

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RAYMOND BALDHOSKY,
Plaintiff,
v.
SUSAN HUBBARD, *et al.*,
Defendants.

Case No. 1:12-cv-01200-LJO-JDP
FINDINGS AND RECOMMENDATIONS
THAT DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT BE
DENIED
ECF No. 168
OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN DAYS

I. INTRODUCTION

Plaintiff is a state prisoner proceeding with counsel in this civil rights action brought under 42 U.S.C. § 1983. ECF No. 28. This action now proceeds on the third amended complaint, filed on October 28, 2015, against Drs. Gonzalez, Nguyen, and Metts; Physician Assistants Peters and Byers; and Nurses Grossi, Ruff, Indendi, Kaylor, and Dunn. ECF No. 139. Plaintiff alleges deliberate indifference to his serious medical needs in violation of the Eighth Amendment. ECF No. 28 at 24-29.

On November 16, 2018, defendants Dunn, Indendi, Kaylor, and Ruff moved for partial summary judgment. ECF No. 168. Plaintiff filed an opposition on December 17, 2018, ECF No. 173, and defendants filed a reply on January 8, 2019, ECF No. 176. The motion was submitted

1 on the record without oral argument under Local Rule 230(I). For the reasons set forth below, we
2 recommend that the court deny defendants’ motion.

3 **II. LEGAL STANDARDS**

4 **a. Summary Judgment**

5 Summary judgment is appropriate where there is “no genuine dispute as to any material
6 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Washington*
7 *Mutual Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). An issue of fact is genuine
8 only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party,
9 while a fact is material if it “might affect the outcome of the suit under the governing law.”
10 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Wool v. Tandem Computers, Inc.*, 818
11 F.2d 1422, 1436 (9th Cir. 1987).

12 Rule 56 allows a court to grant summary adjudication, also known as partial summary
13 judgment, when there is no genuine issue of material fact as to a claim or portion of that claim.
14 *See* Fed. R. Civ. P. 56(a); *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 769 n.3 (9th Cir. 1981) (“Rule
15 56 authorizes a summary adjudication that will often fall short of a final determination, even of a
16 single claim”) (internal quotation marks and citation omitted). The standards that apply on a
17 motion for summary judgment and a motion for summary adjudication are the same. *See* Fed. R.
18 Civ. P. 56 (a), (c); *Mora v. Chem-Tronics*, 16 F. Supp. 2d 1192, 1200 (S.D. Cal. 1998).

19 Each party’s position must be supported by (1) citing to particular portions of materials in
20 the record, including but not limited to depositions, documents, declarations, or discovery; or
21 (2) showing that the materials cited do not establish the presence or absence of a genuine dispute
22 or that the opposing party cannot produce admissible evidence to support the fact. *See* Fed. R.
23 Civ. P. 56(c)(1) (quotation marks omitted). The court may consider other materials in the record
24 not cited to by the parties, but it is not required to do so. *See* Fed. R. Civ. P. 56(c)(3); *Carmen v.*
25 *San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); *see also Simmons v.*
26 *Navajo County, Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010).

27 “The moving party initially bears the burden of proving the absence of a genuine issue of
28 material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To meet its burden, “the

1 moving party must either produce evidence negating an essential element of the nonmoving
2 party's claim or defense or show that the nonmoving party does not have enough evidence of an
3 essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins.*
4 *Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party meets this
5 initial burden, the burden then shifts to the non-moving party "to designate specific facts
6 demonstrating the existence of genuine issues for trial." *In re Oracle Corp. Sec. Litig.*, 627 F.3d
7 376, 387 (citing *Celotex Corp.*, 477 U.S. at 323). The non-moving party must "show more than
8 the mere existence of a scintilla of evidence." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477
9 U.S. 242, 252 (1986)). However, the non-moving party is not required to establish a material
10 issue of fact conclusively in its favor; it is sufficient that "the claimed factual dispute be shown to
11 require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W.*
12 *Electrical Serv., Inc. v. Pacific Elec. Contractors Assoc.*, 809 F.2d 626, 630 (9th Cir. 1987).

