IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Kathleen M. Tafoya

Civil Action No. 15–cv–00491–KMT

JAYSON M. OSLUND,

Plaintiff,

v.

MAURICE FAUVEL, and
C/O MULLEN, in their official and individual capacities,

Defendants.

ORDER

This case comes before the court on Defendants' "Combined Motion and Brief in Support of Summary Judgment" (Doc. No. 51 [Mot.], filed November 2, 2016). Plaintiff filed his response on December 12, 2016 (Doc. No. 55 [Resp.]), and Defendants filed their reply on December 30, 2016 (Doc. No. 58 [Reply]).

STATEMENT OF THE CASE

Plaintiff, proceeding *pro se*, asserts claims for violations of his Eighth Amendment rights for the defendants' alleged failure to provide him proper medical care and use of excessive force. (*See* Doc. No. 6 [Compl.], filed May 7, 2015). At the time of the events in this case, Plaintiff was an inmate at the Sterling Correctional Facility ("SCF") within the Colorado Department of Corrections ("CDOC"). (*Id.* at 4.) Plaintiff states Defendant Fauvel was assigned to be his primary medical care provider at SCF. (*Id.*)

Plaintiff alleges on March 7, 2013, he suffered a grand mal seizure. (*Id.*) As a result of the seizure, Plaintiff fell, was knocked unconscious, suffered a concussion, and required five stitches. (*Id.*) Plaintiff alleges Defendant Fauvel, who treated him after the seizure, failed to provide proper medical care by ordering Plaintiff to return to his cell following his first seizure, concussion, and head injury. (*Id.* at 6.)

Later that day, Plaintiff suffered another seizure. (*Id.* at 7.) Plaintiff alleges his cellmate informed him that, during Plaintiff's second seizure, Defendant Mullen, "grabbed [Plaintiff] while [he] was seizing and convulsing, yelled at [him] to 'Stop resisting', and then began slamming [his] head into the ground." (*Id.* at 5.) Plaintiff states after the second seizure "[a]t some point [he] realized that [he] could not walk." (*Id.*) Plaintiff states he has been immobile and has to use a wheelchair since his second seizure. (*Id.*)

UNDISPUTED FACTS

On the afternoon of March 7, 2013, Plaintiff was on the second tier of his living unit when he experienced a seizure, fell backwards, and hit his head on the concrete. (Mot., Ex. A [Oslund Dep.], 20:3–18; 22:10–18; 73:6–8.) Defendant Fauvel treated Plaintiff following the seizure. (Mot., Ex. G [Fauvel Aff.], ¶ 5.) Defendant Fauvel identified a laceration on Plaintiff's head about 3.5 cm in size and repaired it with five stitches. (*Id.* ¶ 7.) Defendant Fauvel also started Plaintiff on a medication to help control the seizures. (*Id.*, ¶¶ 8, 17.) Officer Nathan Teter took Plaintiff back to his unit after he received medical treatment for the first seizure. (Mot., Ex. B [Teter Aff.], ¶ 3.)

About fifteen to twenty minutes after Officer Teter returned Plaintiff to the living unit, Plaintiff had a second seizure. (*Id.*, ¶ 4.) Officers Sherwood, Teter, Cook, Mullen, and Sergeant

Munson were among the officers who responded. (*Id.* ¶ 5; Mot., Ex. C [Mullen Aff.], ¶ 3; Mot., Ex. D [Munson Aff.], ¶ 4; Mot., Ex. E [Cook Aff.], ¶ 4.) All of the officers were aware Plaintiff was experiencing a seizure. (Mullen Aff., ¶¶ 6–8; Munson Aff., ¶ 9; Cook Aff. ,¶ 6.) Plaintiff's cellmate, Inmate Charles Garlick, was supporting Plaintiff's head. (Teter Aff., ¶ 6.) Plaintiff was incoherent and unaware of his surroundings. (Mullen Aff., ¶ 7.) At some point, Mr. Garlick was instructed to leave the cell. (Teter Aff., ¶ 9; Mullen Aff., ¶ 10; Munson Aff., ¶ 8; Cook Aff., ¶ 9.) Plaintiff was not conscious during the second seizure and has no recollection of what happened. (Oslund Dep. 13:12–24.)

