

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

4 Bobby Richards,

5 Plaintiff

6 v.

7 William Hutchings, et al.,

8 Defendants
9

Case No. 2:21-cv-00209-CDS-EJY

Order Granting Defendant's Motion for
Summary Judgment, and Closing Case

[ECF No. 29]

10 This is a 42 U.S.C. § 1983 civil rights action brought by incarcerated pro se plaintiff
11 Bobby Richards, alleging that defendant Dr. Henry Landsman¹ was deliberately indifferent to his
12 medical needs while he was housed at the Southern Desert Correctional Center (SDCC). On
13 March 1, 2023, Dr. Landsman moved for summary judgment, arguing that Richards failed to
14 exhaust his administrative remedies prior to filing this suit, and that in either event, he is
15 entitled to qualified immunity. ECF No. 29. Any opposition to the motion was due by March 22,
16 2023. *See id.*; *see also* Local Rule 7-2(b) (“The deadline to file and serve any points and authorities
17 in response to a motion for summary judgment is 21 days after service of the motion.”). As of the
18 date of this order, no opposition has been filed. Because I find that Richards failed to exhaust his
19 administrative remedies as required by the Prison Litigation Reform Act (PLRA), defendant Dr.
20 Landsman’s motion for summary judgment is granted.

21 **I. Legal standard**

22 Summary judgment is appropriate when the pleadings and admissible evidence “show
23 that there is no genuine issue as to any material fact and that the movant is entitled to judgment
24

25 ¹ Pursuant to the screening order, only claim I against defendant Dr. Henry Landsman and claim II against
26 defendant Sonja Carillo were allowed to proceed. ECF No. 6 at 6. Carillo was never served. *See* ECF No. 21
(unexecuted summons for Carillo). On June 30, 2022, Magistrate Judge Elayna J. Youchah issued an order
to show cause as to why Carillo should not be dismissed for lack of service. ECF No. 22. Richards never
responded to the show-cause order. Carillo is hereby dismissed without prejudice from this action under
Fed. R. Civ. P. 4(m).

1 as a matter of law.” See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P.
2 56(c)). The court’s ability to grant summary judgment on certain issues or elements is inherent
3 in Federal Rule of Civil Procedure 56. See Fed. R. Civ. P. 56(a). “By its very terms, this standard
4 provides that the mere existence of some alleged factual dispute between the parties will not
5 defeat an otherwise properly supported motion for summary judgment; the requirement is that
6 there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A
7 fact is material if it could affect the outcome of the case. *Id.* at 249. At the summary judgment
8 stage, the court must view all facts and draw all inferences in the light most favorable to the
9 nonmoving party. *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).
10 The movant need only defeat one element of a claim to garner summary judgment on it because
11 “a complete failure of proof concerning an essential element of the nonmoving party’s case
12 necessarily renders all other facts immaterial.” *Celotex Corp.*, 477 U.S. at 322.

13 District courts may grant an unopposed motion for summary judgment if the movant’s
14 papers sufficiently support the motion and do not present on their face a genuine issue of
15 material fact. See *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993). The failure to oppose a
16 motion for summary judgment does not permit the court to enter summary judgment by default,
17 but the lack of a response is not without consequences. *Heinemann v. Satterberg*, 731 F.3d 914, 917
18 (9th Cir. 2013). As FRCP 56(e) explains, “[i]f a party fails . . . to properly address another party’s
19 assertion of fact[,] . . . the court may . . . consider the fact undisputed for purposes of the motion”
20 and “grant summary judgment if the motion and supporting materials—including the facts
21 considered undisputed—show that the movant is entitled to it.” Fed. R. Civ. P. 56(e)(2), (3);
22 *Heinemann*, 731 F.3d at 917. But the nonmoving party’s failure to respond does not absolve the
23 moving party from its affirmative duty to demonstrate that it is entitled to judgment as a matter
24 of law. *Martinez v. Stanford*, 323 F.3d 1178, 1182–83 (9th Cir. 2003).