13 The court must apply standards consistent with Rule 56 to determine whether the moving
14 party has demonstrated there to be no genuine issue of material fact and that judgment is
15 appropriate as a matter of law. *See Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993).
16 "[A] court ruling on a motion for summary judgment may not engage in credibility
17 determinations or the weighing of evidence." *Manley v. Rowley*, 847 F.3d 705, 711 (9th Cir.
18 2017) (citation omitted). The evidence must be viewed "in the light most favorable to the
19 nonmoving party" and "all justifiable inferences" must be drawn in favor of the nonmoving party.
20 *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 772 (9th Cir. 2002); *accord Addisu v. Fred*
21 *Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

22 **b. Deliberate Indifference to Serious Medical Needs**

23 "[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate
24 must show 'deliberate indifference to serious medical needs.'" *Jett v. Penner*, 439 F.3d 1091,
25 1096 (9th Cir. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). The two-part test for
26 deliberate indifference requires the plaintiff to show (1) "'a serious medical need' by
27 demonstrating that 'failure to treat a prisoner's condition could result in further significant injury
28 or the unnecessary and wanton infliction of pain,'" and (2) that "the defendant's response to the

1 need was deliberately indifferent.” *Jett*, 439 F.3d at 1096 (quoting *McGuckin v. Smith*, 974 F.2d
2 1050, 1059 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d
3 1133, 1136 (9th Cir. 1997) (en banc) (internal quotations omitted)). “This second prong—
4 defendant’s response to the need was deliberately indifferent—is satisfied by showing (a) a
5 purposeful act or failure to respond to a prisoner’s pain or possible medical need and (b) harm
6 caused by the indifference.” *Id.* (citing *McGuckin*, 974 F.2d at 1060). Indifference may be
7 manifest “when prison officials deny, delay or intentionally interfere with medical treatment, or it
8 may be shown by the way in which prison physicians provide medical care.” *Id.* When a
9 prisoner alleges a delay in receiving medical treatment, the delay must have led to further harm
10 for the prisoner to make a claim of deliberate indifference to serious medical needs. *See*
11 *McGuckin*, 974 F.2d at 1060 (citing *Shapely v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d
12 404, 407 (9th Cir. 1985)).

13 “Deliberate indifference is a high legal standard.” *Toguchi v. Chung*, 391 F.3d 1051,
14 1060 (9th Cir. 2004). “Under this standard, the prison official must not only ‘be aware of the
15 facts from which the inference could be drawn that a substantial risk of serious harm exists,’ but
16 that person ‘must also draw the inference.’” *Id.* at 1057 (quoting *Farmer*, 511 U.S. at 837). “If a
17 prison official should have been aware of the risk, but was not, then the official has not violated
18 the Eighth Amendment, no matter how severe the risk.” *Id.* (quoting *Gibson v. County of*
19 *Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002)). “A showing of medical malpractice or negligence
20 is insufficient to establish a constitutional deprivation under the Eighth Amendment.” *Id.* at 1060.
21 “[E]ven gross negligence is insufficient to establish a constitutional violation.” *Id.* (citing *Wood*
22 *v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990)). Additionally, a difference of opinion
23 between an inmate and prison medical personnel—or between medical professionals—on
24 appropriate medical diagnosis and treatment is not enough to establish a deliberate indifference
25 claim. *See Toguchi*, 391 F.3d at 1058; *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

26 **III. SUMMARY JUDGMENT RECORD**

27 To decide a motion for summary judgment, a district court may consider materials listed
28 in Rule 56(c). Those materials include depositions, documents, electronically-stored information,

1 affidavits or declarations, stipulations, party admissions, interrogatory answers, “or other
2 materials.” Fed. R. Civ. P. 56(c). A party may object that an opponent’s evidence “cannot be
3 presented in a form that would be admissible” at trial, *see* Fed. R. Civ. P. 56(c)(2), and the court
4 ordinarily rules on evidentiary objections before deciding a summary judgment motion to
5 determine what materials the court may consider, *see Norse v. City of Santa Cruz*, 629 F.3d 966,
6 973 (9th Cir. 2010); *Fonseca v. Sysco Food Servs. of Arizona, Inc.*, 374 F.3d 840, 845 (9th Cir.
7 2004). Here, defendants present the declaration of Dunn, ECF No. 168-3; the declaration of
8 Indendi, ECF No. 168-4; the declaration of Kaylor, ECF No. 168-5; and the declaration of
9 defendants’ attorney Diana Esquivel and accompanying exhibits, ECF No. 168-6. Plaintiff
10 presents his declaration, ECF No. 173-3; and the declaration of his expert, Tara M. Godoy, and
11 accompanying exhibits, ECF No. 173-4; ECF No. 173-5; ECF No. 173-6. We will also consider
12 plaintiff’s third amended complaint (“TAC”) to be part of the summary-judgment record. ECF
13 No. 28.

