NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 14, 2023
Decided March 9, 2023*

Before

DIANE P. WOOD, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 22-2260

BOOKER T. SHIPP,
Plaintiff-Appellant,

v.

KENNETH LOBENSTEIN and DANIEL WINKLESKI,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 21-cv-167-jdp

James D. Peterson,
Chief Judge.

O R D E R

Booker Shipp, a prisoner at the New Lisbon Correctional Institution in Wisconsin, sued prison officials for deliberate indifference under the Eighth Amendment because he became ill after being forced to quarantine with a cellmate who had COVID-19 during an outbreak of the virus. See 42 U.S.C. § 1983. The district court

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

granted the defendants' motion for summary judgment, which relied in part on emails discussing the prison's response to the outbreak. But the emails were never disclosed to Shipp during discovery. Although the question whether the non-disclosure was erroneous but harmless is close, we conclude that the district court should have ensured that Shipp had an adequate opportunity to study the emails before disposing of the case. We thus vacate and remand to cure this problem. We make no comment on the ultimate merits of Shipp's claim, which may turn out to have merit, but may be blocked by the considerations outlined in the dissent.[1]

We recount the facts supported by the summary judgment record in the light most favorable to Shipp. See *James v. Hale*, 959 F.3d 307, 314 (7th Cir. 2020). During other outbreaks before October 2020, prisoners at New Lisbon who tested positive for COVID-19 were placed on "isolation status" in single-occupancy "wet" cells (that is, cells with plumbing). Prisoners who tested negative but were in close contact with those who tested positive were put on "quarantine status" but not moved. In mid-October 2020, 50 prisoners in two of New Lisbon's housing units (seemingly not including B Unit, where Shipp resided) tested positive for COVID-19. At that time, the Division of Adult Institutions' Bureau of Health Services had a written policy stating: "Do not place a person who needs to be quarantined [*i.e.*, a close contact] with an isolated person [*i.e.* someone who is COVID-positive]." On October 19, the health services unit supervisor, Roslyn Huneke, emailed the Bureau to ask if, contrary to the published guidance, prisoners requiring quarantine could be left in cells with COVID-positive cellmates because (she asserted) "space [was] not available." An associate medical director approved this deviation from the published guidance, as did the medical director, who responded that whenever "possible, it is best to cohort positives and quarantines together," but because "there is likely already spread from a positive person to the roommate, it makes sense to simply restrict all movement."

On November 5, results from additional testing showed that 145 prisoners in Shipp's unit tested positive. Shipp tested negative, but his cellmate tested positive. The same day, warden Daniel Winkleski, relying on the Bureau advice in response to the October outbreak, told staff that B Unit would quarantine "in place"; no prisoners were

[1] Most of the points made in the dissent relate to the merits, rather than whether, at summary judgment, Shipp was given a fair opportunity to develop evidence negating the factual defense that the dissent embraces. Since we find the procedural point to be dispositive, we do not address the merits, including the question whether the defendants' actions were saved by their privilege to rely on medical advice, or similar factors.

to move cells, even if they were COVID-positive and their cellmates were not. Kenneth Lobenstein, Shipp's unit manager, relayed the warden's instructions. Shipp asked Lobenstein to move him into a B-Unit cell with someone else who was negative. Although unit managers typically have discretion over cell assignments, Lobenstein refused, based on the warden's order. Shipp says he was threatened with punishment if he resisted quarantining with his cellmate.

Shipp feared for his health, especially because he has high blood pressure. And indeed, he tested positive for COVID-19 five days later. He had a severe, bloody cough, body aches, headaches, vomiting, loss of smell, and migraines. He filed Health Services Requests on November 11, 13, and 15, seeking relief for his symptoms.

After the outbreak, Shipp sued the warden, unit manager, and health services supervisor under 42 U.S.C. § 1983, alleging that they were deliberately indifferent to his health and safety by knowingly exposing him to COVID-19 in his cell. He also alleged negligence under Wisconsin law. At screening, the district court dismissed Huneke (the health services supervisor), see 28 U.S.C. § 1915A, but allowed the case against the warden and unit manager to proceed to discovery.

Shipp sent his first document request in mid-September 2021. Among other things, he asked for "all Covid-19 related memos produced by the Wisconsin Department of Corrections, regarding Covid-19." On October 29, the defendants responded with what they represented were "[m]emoranda and e-mails received by and sent by New Lisbon" regarding COVID-19. Their response did not include the October 2020 email exchange modifying the written policy. Shipp also asked for all "policies" of the Division of Adult Institutions (DAI) and the Bureau (both of which are within the Department of Corrections) "that the defendants relied on in mitigating the spread of Covid-19 on 11-5-2020." The defendants responded that there were no DAI or Bureau "policies" related to COVID-19, and they objected on overbreadth grounds to Shipp's request for "any/and all Covid-19 related emails received and/or sent to other prison administrators by defendants." Critically, however, they did not say whether they were withholding any responsive documents on that ground, see FED. R. CIV. P. 34(b)(2)(C), and if so, how many. At the same time, Shipp (who of course was proceeding *pro se*) did not confer with the defendants about these responses.