1 **II. Background**

2 **A. Richards' allegations**

3 In his amended complaint,² Richards alleges that another doctor at Ely State Prison
4 (ESP) had previously ordered him to have surgery to repair his anterior cruciate ligament (ACL)
5 injury.³ ECF No. 5 at 5. There is no dispute that he was subsequently transferred from ESP to
6 SDCC on February 20, 2019. *See id.* (references transfer); *see also* Richards' Bed Assignment
7 History, Def.'s Ex. A, ECF No. 29-1. According to Richards, upon arrival at SDCC, Dr. Landsman
8 refused to refer him for the previously ordered surgery. *See generally* ECF No. 5 at 5. He further
9 alleges that Dr. Landsman diagnosed him with plantar fasciitis and over-pronation, and was
10 aware of his medical issues, including severe pain in his left knee and foot and issues walking
11 and standing. *Id.* Richards alleged that his pain was ongoing and worsening. *Id.* As a result,
12 Richards brought this action, claiming that Dr. Landsman was deliberately indifferent to his
13 medical needs in violation of the Eighth Amendment. *Id.*

14 **B. Dr. Landsman's motion for summary judgment**

15 Dr. Landsman disputes almost all of Richards' allegations. He contends that there is no
16 evidence showing that Richards was referred for surgery. ECF No. 29 at 6. Instead, he asserts
17 that the only relevant ESP document regarding Richards was an orthopedic referral that neither
18 ordered nor referred Richards for surgery. *See* Referral, Def.'s Ex. M, ECF No. 31-2. Dr. Landsman
19 also refutes that he diagnosed Richards with plantar fasciitis and over-pronation, noting that no
20 medical record supports this allegation. ECF No. 29 at 6. Indeed, records show the ESP doctor
21 ordered Richards to receive "high ankle support" and "good arch support shoes" for a torn
22 ACL—not surgery. Medical Order for Richards dated 12/11/2018, Def.'s Ex. E, ECF No. 31-3.⁴

23 _____
24 ² Unless otherwise noted, the court only cites to the amended complaint to provide context to this
25 action, not to indicate findings of fact. ECF No. 5.

26 ³ Unlike a motion to dismiss, a court does not accept the factual allegations of a complaint as true when
resolving a motion for summary judgment. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (discussing
that when resolving motions to dismiss a court takes as true all material allegations of the complaint and
construes the complaint in favor of the plaintiff).

⁴ That document is stamped "pending approval" in red.

1 Richards' progress notes also reveal that no surgery was ordered. A note from April 17, 2019,
2 shortly after Richards arrived at SDCC, provides that "Dr. Wulf" did not indicate an operation
3 as necessary, and Dr. Landsman concurred. Progress Notes, Def.'s Ex. G, ECF No. 31-4 at 10. Also
4 on April 17, 2019, Dr. Landsman ordered a neoprene knee brace for Richards, restricted him to a
5 lower bunk, and prescribed "IBU" medication,⁵ and other orders that are difficult to discern.
6 Orders, Def.'s Ex. H, ECF No. 31-5 at 7.

7 Progress notes reflect that Richards was seen numerous times between 2019 and 2022.
8 *See generally* Progress Notes, Def.'s Ex. G, ECF No. 31-4. For example, in May of 2019, Richards
9 was given a steroid injection and diagnosed with osteoarthritis in his left knee. Granados'
10 Decl., Def.'s Ex B, ECF No. 29-2 at 3, ¶ 7. Later, in August of 2019, Dr. Landsman ordered a knee
11 x-ray and another prescription for Meloxicam and Richards was directed to follow-up as
12 needed. Progress Notes, Def.'s Ex. G, ECF No. 31-4 at 6. In June of 2021, Richards was seen by
13 Dr. Wulff, during which it was recommended that he get another steroid injection; Richards
14 advised that he did not want another injection because the prior one did not work. Granados'
15 Decl., Def.'s Ex B, ECF No. 29-2 at 3, ¶ 9. Richards' records from March and June of 2022, which
16 are slightly difficult to read, show that Richards was diagnosed with flat-footedness and an ACL
17 injury. Progress Notes, Def.'s Ex. G, ECF No. 31-4 at 2. The June 28, 2022 note reflects that
18 Richards' knee was "extremely painful" and swollen. *Id.* No record before the court demonstrates
19 that Richard was ever referred for surgery. Richards filed this suit on February 8, 2021.
20 ECF No. 1.