14 **A. Defendants’ Objections to Plaintiff’s Declaration**

15 Defendants object to the admissibility of certain paragraphs in plaintiff’s declaration.¹
16 ECF No. 176 at 4 (objecting to “paragraphs 9 to 20, 28, and 29”). Defendants contend that these
17 paragraphs “contradict[] or [are] inconsistent with [plaintiff’s] deposition testimony and include[]
18 information requested at his deposition, but which he failed to provide.” *Id.* Thus, defendants
19 argue that we should disregard these paragraphs under the “sham-affidavit rule.”

20 The sham-affidavit rule provides that “a party cannot create an issue of fact by an affidavit
21 contradicting his prior deposition testimony.” *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 998
22 (9th Cir. 2009) (quoting *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)). The
23 rule is necessary because “if a party who has been examined at length on deposition could raise
24 an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this

25
26 ¹ Defendants also object to the “remaining paragraphs” in plaintiff’s declaration as “irrelevant and
27 immaterial” on the ground that plaintiff “does not [specify] the purported misconduct of
28 Defendants Dunn, Indendi, and Kaylor.” ECF No. 176 at 4. The court finds this objection
unavailing; the generalized nature of the “remaining paragraphs” does not render them irrelevant
or immaterial.

1 would greatly diminish the utility of summary judgment as a procedure for screening out sham
2 issues of fact.” *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). However,
3 “the sham affidavit rule should be applied with caution because it is in tension with the principle
4 that the court is not to make credibility determinations when granting or denying summary
5 judgment.” *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012).

6 To trigger the sham-affidavit rule, the court “must make a factual determination that the
7 contradiction is a sham, and the inconsistency between a party’s deposition testimony and
8 subsequent affidavit must be clear and unambiguous to justify striking the affidavit.” *Id.* “The
9 non-moving party is not precluded from elaborating upon, explaining or clarifying prior
10 testimony elicited by opposing counsel on deposition and minor inconsistencies that result from
11 an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an
12 opposition affidavit.” *Id.*

13 Plaintiff’s declaration is not a sham affidavit, and we will therefore disregard defendants’
14 objections. Defendants correctly point out that plaintiff provided more details about his
15 interaction with defendant Ruff in his declaration than at his deposition; but the declaration and
16 deposition are not inconsistent. *Compare* Baldhosky Dep. 71:17-72:24 *with* Baldhosky Decl.
17 ¶¶ 9-11. And contrary to defendants’ contention, the present case is not analogous to *Yeager*.
18 There, the deponent claimed to not remember key facts during his deposition, only to describe
19 them at length in a later affidavit:

20 According to the district court, “the deponent remember[ed] almost
21 nothing about the events central to the case during his deposition,
22 but suddenly recall[ed] those same events with perfect clarity in his
23 declaration in opposition to summary judgment without any
24 credible explanation as to how his recollection was refreshed.”
25 During his deposition, Yeager responded that he did not recall
26 answers to approximately 185 different questions. For example,
27 Yeager stated that he did not recall significant or difficult-to-forget
28 events in the recent past, such as testifying in court or his
involvement in a plane crash. In his declaration, Yeager provided
no reason for his sudden ability to recall specific facts that he could
not recall during his deposition other than stating that since his
deposition he “reviewed several documents that have refreshed
[his] recollection about some things [he] did not recall.” The

1 district court found this explanation to be “unbelievable given that
2 Yeager was shown over twenty exhibits during his deposition in an
3 attempt to refresh his recollection.”

4 *Yeager*, 693 F.3d at 1080. Here, by stark contrast, plaintiff substantively and directly answered
5 almost every question about defendant Ruff’s alleged failure to change his soiled bandages at his
6 deposition, and, in his declaration, he simply provided further detail. There was no inconsistency,
7 so plaintiff’s declaration need not be excluded under the sham-affidavit rule.