In an initial set of interrogatories, Shipp quoted statements in the defendants' answer to the effect that "the direction was to house on the unit and lock down B Unit" and that "[t]here was no single cell space to move negative inmates to or to move positive inmates to." In response, he asked, "WHO made this 'direction'?" As far as the record shows, the defendants never answered this question. Then, in supplemental

interrogatories on November 10, Shipp asked why the defendants had apparently made no effort to establish a plan to separate COVID-positive prisoners from COVID-negative prisoners during the November 2020 outbreak on B Unit.

On December 8, the defendants responded that the warden made the decision to isolate in place "[b]ased on guidance from the Bureau." Shipp states, and the defendants do not dispute, that this was the first time that the defendants ever revealed that there was any Bureau guidance. Shipp followed up with a document request on January 12, 2022, seeking "the email, memo, or the name of the person" from the Bureau "that SPECIFICALLY says isolate/cohort confirmed COVID-19 positive" prisoners with negative ones.

The defendants did not respond directly to this request. Instead, on February 3 (the day before the deadline for dispositive motions), they left these inquiries hanging and moved for summary judgment. They included with the motion the October emails between the health services supervisor and the Bureau—emails they had never provided to Shipp in response to any discovery request, though they filed their motion within the 30-day deadline for responding to the January 12 document request. They asserted that the warden's decision to keep all B Unit prisoners isolated in place was based on several factors, including the emailed Bureau guidance. And they argued that they were not deliberately indifferent in part because their decision to have the inmates isolate in place was "informed by consultation with medical professionals." A few days later, the defendants finally sent Shipp a copy of the emails as a discovery response.

Shipp opposed summary judgment, arguing that Huneke incorrectly stated in the October email that there were not enough cells to isolate the COVID-19 positive prisoners. Therefore, he said, alternative measures were both possible and should have been taken—such as having COVID-negative prisoners on B Unit move in together, or moving COVID-positive prisoners to a different unit.[2]

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[2] Shipp also advanced, but did not develop, an argument that even if the plan was to quarantine in place, it was unreasonable for the unit manager to deny his specific request to be moved, presumably because of his risk factor. In his complaint, Shipp alleged that he "suffers from serious high blood pressure," which put him "in a HIGH RISK category for COVID-19 complications." He also attested that he told Lobenstein that he had high blood pressure, which Lobenstein does not dispute but says he does not remember. The defendants also assert that Shipp did not include proof of his serious high blood pressure beyond his own declaration.

Shipp also moved for sanctions against the defendants for failing to disclose the emails earlier, an omission that he contended violated discovery rules. See FED. R. CIV. P. 37(c)(1). He stated that the emails were "vital" to his case and urged the court not to allow them into the summary judgment record. He also asserted that, had the emails been disclosed earlier, he would have amended his complaint to reinstate Huneke as a defendant based on her involvement in misrepresenting (in Shipp's view) conditions at the prison. He also would have added as defendants the Bureau staff who responded to the emails, and conducted additional discovery about the decision-making process. In other words, he made an effort to show why this additional information would have made a difference.

The district court entered summary judgment for the defendants, concluding that Shipp could not show deliberate indifference, in part because the warden "ultimately chose a policy approved by the DOC medical supervisors, whose medical judgment he was allowed to rely on." The court also denied the sanctions motion; it found that Shipp contributed to the delayed email production by making an overbroad request and waiting too long to amend it, and then failing to confer with the defendants. The court found it "not plausible" that Shipp did not believe that there were more emails, because "if he thought he already had all the relevant emails," he would not have made his January request. And the court concluded that the nondisclosure was unintentional and harmless because Shipp could not show deliberate indifference even if he had known of the emails and taken more discovery.

On appeal, Shipp primarily contests the court's reliance on the emails despite the defendants' failure to produce them before moving for summary judgment. We review a district court's denial of discovery sanctions for an abuse of discretion. See *Karum Holdings LLC v. Lowe's Cos., Inc.*, 895 F.3d 944, 950 (7th Cir. 2018). We apply the same standard to the denial of a request to postpone a summary judgment ruling for more discovery. See *Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 865 (7th Cir. 2019). An abuse of discretion may occur when a court bases its decision on "clearly erroneous factual findings," or "an erroneous conclusion of law." See *Karum Holdings LLC*, 895 F.3d at 951.

