

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

**ANDRE D. MCEWING
ADC #116327**

PLAINTIFF

v.

No. 5:12-cv-298-DPM-JJV

**SHORES, Lieutenant, Varner Unit, ADC;
ROBERT HUTCHESON, Sergeant, Varner Unit, ADC;
COCKRELL, Sergeant, Varner Unit, ADC;
HAYES, Sergeant, Varner Unit, ADC;
J. BYERS, Major, Varner Unit, ADC;
JAMES PLUMMER, Sergeant, Varner Unit, ADC;
J. PRICE, Property Officer, Varner Unit, ADC;
NEWTON, Nurse, Varner Unit, ADC;
FLORIA WASHINGTON, Sergeant, Varner Unit, ADC;
TONDA SPENCER, Sergeant, Varner Unit, ADC;
MINNIE DRAYER, Administrative Disciplinary Judge, ADC;
J. BANKS, Unit Warden, Varner Unit, ADC;
BENNY MOORE, CO II, Varner Unit, ADC; MARK ALLEN,
CO II, Varner Unit, ADC; DERRICK JONES, CO II,
Varner Unit, ADC; STEPHEN POE, Sergeant;
PATRICIA COOLEY, Sergeant, Varner Unit, ADC;
STEVENS, Captain, Varner Unit, ADC; JOHNSON,
Lieutenant, Varner Unit, ADC; S. BYERS, Nurse,
Varner Unit, ADC; and GENE CAROL ABLES, Nurse,
Varner Unit, ADC**

DEFENDANTS

ORDER

This case is in a procedural tangle. The remaining defendants have filed motions for summary judgment. *No 187 & 191*. McEwing missed the deadline for responding to those motions, and Magistrate Judge Volpe issued his

proposed findings and recommendations. *No 195*. Then McEwing responded to the motions, mistakenly believing he had thirty days to do so. *No 201*. McEwing also filed a motion to continue, *No 198*, saying that he has asked a prison guard to submit an affidavit that will corroborate McEwing's claims. McEwing timely objected to the recommendations. *No 201*. And he's filed a motion to strike. *No 202*.

The Court rejects McEwing's request for a continuance. This case needs resolution. McEwing has vigorously litigated his claims for more than two years. And although McEwing has requested an affidavit from a prison guard, it's unclear whether the guard has agreed to give one or what he will say. This Court will consider all of McEwing's post-recommendation filings but will not halt this case for more discovery.

The Court rejects the motion to strike the Hospital Defendants' Local Rule 56.1 statement of material facts. First, McEwing put his medical condition in issue by filing this case. Second, striking the statement would be too harsh a sanction for filing some medical records. The Court instead will seal the materials.

On *de novo* review, the Court adopts the sovereign-immunity

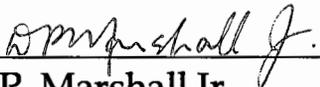
recommendation and the failure-to-exhaust recommendation, but declines the excessive-force recommendation and the Plummer recommendation. *No 195*; FED. R. CIV. P. 72(b)(3). McEwing's objections, *No 201*, are sustained for now in part. The Court would appreciate further consideration and another recommendation – based on the new completed record and, at Judge Volpe's discretion, a pre-jury hearing – about excessive force and whether Plummer was working in the early morning hours of 26 February 2011. Because this is an older case, the Court would appreciate the new recommendation as soon as practicable.

* * *

Motion for continuance, *No 198*, denied. Motion to strike, *No 202*, denied. Docket *No 193*, and all attachments, sealed. Recommendation, *No 195*, adopted in part and declined in part. Motion for summary judgment, *No 187*, granted in part and denied in part. Motion for summary judgment, *No 191*, granted. McEwing's claims against Spencer, Moore, Jones, Poe, Johnson, Cooley, Stevens, Washington, Drayer, Ables, Shelly Byers, and Newton are dismissed without prejudice for failure to exhaust. McEwing's property claims against Price are dismissed without prejudice. Two claims remain in this case: the

property claim against Plummer; and the excessive-force claims against Hutcheson, Shores, Cockrell, Hayes, Banks, Allen, and Jared Byers.

So Ordered.



D.P. Marshall Jr.
United States District Judge

10 December 2014