8 **B. Defendants’ Objections to Godoy Declaration**

9 Defendants object to the admissibility of the declaration of Nurse Godoy, plaintiff’s
10 expert, on the ground that it is untimely. ECF No. 176 at 5. The expert-discovery deadline in
11 this case was December 14, 2018, ECF No. 167, but plaintiff filed his expert declaration on
12 December 17, 2018, ECF No. 173-4.² Given the declaration’s untimeliness, defendants contend
13 that the court should decline to consider it under Rule 37(c)(1) (“If a party fails to provide
14 information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use
15 that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the
16 failure was substantially justified or is harmless.”).

17 Federal Rule of Civil Procedure 26(a)(2) directs a party to disclose to other parties the
18 identity of any witness it may use at trial to present evidence. Fed. R. Civ. P. 26(a)(2)(A). For an
19 expert witness, this disclosure must be accompanied by a written report prepared and signed by
20 the expert. Fed. R. Civ. P. 26(a)(2)(B). If the disclosure is later found to be incomplete or
21 incorrect, the providing party must supplement or correct the disclosure in a timely fashion. Fed.
22 R. Civ. P. 26(e)(1)(A). For expert witnesses, the duty to supplement extends to both the report
23 and information given during the expert’s deposition. Fed. R. Civ. P. 26(e)(2). “Any additions or
24 changes to this information must be disclosed by the time the party’s pretrial disclosures under
25 Rule 26(a)(3) are due.” *Id.*

26 Here, defendants’ objections to Godoy’s declaration have some merit. Plaintiff disclosed

27 ² Defendants acknowledge that plaintiff disclosed Godoy’s expert report within the timeline set
28 by the court, ECF No. 166; they take issue only with Godoy’s declaration.

1 Godoy’s expert report before the expert-discovery deadline of December 14, 2018. *See* ECF No.
2 167. However, with his opposition to defendants’ motion for summary judgment, plaintiff filed
3 Godoy’s declaration, which included new, additional expert opinions that were not disclosed prior
4 to the expert-discovery deadline. *See* Godoy Decl. ¶¶ 7-12 (opining that exposing a wound to
5 feces can lead to infection, that a MRSA infection can cause death, and that it is sometimes
6 appropriate for a nurse to deviate from a doctor’s order). Though defendants’ objections thus
7 have some merit, we find that the addition of this new information was harmless. It is common
8 knowledge that exposing a wound to feces can lead to infection, that a MRSA infection can cause
9 death, and that a “nurse must use common sense and professional knowledge when carrying out a
10 physician’s orders.” *Id.* Because these opinions could not have been a surprise to defendants, the
11 late filing of Godoy’s declaration is harmless. Therefore, the court will not decline to consider
12 the nurse’s opinions under Rule 37(c)(1).

13 **C. Plaintiff’s Objections**

14 Plaintiff raises numerous objections to defendants’ evidence. ECF No. 173-1. These
15 objections are immaterial to the court’s ruling, and the court will therefore decline to address
16 them. *See Norse*, 629 F.3d at 973.

17 **D. The Factual Record**

18 In accordance with Local Rule 260, defendants filed a statement of undisputed facts, ECF
19 No. 168-2, and plaintiff filed a reproduction of that statement with admissions and denials as
20 appropriate, ECF No. 173-1. The court has reproduced the facts below, calling attention to
21 material disputes.

22 **i. The Parties**

23 Plaintiff “suffers from a spinal cord injury and is confined to a wheelchair.” TAC at 2
24 (punctuation altered). As a result of plaintiff’s paraplegia, he has neurogenic bowels and is
25 incontinent. *See Baldhosky Decl.* ¶ 7. From May 29, 2009 to July 29, 2010, plaintiff was
26 incarcerated at the California Substance Abuse Treatment Facility and State Prison (“SATF”).
27 Baldhosky Dep. 7:12-14, 8:12-19; Baldhosky ¶ 5.

28 Defendants are healthcare employees who, at all times alleged in the complaint, were

1 healthcare providers at CDCR. Defendant Ruff was a licensed registered nurse at SATF who
2 acted as “gatekeeper” to all medical care at the clinic in Yard F. Baldhosky Dep. 68:8-12; *accord*
3 TAC at 3. Defendants Dunn, Indendi, and Kaylor were licensed vocational nurses at SATF.
4 TAC at 3.