Plaintiff returned for medical treatment after having the second seizure. (Fauvel Aff., ¶ 10.) Defendant Fauvel ordered medication and checked Plaintiff's previous head wound for any further damage. (*Id.*, ¶ 11.) Given that Plaintiff had experienced two seizures in one day, Defendant Fauvel ordered that Plaintiff be placed in observation segregation overnight as a precautionary measure. (*Id.*, ¶ 11.) Following the seizure events on March 7, 2013, Defendant Fauvel began treating Plaintiff approximately every two weeks. (*Id.*, ¶ 13.) At some point, Defendant Fauvel prescribed a wheelchair because of Plaintiff's complaints of balance problems and vertigo, which had developed after the seizures. (*Id.*, ¶¶ 14, 17.) From March 11, 2013, through October 2014, when Defendant Fauvel left his employment at the CDOC, Defendant Fauvel ordered radiographs, CT scan, x-rays, and an MRI, all of which were read as "normal" (*id.*, ¶¶ 15, 16, 19); ordered physical therapy to assist with Plaintiff's transition to a walker (*id.*, ¶ 21); and continued to monitor and adjust Plaintiff's medication levels (*id.*, ¶¶ 18, 25).

STANDARD OF REVIEW

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc. v. City & Cnty. of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994) (citing *Celotex*, 477 U.S. at 325). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324; *see also* Fed. R. Civ. P. 56(c). A disputed fact is "material" if "under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir.1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute is "genuine" if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. *Thomas v. Metropolitan Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011) (citing *Anderson*, 477 U.S. at 248).

When ruling on a motion for summary judgment, a court may consider only admissible evidence. *See Johnson v. Weld County, Colo.*, 594 F.3d 1202, 1209–10 (10th Cir. 2010). The factual record and reasonable inferences therefrom are viewed in the light most favorable to the party opposing summary judgment. *Concrete Works*, 36 F.3d at 1517. Moreover, because Plaintiff is proceeding *pro se*, the court, "review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United*

States, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted); *see also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (holding allegations of a *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers"). At the summary judgment stage of litigation, a plaintiff's version of the facts must find support in the record. *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1312 (10th Cir. 2009). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Thomson*, 584 F.3d at 1312.

ANALYSIS

1. Deliberate Indifference Claim Against Defendant Fauvel

The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend VIII. As such, it requires that "prison officials . . . ensure that inmates receive adequate food, clothing, shelter, and medical care, and [that they] must 'take reasonable measures to guarantee the safety of the inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citation omitted). The court's analysis of Plaintiff's Eighth Amendment claims involves both an objective and subjective component. *Wilson v. Seiter*, 501 U.S. 294, 298–99 (1991).

As to the objective component, the court considers whether Plaintiff has been deprived of a sufficiently serious basic human need. "[A] medical need is considered 'sufficiently serious' if the condition 'has been diagnosed by a physician as mandating treatment . . . or is so obvious that even a lay person would easily recommend the necessity for a doctor's attention.' " *Oxendine v. Kaplan*, 241 F.3d 1272, 1276 (10th Cir. 2001) (quoting *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 2001)).

As to the subjective component of a deliberate indifference claim, the plaintiff must prove that the prison official "kn[ew] of and disregard[ed] an excessive risk to inmate health and safety." *Farmer*, 511 U.S. at 837. That is, "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.*

Defendants argue only that Plaintiff has failed to satisfy the subjective element of an Eighth Amendment claim against Defendant Fauvel. (Mot. at 11–13.) In his Complaint, Plaintiff contends Defendant Fauvel failed to provide proper medical care by ordering Plaintiff to return to his cell following his first seizure, concussion, and head injury. (Compl. at 6.) Plaintiff alleges that after his first seizure, he awoke to Defendant Fauvel giving him stitches. (*Id.* at 4.) Plaintiff alleges as soon as Defendant Fauvel finished stitching his head, Defendant Fauvel failed to providing proper medical treatment when he ordered Plaintiff to return to his cell, despite Defendant Fauvel's knowledge that "symptoms of a head injury which may indicate a concussion require supervision." (*Id.* at 6.) Plaintiff alleges he suffered another seizure shortly thereafter and that he has been immobile and in a wheelchair ever since. (*Id.* at 5.)

The undisputed facts show that when Defendant Fauvel treated Plaintiff after his first seizure, Defendant Fauvel diagnosed Plaintiff with a cut to his head and repaired it with five stitches and started Plaintiff on a medication to help control the seizures. (Mot., Ex. G [Fauvel Aff.[1]], ¶¶ 5, 7, 8, 17.) Based on Defendant Fauvel's examination of Plaintiff, Defendant Fauvel

[1] Plaintiff argues that the facts in Defendant Fauvel's affidavit are inadmissible because it is not notarized. (Resp. at 2.) As Defendants point out, however, the affidavits submitted as exhibits to Defendants' Motion for Summary Judgment had electronic signatures in compliance with the Local Rules of Practice and the Electronic Case Filing Procedures for the District of Colorado. (*See* D.C.COLO.LCivR 5.1; Electronic Case Filing Procedures for the District of Colorado (Civil

cleared him to return to his room and determined overnight observation was not necessary. (*Id.*, ¶ 9.) Defendant Fauvel made this decision based on his own experience and training and reasonable practice standards for this type of injury and illness. (*Id.*)