21 **III. Discussion**

22 Dr. Landsman moves for summary judgment in his favor, arguing that Richards' claim
23 against him is barred because he failed to exhaust his administrative remedies prior to filing suit.
24 ECF No. 29 at 9–11. I agree.

25
26

⁵ The court interprets "IBU" as ibuprofen.

1 “In an effort to address the large number of prisoner complaints filed in federal court,
2 Congress enacted the [PLRA].” *Jones v. Bock*, 549 U.S. 199, 202 (2007) (citing 42 U.S.C. § 1997e).
3 Under the PLRA, a prisoner may not file any section 1983 civil rights suit unless they have
4 exhausted the administrative remedies at the facility. 42 U.S.C. § 1997e(a); *Rodriguez v. Cnty. of Los*
5 *Angeles*, 891 F.3d 776, 792 (9th Cir. 2018). The exhaustion requirement gives an agency the
6 opportunity to correct its own mistakes before being dragged into federal court, and it promotes
7 greater efficiency and economy in resolving claims. *McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir.
8 2015). However, “a prisoner is excused from the exhaustion requirement in circumstances where
9 administrative remedies are effectively unavailable, including circumstances in which a prisoner
10 has reason to fear retaliation for reporting an incident.” *Rodriguez*, 891 F.3d at 792 (citing *McBride*,
11 807 F.3d at 987). “Failure to exhaust under the PLRA is ‘an affirmative defense [that] the
12 defendant must plead and prove.’” *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones*,
13 549 U.S. at 204).

14 Exhaustion “demands compliance with an agency’s deadlines and other critical
15 procedural rules because no adjudication system can function effectively without imposing some
16 orderly structure on the course of its proceedings.” *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006). In
17 Nevada, the remedies available to inmates are promulgated under Nevada Department of
18 Corrections Administrative Regulation 740 (AR 740). AR 740’s purpose is to “set forth the
19 requirements and procedures of the administrative process that [Nevada Department of
20 Corrections (NDOC)] inmates must utilize to resolve addressable grievances and claims
21 including . . . any [] tort or civil rights claim relating to conditions of confinement.” *Welch v.*
22 *Liggett*, 2023 WL 158603, at *3 (D. Nev. Jan. 11, 2023). “An inmate whose grievance is denied in its
23 entirety may appeal the grievance to the next level.” *Id.* The grievance structure is essentially a
24 multi-level dispute resolution mechanism, under which an inmate must satisfy each level’s
25 substantive and procedural requirements before filing a higher-level grievance. *Id.* It requires
26 inmates to first pursue resolution via alternative means, “such as discussion with staff or

1 submitting an inmate request form.” *Id.* Once an inmate has exhausted alternative means, he may
2 file an informal grievance. *Id.* If that fails to provide the requested relief, the inmate may file a
3 first-level grievance, and if that fails, a second-level grievance. *Id.* An inmate exhausts his
4 administrative remedies either after a denial of the second-level grievance, or “if the [g]rievance
5 is ‘[g]ranted’ at any level.” *Id.*

6 “The Ninth Circuit instructed in *Albino v. Baca* that a summary-judgment motion is the
7 proper procedural device to resolve PLRA exhaustion questions.” *Hobson v. Clark Cnty.*, 2019 WL
8 1442171, at *3 (D. Nev. Mar. 31, 2019) (citation omitted). It is “the defendant’s burden is to prove
9 that there was an available administrative remedy and that the prisoner did not exhaust that
10 available remedy.” *Albino*, 747 F.3d at 1172. If this is accomplished, “the burden shifts to the
11 prisoner to come forward with evidence showing that there is something in his particular case
12 that made the existing and generally available administrative remedies effectively unavailable to
13 him.” *Id.* “If undisputed evidence viewed in the light most favorable to the prisoner shows a
14 failure to exhaust, a defendant is entitled to summary judgment under Rule 56.” *Id.* at 1166.