5 **ii. Pressure Sores**

6 In August 2008, CDCR officials initiated a plan of care for plaintiff “indicating that Mr.
7 Baldhosky was at risk for impaired skin integrity related to decreased mobility.” Godoy Rpt. at 3.
8 Indeed, medical records show that plaintiff suffered from skin redness and dryness on his
9 buttocks in April 2009. *Id.* By July 2009, plaintiff had developed pressure sores on his hip,
10 buttock, and coccyx. *Id.* at 4. On July 17, 2009, Dr. Nyenke issued a telephone order for
11 Baldhosky to receive wet-to-dry dressing changes once a day for his pressure sores. Esquivel
12 Decl. Ex. A at 5. Baldhosky estimates he started receiving dressing changes in mid-August 2009.
13 Baldhosky Dep. 42:4-13.

14 **iii. Defendant Ruff’s Interactions with Plaintiff**

15 On October 19, 2009, plaintiff “started the day with diarrhea and an unintended bowel
16 movement that soiled [him] and the [pressure-sore] wound dressing that was attached with paper
17 tape.” Baldhosky Decl. ¶ 10. Plaintiff “took a shower to clean the feces off” and the “dressing
18 came off in the wet environment.” *Id.* Accordingly, plaintiff “went to the yard clinic for a clean
19 dressing.” *Id.*

20 Plaintiff and defendant dispute what happened next. According to plaintiff, after being
21 made to wait for an unduly long time without treatment, plaintiff complained, and Ruff ordered
22 plaintiff into her office. *Id.* Upon arrival, Ruff interrogated plaintiff “about why [he] violated her
23 order to leave the dressing on at all times.” *Id.* Plaintiff alleges that he then described the soiled
24 condition of the dressing, but Ruff criticized him “for not holding the soiled dressing on to the
25 open wound.” *Id.* “She then stated that she would not permit the dressing to be replaced.” *Id.*
26 Following an acrimonious interaction with Ruff’s colleague, plaintiff exited the clinic to the yard,
27 where he accidentally fell out of his wheelchair. *Id.* ¶ 12. While plaintiff was on the ground,
28 Ruff “appeared and asked in a condescending and sarcastic way, ‘What are you doing on the

1 ground?”” *Id.* ¶ 13. Due to the foregoing events, plaintiff refused any assistance from Ruff. *Id.*

2 According to defendants, Ruff did not withhold treatment; plaintiff refused it:

3 On October 19, 2009, at 1435 hours, Ruff saw Baldhosky for a
4 dressing change and fall from his wheelchair. Baldhosky refused to
5 allow Ruff to examine him because he “feared” for his “safety,
6 health, and well-being.” Despite Baldhosky’s refusal to be treated,
7 Ruff reminded him to return to the clinic in the evening for his
8 dressing change.

9 Defendants’ Statement of Undisputed Facts ¶ 10 (citing Medical Record 463, 464, 591; Ruff Dep.
10 165:17-174:2.).

11 **iv. Defendants Dunn, Kaylor, and Indendi’s Interactions with
12 Plaintiff**

13 Plaintiff alleges that defendants Indendi, Dunn, and Kaylor “ignored the consequences of
14 unintended [bowel movements] by failing to provide an opportunity to be clean, dry and to
15 provide additional clothing.” TAC at 15; *accord* Baldhosky Dep. 80:15-17. He further alleges
16 that defendants’ actions and inactions “created an environment in which skin breakdown would,
17 and did, occur.” TAC at 15. Specifically, plaintiff alleges that Indendi refused to change his
18 soiled dressings on October 24, 2009. TAC 20-21. At his deposition, plaintiff could not specify
19 the dates on which Indendi refused to change his dressing and explained that she told him to come
20 back at his scheduled time for his dressing change—8 or 9 p.m. Baldhosky Dep. 77:1-78:12.

