, 2010) (unpub.). The Fourth Circuit additionally vacated and remanded this Court's judgment as to the Plaintiff's medical indifference claims. *Id.*

After remand, Defendants filed a second Motion for Summary Judgment (ECF No. 62), whereupon the Court granted summary judgment to the Defendants on all of the Plaintiff's claims except for (1) that pertaining to Defendant Crum's alleged use of excessive force on November 1, 2007, and (2) that pertaining to Defendant Taylor's alleged use of excessive force on January 15, 2008. Mem. Op., April 4, 2011 (ECF No. 68). Importantly for present purposes, the Court denied Defendants' claims of qualified immunity on the aforementioned claims at that time. *Id.* at 20-22. Defendants now bring a renewed motion for summary judgment, arguing that since the actions at issue occurred during a period when the *de minimis* injury requirement was

still the law of the Fourth Circuit, they should be granted summary judgment because they were acting as reasonable officers would under then-clearly established law.

II. Defendants' Motion for Summary Judgment

a. Timeliness of the Motion

“Cleanliness, it is said, is next to godliness. In the federal courts . . . the same might be said of timeliness.” Delaney v. Rariden, 322 F. App'x. 427, 428 (6th Cir. 2009) (unpub.).

Defendants filed the instant summary judgment motion on September 2, 2011, 34 days before trial on October 6, 2011. Plaintiff Hill moves to strike the motion as untimely. Unless another time is fixed by the Court, motions for summary judgment are not to be considered unless they are filed within a reasonable time before the date of trial. W.D. Va. Civ. R. 56. A trial court is afforded broad discretion in maintaining the orderly flow of its docket. *See In re: Fine Paper Antitrust Litig.*, 685 F.2d 810, 817 (3d Cir. 1982) (“We will not interfere with a trial court's control of its docket except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant.”); Shivers v. Int'l Bhd. of Elec. Workers Local Union 349, 262 Fed. App'x 121, 126 (11th Cir. 2008) (unpub.); Moringlane-Ruiz v. Trujillo-Panisse, 232 Fed. App'x. 8, 9 (1st Cir. 2007) (unpub.). Now, scarcely a month before trial, the Defendants have brought forth yet a third summary judgment motion. Although the instant motion takes a different approach to argument, it brings forth no additional evidence and focuses almost exclusively on the issue of qualified immunity—a defense this Court rejected several months ago. *See Mem. Op.*, April 4, 2011. Under the rules of this Court, the Plaintiff would have 14 days to respond to the motion, and the Defendants would be allowed 7 days to reply. W.D. Va. Civ. R. 11(c)(1). Trial is set for October 6. If the parties took all the time they

were allowed, the Court would be asked to decide a summary judgment motion with less than two weeks left until trial.

Taking into account all the circumstances, the Court finds that the Defendants' Motion for Summary Judgment is cumulative and has not been filed within a reasonable time before the date of trial, in violation of the Court's Local Rules. Moreover, the Court finds no evidence of excusable neglect that might explain or justify such a violation of the rules. *Cf.* Fed. R. Civ. P. 6(b) (allowing Court to extend time where party fails to meet deadline due to excusable neglect). Thus, the Court denies the Motion as untimely.

b. Qualified Immunity

But even if the Defendants' motion was timely filed, it would still fail on the merits. Upon a motion for summary judgment, the Court must view the facts, and the inferences to be drawn from those facts, in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Summary judgment is appropriate if the movant can show that there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if reasonable jurors could find by a preponderance of the evidence that the non-moving party is entitled to a verdict in his favor. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 252 (1986). This Court has previously found that there is a genuine issue of material fact as to both claims. *See* Mem. Op., April 4, 2011, at 11, 19. As such, the only novel claim raised by the Defendants' instant motion is whether Norman's *de minimis* injury requirement necessitates summary judgment for the Defendants on the basis of qualified immunity.

The qualified immunity doctrine generally protects officers from civil liability unless the right at issue was "clearly established" at the time of the alleged violation. Cloaninger v.

McDevitt, 555 F.3d 324, 330-31 (4th Cir. 2003). In other words, a government official performing a discretionary function is generally entitled to qualified immunity to the extent that his “conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Supreme Court has further specified that “the contours of the right [at issue] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” Anderson v. Creighton, 483 U.S. 635, 638 (1987). Yet, the Supreme Court has also made clear that the purpose of the “clearly established” requirement is providing notice to potential defendants: “[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” Saucier v. Katz, 533 U.S. 194, 202 (2001) (citing Wilson v. Layne, 526 U.S. 603, 615 (1999)).

The Defendants proffer that despite the Supreme Court’s repudiation in Wilkins, the Fourth Circuit’s jurisprudence under Norman required a plaintiff to allege more than a *de minimis* injury in order to make out an Eighth Amendment violation. Since Norman was the clearly established law of the Fourth Circuit in 2007 and 2008, they reason, they are entitled to qualified immunity. Defendants conclude that “neither of [the] claimed incidents of force were unconstitutional because neither involved more than *de minimis* harm.” Def.’s Mem. of Law in Supp. of Their Mot. for Summ. J. 11, Sept. 2, 2011 (ECF No. 114). Yet, under the Defendants’ line of reasoning, they are entitled to qualified immunity for any and all actions done to the plaintiff in the pre-Wilkins era, no matter how vile, disgusting, or unreasonable, as long as they were sure not to leave anything more than a slight injury.¹ This analysis is unavailing. Even

¹ As the Supreme Court recognized well before Wilkins:

before Wilkins, the Fourth Circuit warned against such a view: “[C]ourts should be wary of finding uses of force that inflict ‘merely’ pain but not injury to be *de minimis*, and therefore beyond requiring justification under the Eighth Amendment.” Williams v. Benjamin, 77 F.3d 756, 762 n.2 (4th Cir. 1996). This Court is wary of just such an interpretation.