15 Dr. Landsman asserts that Richards never filed a grievance regarding his alleged need for
16 surgery or Dr. Landsman’s alleged denial of such surgery. ECF No. 29 at 10–11. The record
17 corroborates this. Richards filed six grievances since he became an NDOC inmate in May of
18 2016. *See generally* Inmate Grievance History, Def.’s Ex. M, ECF No. 29-4. Most of those
19 grievances comprised Richards’ grieving issues regarding work/credit time⁶ and being denied
20 the common fare diet.⁷ While Richards did file one grievance related to his knee issues in
21 October of 2020, this grievance was about being denied access to medical shoes. *See id.* at 4
22 (Grievance number 20063109330). While Dr. Landsman is mentioned in the grievance, nowhere
23 in it does Richards complain that he was denied knee surgery, either by Dr. Landsman or anyone
24 else. *See id.* While a grievance “need not include legal terminology or legal theories,” it must “alert
25 the prison to the nature of the wrong for which redress is sought.” *Sapp v. Kimbrell*, 623 F.3d 813

26 ⁶ Def.’s Ex. M, ECF No. 29-4 at 2 (Grievance number 20063139429).

⁷ *Id.* at 2–3 (Grievance numbers 20063116665; 20063114651; 20063114649; 20063114633).

1 (9th Cir. 2010) (quoting *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009)). Richards' October
2 2020 grievance did not adequately alert the prison or Dr. Landsman to the "wrong" underlying
3 his instant Eighth Amendment claim nor accordingly give them an opportunity to resolve the
4 issue prior to him filing suit. Indeed, medical shoes and surgery are very different things. For that
5 reason, Richards failed to meet the very first step of exhausting the grievance process for the
6 instant claim: filing a grievance.

7 As Richards failed to respond to this motion, there are no explanations or contrary
8 arguments before the court at this time addressing this issue. However, based on an
9 independent assessment of the record, I also note that there is no readily apparent evidence
10 suggesting that the administrative remedies were effectively unavailable to Richards as a matter
11 of law. Consequently, I find that Richards has not exhausted his administrative remedies and his
12 Eighth Amendment claim against Dr. Landsman is thus barred pursuant to the PLRA. Because I
13 grant summary judgment to Richards on failure to exhaust, I do not address Dr. Landsman's
14 other summary judgment arguments on the merits.⁸

15 **IV. Conclusion**

16 IT IS HEREBY ORDERED that defendant Sonja Carillo is dismissed from this action.

17 IT IS FURTHER ORDERED that the Dr. Landsman's motion for summary judgment
18 [ECF No. 29] is GRANTED.

19 The Clerk of Court is kindly instructed to enter judgment accordingly and to close this
20 case.

21 DATED: January 16, 2024

22 
Cristina D. Silva
United States District Judge

23
24 ⁸ The court does note though that "[a] prison official is deliberately indifferent . . . only if the official
25 'knows of and disregards an excessive risk to inmate health and safety.'" *Colwell v. Bannister*, 763 F.3d 1060,
26 1066 (9th Cir. 2014) (quoting *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004)). "This requires more
than ordinary lack of due care . . . the official must both be aware of facts from which the inference could
be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* (cleaned
up). The undisputed record shows that Richards was treated numerous times between 2019 and 2022,
and there is no evidence demonstrating any excessive risk to Richards' health or safety.