21 Plaintiff alleges that Kaylor refused to change his soiled dressings on November 13-14,
22 2009. TAC at 21. At his deposition, plaintiff testified that he could not recall how many times
23 Kaylor refused to change his dressing, but that it occurred on at least on one occasion. Baldhosky
24 Dep. 78:22-80:2. He further testified that Kaylor told him to come back at his scheduled dressing
25 time. *Id.* He testified that on one occasion, he threatened to complain to the yard lieutenant when
26 Kaylor refused to change his dressing, and that she then agreed to change his dressing—but he
27 still had to wait about two hours before his soiled bandages were changed. *Id.*

28 Plaintiff alleges that Dunn refused to change his soiled dressings after unintended bowel
movements on November 23, 2009. TAC at 21. At his deposition, plaintiff testified that he told

1 Dunn that he had a soiled dressing or that it came off during the shower, and that it needed to be
2 replaced. Baldhosky Dep. 80:22-81:2, 81:15-19. He testified that Dunn refused to change his
3 soiled bandages when requested and told him to “come back later.” Baldhosky Dep. 80:22-81:2,
4 81:15-19.

5 Each defendant alleges that though they do not specifically recall any interaction with
6 plaintiff, based on their custom and practice, they would not have refused to change plaintiff’s
7 soiled bandages. Dunn Decl. ¶¶ 3-5; Indendi Decl ¶¶ 3-5; Kaylor Decl. ¶¶ 3-8.

8 **v. Alleged Harm**

9 On October 24, 2009—five days after Ruff’s alleged misconduct and the day of Indendi’s
10 alleged misconduct—the nurse who changed plaintiff’s bandages became concerned about
11 plaintiff’s wound and notified the on-call physician. Baldhosky Decl. ¶ 21. Plaintiff was then
12 transferred to a local hospital where he “was advised that [he] had a Stage III pressure sore
13 infected with MRSA.” *Id.* ¶ 22. He remained at the hospital for eight days of treatment. *Id.*

14 Approximately ten days after being discharged from the local hospital, plaintiff alleges
15 that “Defendants continued their deliberate indifference to the dressing changes [that plaintiff]
16 required.” Baldhosky Decl. ¶ 23. In a report from San Joaquin Community Hospital dated
17 December 19, 2009, physicians again detected MRSA in plaintiff’s wound that had deteriorated
18 to a “Stage IV/unstageable pressure sore.” Baldhosky Decl. ¶ 25.

19 **IV. DISCUSSION**

20 We first consider whether defendants, the moving party, have met their initial burden of
21 “proving the absence of a genuine issue of material fact” and a prima facie entitlement to
22 summary judgment. *Celotex Corp.*, 477 U.S at 323. Defendants raise two primary arguments for
23 why they are entitled to summary judgment: (1) “they did not refuse to provide the medically
24 ordered dressing changes,” and (2) “no evidence shows that Plaintiff suffered an injury as a result
25 of any delay in providing the dressing changes.” ECF No. 168-1 at 6. We will address each
26 argument in turn.

1 **A. Whether the Evidence Shows that Defendants Refused to Change**
2 **Plaintiff’s Soiled Bandages**

3 Defendants contend that the evidence shows that “Defendants did not refuse to provide,
4 nor did they deny, Plaintiff the needed dressing changes.” ECF No. 168-1 at 6. Specifically,
5 with regard to defendant Ruff, defendants argue that the evidence shows that Ruff did not refuse
6 to treat plaintiff; rather, plaintiff refused treatment. *Id.* And with regard to defendants Kaylor,
7 Dunn, and Indendi, defendants argue that the evidence shows that “[s]ince Dr. Nyenke’s July 17,
8 2009 order specified that the wound dressing be changed once a day, Plaintiff’s bandage changes
9 were clearly within the recommended number of daily wound changes regardless of any
10 purported refusal or delay by Defendants.” *Id.* at 7. We reject both arguments.

11 First, the evidence does not show that plaintiff merely refused treatment from Ruff. On
12 the day in question, plaintiff alleges that he had had an inadvertent bowel movement, soiling his
13 bandages. Baldhosky Decl. ¶ 10. He sought treatment from Ruff, who berated him for
14 disobeying her order to leave the bandages on at all times. *Id.* Plaintiff then had an acrimonious
15 interaction with Ruff’s colleague, which led to him falling out of his wheel chair in the yard. *Id.*
16 While plaintiff was on the ground, Ruff “appeared and asked in a condescending and sarcastic
17 way, ‘What are you doing on the ground?’” *Id.* ¶ 13. Due to the foregoing events, plaintiff
18 refused any assistance from Ruff. *Id.* Plaintiff’s refusal at this point does not nullify Ruff’s
19 alleged refusal to change his soiled bandages earlier in the day.