We first address the court's decision to hold Shipp responsible for the defendants' failure to produce the emails in discovery. That conclusion pushes the record further than it can support and fails to heed the Supreme Court's admonition to give *pro se* litigants some leeway. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Based on Shipp's timeline—which the defendants do not dispute—Shipp conducted discovery in a "diligent, sensible, and sequenced manner." See *Smith*, 933 F.3d at 861. It was only after the defendants' December interrogatory response, stating for the first time that

they were acting on Bureau guidance, that Shipp could have known that other discovery material relevant to the warden's decision was available. That prompted his second document request; there was no mystery about the need for follow-up. And although defense counsel asserted that he was unaware of the email chain until that January request, it appears that the defendants were aware of it, because that is the only "guidance" to which they could have been referring in their December response. If the defendants did not produce the emails to counsel, one can hardly blame Shipp for not identifying these materials in his earlier requests. To the extent the record is murky here, it was not appropriate to take defendants' word for what happened; to the contrary, on summary judgment we must take the facts in the light most favorable to the opponent of the motion.

Our dissenting colleague sees the case differently in part because, as he reads the record, the defendants had asserted as early as that December 2021 response that they had made their quarantining decisions in reliance on medical advice from health professionals. We do not find the record to be so clear. It looks to us as if the dissent is relying on an interrogatory response that reads as follows: "Based on guidance from the Bureau of Health Services the Warden … made the decision to shelter inmates that had already been exposed to a COVID-positive cellmate in their cell with their cellmate." But this response does not say that the warden received this medical advice from health professionals in the Bureau, nor does it describe what the advice was, who gave it, or clarify that the guidance stemmed from the 50 October cases that do not appear to have been in Shipp's unit. In short, important questions of fact remain concerning the alleged advice from health professionals.

We have no quarrel with the proposition, stressed by our dissenting colleague, that Shipp must do more than show that the district court erred. If the nondisclosure did not prejudice him and was thus harmless, it would not support his request for further proceedings. Viewing the record in the light most favorable to Shipp, however, one can see that the October emails were material and potentially important for Shipp's case. The defendants swore that they relied on the Bureau's advice, but Shipp had no opportunity to dispute this because he was blindsided with the emails. Shipp could have probed the question of reliance in depositions or other discovery directed at the defendants, Huneke, or the Bureau staff who issued the guidance. For this purpose, the emails were particularly important given that the guidance deviated from both the written policy and what the prison did during an outbreak in a different housing unit, when it moved prisoners around within the unit to create isolation cells. A deviation from policy does not establish a constitutional violation, to be sure, see *Estate of Simpson v. Gorbett*, 863 F.3d 740, 746 (7th Cir. 2017), but it can shed light on the issues pertinent

to Shipp's claim. He was entitled to know that the policy had been modified and on what basis.

It was therefore premature for the district court to conclude that, even if Shipp had taken additional discovery and amended his pleadings to sue Bureau officials and restore Huneke as a defendant, he did not "have a plausible Eighth Amendment claim about the implementation of the quarantine-in-place policy." To succeed, Shipp had to prove "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). We assume for present purposes that knowingly and deliberately exposing Shipp to COVID-19 in his cell created a substantial risk of serious harm to him. See *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *Powers v. Snyder*, 484 F.3d 929, 931 (7th Cir. 2007).

Shipp's ultimate success will turn on his ability to show that the defendants did not "respond[] reasonably" to that risk. See *Farmer v. Brennan*, 511 U.S. 825, 844 (1994). The emails show that New Lisbon based its request to diverge from the written policy on an asserted inability to comply with it because of space constraints. Shipp vigorously disputes this premise. Moreover, he had no opportunity to ask why Huneke stated that sick prisoners could not be isolated, nor could he develop an argument that the Bureau's guidance—about which he learned only when he got the emails—was not a reasonable response to the serious risk. Shipp also emphasized in the district court that a full two weeks passed between the emails to the Bureau and the warden's decision to apply that guidance to Shipp's unit. Given the constantly changing conditions, Shipp might have probed whether, assuming the warden was relying on the October emails, it was appropriate for him to apply that guidance to an apparently different housing unit at a later time.

We are aware that Shipp did not formally move to postpone summary judgment, as he might have done under Rule 56(d). But as we already have noted, he is proceeding *pro se*, see *Erickson*, 551 U.S. at 94, and he provided the functional equivalent of such a motion when he attested that the emails had not been produced previously and that he needed specific additional discovery to respond to arguments based on that evidence. We have emphasized "the importance of allowing a party the opportunity to take meaningful discovery before granting summary judgment against" him, especially if the motion comes before the close of discovery. See *Smith*, 933 F.3d at 865, 866. Here, dispositive motions were not due until three weeks after Shipp's January 12 supplemental request, and discovery was not scheduled to end until July 2022; further, as late as January 27, the magistrate judge supervising discovery ordered further disclosures in response to a motion by Shipp. Shipp's January 12 supplemental request

was therefore timely. Delaying summary judgment for extended discovery may be inappropriate when a case is frivolous, see *Arnold v. Villarreal*, 853 F.3d 384, 389 (7th Cir. 2017), or when the plaintiff has not pursued discovery "diligently," see *Smith*, 933 F.3d at 866, but neither of those scenarios is present here. See *Farmer v. Brennan*, 81 F.3d 1444, 1449–50 (7th Cir. 1996).