As discussed above, the “clearly established” prong of the qualified immunity inquiry revolves chiefly around fair notice to a potential defendant, not around the results of his conduct. See Anderson, 483 U.S. at 646 (citing Davis, 468 U.S. at 195) (“The rule of qualified immunity is intended to provide government officials with the ability ‘reasonably [to] anticipate when their conduct may give rise to liability for damages.”); Iko v. Shreve, 535 F.3d 225, 238 (4th Cir. 2008) (“In the end, the lodestar for whether a right was clearly established is whether the law gave the officials fair warning that their conduct was unconstitutional.”). See generally Saucier, 533 U.S. at 202 (discussing qualified immunity in terms of providing notice to officer). Determining whether a right is clearly established means asking “whether it would have been apparent to a reasonable officer in the respective defendants’ positions that his actions violated the [right].” Altman v. City of High Point, 330 F.3d 194, 200 (4th Cir. 2003). Put another way, the key inquiry for an official immunity defense is whether the official’s actions themselves are objectively legally reasonable. Harlow, 457 U.S. at 819.

As this Court has noted previously, it *was* clearly established law at the time of the alleged violations that the “unnecessary and wanton infliction of pain” against prisoners violates the Eighth Amendment. Whitley v. Albers, 475 U.S. 312, 320, 327 (1986). Moreover, “the pre-

When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic and inhuman, inflicting less than some arbitrary quantity of injury.
Hudson v. McMillian, 503 U.S. 1, 9 (1992).

Wilkins Fourth Circuit consistently disapproved of the wanton use of force against an unresisting inmate, regardless of the amount of injury suffered.” Bell v. Johnson, No. 7:09-cv-214, 2011 WL 1226003, at *8 n.4 (W.D. Va. Mar. 30, 2011) (Conrad, C.J.) (citing Riley v. Dorton, 93 F.3d 113, 117–18 (4th Cir. 1996); Rainey v. Conerly, 973 F.3d 321, 324 (4th Cir. 1992)). Both of the claims at issue here involve allegations of wanton and unwarranted force.² It cannot credibly be claimed that Defendants were not on notice that unnecessarily inflicting pain on the Plaintiff violated his constitutional rights. As the Court has previously noted, “[i]f Hill’s allegations are true, the constitutional violation[s] would have been clearly established at the time of the incident.” Mem. Op. 22, April 4, 2011. The Court sees no reason to alter that conclusion in light of the Defendants’ most recent summary judgment motion.

III. Defendants’ Motion to Compel

Defendants move to compel the Plaintiff to comply with the Court’s May 19, 2011 scheduling order, or in the alternative, to exclude Plaintiff’s inmate witnesses. The Court’s May 19 scheduling order allowed for the Plaintiff to call up to three inmate witnesses if the Plaintiff included an explanation of why each witness was necessary for the presentation of his case. The Plaintiff’s witness list currently includes two inmates by name, as well as all “inmates in cell with Plaintiff Hill throughout his term of stay at U.S.P. Lee.” The Defendants are correct that this list is not in compliance with the Court’s scheduling Order. However, Plaintiff’s counsel has recently indicated to the Court that she intends to call only three inmate witnesses. Additionally, Plaintiff has filed three Writs of Habeas Corpus Ad Testificandum (ECF Nos. 129—131) which

² The Court has previously discussed the facts of Hill’s allegations, and therefore will not address them in detail here. See Mem. Op., April 4, 2011. The two claims that have survived and are set for trial are, briefly summarized: On November 1, 2007, Defendant Crum punched Hill in the ribs and elbowed him in the side of the head while he was restrained for no apparent reason. On January 15, 2008, Defendant Taylor, without provocation, forcibly grabbed Hill and dug his fingers into Hill’s arm, then grabbed Hill’s head and pushed him to the concrete floor. Once on the floor, Taylor continued holding Hill there while digging his fingers into Hill’s jaw and under his ear causing constant pain.

explain the necessity of those inmate witnesses. The Court intends to exclude any other inmate witnesses brought forth by the Plaintiff. As such, the Defendants' Motion is **DISMISSED** as moot.

IV. Conclusion

Having considered the arguments of the parties, and in light of the foregoing, the Defendants' Motion for Summary Judgment is **DENIED**. The Plaintiff's Motion to Strike is **DISMISSED** as moot. The Defendants' Motion to Compel is also **DISMISSED** as moot. Trial will commence as scheduled on October 6, 2011 in Big Stone Gap.

The Clerk of the Court is directed to send a copy of this memorandum opinion and accompanying final order to the Plaintiff and all counsel of record.

ENTER: This _____ day of September, 2011.

Senior United States District Judge