20 Second, the evidence does not show that, because a doctor had ordered dressing changes
21 once daily, any delay in changing plaintiff’s bandages was excusable as long as plaintiff’s
22 bandages were changed in the evening. Plaintiff alleges that he inadvertently soiled his bandages
23 on several occasions, and common sense dictates that bandages soiled with feces should be
24 change promptly—not only at the end of the day. Indeed, defendants Dunn, Kaylor, and Indendi
25 concede in their declarations that it would be “risky” to not promptly change a soiled bandage.
26 *See* Dunn Decl. ¶ 6 (“I had experience changing dressings for wounds, and was aware of the risks
27 of leaving a soiled dressing intact for prolonged periods of time, especially if the dressing was
28 soiled with fecal matter.”); Kaylor Decl. ¶ 6; Indendi Decl. ¶ 6.

1 In sum, construing the evidence in favor of plaintiff, we find that defendants' first
2 argument does not show their prima facie entitlement to summary judgment. We now consider
3 their second.

4 **B. Whether the Evidence Shows that Plaintiff Was Harmed by the**
5 **Purported Delay in the Changing of Plaintiff's Soiled Bandages**

6 Defendants contend that, assuming defendants delayed changing plaintiff's soiled
7 bandages, "no evidence shows that he sustained injury as a result of such delay." ECF No. 168-1
8 at 8. We disagree. There is sufficient evidence to infer that defendants' alleged failure to
9 promptly change plaintiff's soiled dressings caused the deterioration of plaintiff's condition,
10 perhaps even including MRSA. Three key factors allow us to make the inference.

11 First, plaintiff's expert opined that "[e]xposing a wound to feces can lead to infection."
12 Godoy Decl. ¶ 7. Second, defendants Dunn, Kaylor, and Indendi concede in their declarations
13 that it would be "risky" to not promptly change a soiled bandage. *See* Dunn Decl. ¶ 6; Kaylor
14 Decl. ¶ 6; Indendi Decl. ¶ 6. Third, the sequence of the alleged facts—failures to promptly
15 change a soiled bandage, followed by pressure sores and MRSA—suggest a possible causal
16 relationship. Specifically, Ruff refused to change plaintiff's soiled bandages on October 19,
17 2009, and Indendi refused to change plaintiff's soiled bandages on October 24, 2009.³ TAC at
18 21. Thereafter, on October 24, 2009, plaintiff was transferred to a local hospital where he "was
19 advised that [he] had a Stage III pressure sore infected with MRSA." *Id.* ¶ 22. Likewise, after
20 plaintiff's discharge from the hospital in early November 2009, plaintiff alleges that Kaylor and
21 Dunn failed to change his wounds. TAC at 21. Shortly thereafter, in December 2009, plaintiff
22 was readmitted to the hospital with a "Stage IV/unstageable pressure sore" with MRSA.
23 Baldhosky Decl. ¶ 25.

24 In sum, construing the evidence in favor of plaintiff, we find that defendants' second argument

25
26 ³ Defendants argue that Indendi's alleged actions could not have caused plaintiff harm, because
27 plaintiff had already been feeling unwell in the days prior to Indendi's alleged refusal to change
28 plaintiff's soiled bandages. ECF No. 168-1 at 8. We disagree. Even assuming that Indendi's
alleged actions did not cause plaintiff's infection, it would be justifiable to infer that his actions
exacerbated it.

1 does not show their prima facie entitlement to summary judgment. Therefore, defendants have
2 failed to meet their burden. There are genuine issues of material fact, and defendants are not
3 entitled to summary judgment.