In closing, we question whether Shipp should have needed the January 12 request at all, or if instead the defendants should have long since furnished those materials. The emails seem responsive to multiple document requests and interrogatories that Shipp served long before January 12, as Shipp points out in his brief and supplemental filing. It is not clear the district court considered the extent of Shipp's previous discovery requests, the defendants' failure to comply with them, or the defendants' failure to indicate, in connection with their overbreadth objections, whether they were withholding anything.

We therefore VACATE the judgment and REMAND the case for further proceedings consistent with this order, including additional discovery if necessary. Because Shipp's state-law negligence claims are related to the same set of operative facts as his deliberate indifference claim, we reinstate those claims. See *Edwards v. Snyder*, 478 F.3d 827, 832 (7th Cir. 2007). As we indicated earlier, we make no comment on the ultimate fate of Shipp's lawsuit.

SCUDDER, *Circuit Judge*, dissenting. The district court got this case exactly right when it concluded that the defendants' mistake in discovery was harmless. The summary judgment record contains no evidence that the prison officials acted unreasonably in response to COVID-19 during the relevant period, so I would affirm.

Shipp contracted COVID-19 from his cellmate and brought this case because he thought prison officials were deliberately indifferent to the threat the pandemic posed to his health. All agree that the Eighth Amendment prohibits prison officials from turning a blind eye to serious health risks. See *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976). But officials who are aware of a risk and respond reasonably to it cannot be found liable, even if the risk came to fruition. See *Farmer v. Brennan*, 511 U.S. 825, 844 (1994). It is both reasonable and responsible for prison officials who are not themselves medical experts to defer to the advice of medical staff. See *Giles v. Godinez*, 914 F.3d 1040, 1049–50 (7th Cir. 2019). And the record—including the October 2020 email chain described in the majority's order—shows that is what happened here.

In my view, we should end on this observation alone. Like the district court, I do not see how any additional discovery could change the legal outcome here. Yet my colleagues, focusing on the defendants' mistakes, remand for further discovery. They state that "important questions of fact remain concerning the alleged advice from health professionals." Even if such questions do remain—and I am not sure they do—I fail to see how any answers to any of these questions would change the outcome of this case.

My colleagues suggest, for instance, that if had Shipp known about the October 2020 emails he could have probed in depositions or other discovery the defendants' assertion that they relied on the advice of the Bureau of Health Services. But the defendants explained as early as December 2021—well before they filed for summary judgment—that they made quarantining decisions by relying on medical advice from health professionals at the Bureau. Shipp has never alleged that explanation is false, nor does any evidence in the record suggest it might be. Indeed, the October 2020 emails support, rather than undermine, the defendants' assertion that they relied on medical advice from the Bureau. The advice in those emails directly addressed the risks and challenges the defendants faced in managing the prison during a pandemic. So the defendants' error in disclosing the emails late cannot have prejudiced Shipp. His claim would fail with or without them.

Nor does it matter that Shipp disputes whether prison officials somehow misled the medical experts about space constraints in the prison. The Bureau's medical advice was clear and precise:

- "[I]n situations like this where there is likely already spread from a positive person to the roommate, it makes sense to simply restrict all movement."

- "Movement should be restricted throughout the institution or the other units will be exposed. We will not know if the untested units have positive, asymptomatic cases."

- "Cohorting in place is the best option. Everyone is 'locked down in place' with little to no movement. Those 50 positives have already exposed the rest of their unit, including cellmates."

None of this advice relies on space constraints but instead is targeted at limiting the spread of COVID-19 in the extraordinarily challenging prison context. I see no point in allowing Shipp to engage in further interrogatories or discovery requests about space constraints. Doing so may delay, but cannot change, the district court's ultimate conclusion.

No doubt COVID-19 presents a serious health risk. The pandemic also presented massive and unprecedented challenges for managing organizations and institutions. Prison officials—who oversee inmates and employees by the thousands—were certainly not spared. These defendants responded reasonably to the risk of COVID-19, and nothing in the October 2020 emails suggests there is information out there that would change that fact. We should affirm the district court's entry of summary judgment for the defendants. I therefore respectfully dissent.