4 **V. QUALIFIED IMMUNITY**

5 Defendants contend that they are entitled to qualified immunity. Qualified immunity
6 shields government officials from monetary damages unless their conduct violated “clearly
7 established statutory or constitutional rights of which a reasonable person would have known.”
8 *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *accord Felarca v. Birgeneau*, 891 F.3d 809, 815
9 (9th Cir. 2018). To assess whether qualified immunity attaches, a court asks “two questions: (1)
10 whether the facts, taken in the light most favorable to the non-moving party, show that the
11 officials’ conduct violated a constitutional right, and (2) whether the law at the time of the
12 challenged conduct clearly established that the conduct was unlawful.” *Felarca*, 891 F.3d at 815.

13 To determine whether the law “clearly established” that the challenged conduct was
14 unlawful, the court must consider whether the defendant “would have had fair notice that the
15 action was unlawful.” *Chappell v. Mandeville*, 706 F.3d 1052, 1056-57 (9th Cir. 2013).
16 Qualified immunity does not attach when the law is “sufficiently clear that every reasonable
17 official would have understood” that the conduct in question was unlawful. *See Rodriguez v.*
18 *Swartz*, 899 F.3d 719, 732 (9th Cir. 2018). Although a binding precedent can help determine
19 what a reasonable official would have known, “it is not necessary . . . that the very action in
20 question has previously been held unlawful.” *Id.* at 732 (quoting *Ziglar v. Abbasi*, 137 S.Ct.
21 1843, 1866 (2017)). Qualified immunity does not attach in an “obvious case” of constitutional
22 violation, even if the facts are novel. *See Rodriguez*, 899 F.3d at 734; *accord Hope v. Pelzer*, 536
23 U.S. 730, 738-39 (2002).

24 The first prong—“whether the facts, taken in the light most favorable to the non-moving
25 party, show that the officials’ conduct violated a constitutional right”—need not long delay us.
26 *Felarca*, 891 F.3d at 815. As the court noted at the screening stage, plaintiff’s allegations state an
27 Eighth Amendment claim for deliberate indifference. ECF No. 31.
28

1 The second prong—“whether the law at the time of the challenged conduct clearly
2 established that the conduct was unlawful”—is likewise easily answered in the affirmative.
3 *Felarca*, 891 F.3d at 815. We frame the question as follows: Was it clearly established that
4 refusing to change a prisoner’s soiled bandage for hours is unconstitutional? We believe that it
5 was. Defendants would have been on notice that “deliberate indifference to a prisoner’s serious
6 illness or injury states a cause of action under § 1983.” *Estelle v. Gamble*, 429 U.S. 97, 105
7 (1976). The Supreme Court has also clearly established that prisoners must be protected from
8 serious risks to their health. *See Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994). Plaintiff’s
9 allegations, viewed in the light most favorable to plaintiff, show that the failure to change soiled
10 bandages promptly was a serious risk to plaintiff’s health.

11 The court is unpersuaded by defendants’ argument that “it was not clearly established that
12 Defendants would or could have known that following the doctor’s orders and providing Plaintiff
13 a dressing change a day would violate Plaintiff’s constitutional rights.” ECF No. 168-1 at 10. As
14 defendant succinctly states, “The issue is not whether Defendants had a duty to violate a
15 physician’s orders. The issue is whether Defendants acted with deliberate indifference to an
16 obvious threat to Plaintiff’s health and safety.” ECF No. 173 at 9.

17 Plaintiff’s allegations have satisfied both prongs of the qualified immunity inquiry. Thus,
18 defendant is not entitled to qualified immunity.

19 **VI. FINDINGS AND RECOMMENDATION**

20 Accordingly, we recommend that defendants’ motion for partial summary judgment, ECF
21 No. 168, be denied.

22 The undersigned submits the findings and recommendations to the district judge under 28
23 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District
24 Court, Eastern District of California. Within fourteen days of the service of the findings and
25 recommendations, the parties may file written objections to the findings and recommendations
26 with the court and serve a copy on all parties. That document should be captioned “Objections to
27 Magistrate Judge’s Findings and Recommendations.” The district judge will review the findings
28 and recommendations under 28 U.S.C. § 636(b)(1)(C). The parties’ failure to file objections

1 within the specified time may result in the waiver of rights on appeal. *See Wilkerson v. Wheeler*,
2 772 F.3d 834, 839 (9th Cir. 2014).

3
4 IT IS SO ORDERED.

5 Dated: May 6, 2019


UNITED STATES MAGISTRATE JUDGE

6
7
8
9 No. 203.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28