During his deposition, Plaintiff testified that if Defendant Fauvel had put him in 24 hour observation after his first seizure, Plaintiff's later injuries would not have occurred and he would not now be confined to a wheelchair. (Oslund Dep., 54:25–55:22.) Defendants construe Plaintiff's testimony as a claim for delay of medical care. (Mot. at 12 [quoting *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005)].) However, the court does not construe Plaintiff's testimony as such. Plaintiff testified as follows:

> I can't say it's his fault that I had a second seizure, because it's health, and you can't really control that, I think. But had [Defendant Fauvel] not sent me back to the unit [before] the second seizure, I believe the excessive force with [Defendant] Mullen wouldn't have happened, or the incident wouldn't have happened like it did. Maybe it would have prevented me from—I'm not good with wording. Like, had I been walking before this first seizure, and not the second one, it may have prevented this, me being in a wheelchair, had I been in observation during the first one.

(Oslund Dep., 54:25–55:22.) Plaintiff went on to testify that he bases this belief on "common sense." (*Id.*, 56:1–8.) To the extent Plaintiff believes further observation would have prevented the events following the second seizure in which Plaintiff alleges Defendant Mullen used excessive force, which Plaintiff alleges caused him to be wheelchair-bound, Plaintiff cannot attribute Defendant Mullen's alleged excessive force, which happened after Defendant Fauvel's treatment of Plaintiff, to Defendant Fauvel.

Cases), Section IV.4.3(f).) In any event, the defendants have attached signed and notarized copies of the affidavits to their reply. (*See* Reply, Exs. H-L.)

Nevertheless, though Plaintiff's Complaint is not a model of clarity, it appears Plaintiff also alleges Defendant Fauvel failed to monitor Plaintiff despite his knowledge that "symptoms of a head injury which may indicate a concussion require supervision" (Compl. at 6), and that failure to monitor his concussion caused Plaintiff further injuries, which have caused him to be immobile (*see id.* at 5–6). Defendants assert that "no evidence suggests that [Plaintiff] had a concussion." (Mot. at 11.) Conspicuously absent from the medical records provided by Defendants in their motion are the records from Defendant Fauvel's treatment of Plaintiff on March 7, 2013, the day of the seizures at issue.[2] However, nearly every other record provided by Defendants regarding Defendant Fauvel's treatment of Plaintiff from June 12, 2013, to October 21, 2014, shows that Plaintiff was being treated for postconcussion syndrome with gait instability. (*See* Fauvel Aff., Attach. 1 at 8–9, 11, 13, 16–20, 23–26, 28, 32, 35, 36–38.) On July 16, 2013, Defendant Fauvel specifically noted that Plaintiff suffered from "gait instability after seizure with fall and concussion." (*Id.* at 13.) Defendant Fauvel's affidavit and the attached medical records are devoid of any statements or evidence that Defendant Fauvel's failure to keep Plaintiff under observation for his concussion did not cause Plaintiff's gait issues and immobility.[3] *See Celotex*, 477 U.S. at 325 (holding the moving party bears the initial burden of

[2] Dr. Fauvel notes in his affidavit that the medical records from March 7, 2013, to October 2014 are attached to his affidavit. (Fauvel Aff., ¶ 27.) However, the medical records provided to the court begin with a Consultation Report dated May 17, 2013, over two months after Plaintiff's first and second seizures. (*See id.*, Attach. 1.)

[3] The court notes that Defendants have extensively briefed the care and tests given to Plaintiff by Defendant Fauvel *following* the first seizure. Indeed, the "normal" results of Plaintiff's radiographs, CT scan, x-rays, and MRI may show that Plaintiff's continuing gait problems and immobility are not caused by Defendant Fauvel's decision not to monitor Plaintiff following his first seizure. However, Defendant Fauvel's affidavit does not provide such an explanation. Additionally, the care given by Defendant Fauvel and the Plaintiff's progress made following the second seizure may be relevant to damages and mitigation of damages but do not assist with the

showing an absence of evidence to support the nonmoving party's case). Thus, there is a genuine issue of material fact as to whether Defendant Fauvel "kn[ew] of and disregard[ed] an excessive risk to [Plaintiff's] health and safety" immediately following the first seizure. *Farmer*, 511 U.S. at 837, which precludes summary judgment on the claim against Defendant Fauvel.

2. Excessive Force Claim Against Defendant Mullen

In his Complaint, Plaintiff states that Defendant Mullen, as a "first responder," is tasked with responding to medical emergencies. (Compl. at 6.) Plaintiff states his cellmate informed him that, during Plaintiff's second seizure, Defendant Mullen, "[o]ne of the responding staff, grabbed [Plaintiff] while [he] was seizing and convulsing, yelled at [him] to 'Stop resisting', and then began slamming [his] head into the ground," which caused his immobility and confinement to a wheelchair. (Compl. at 5–6.) Plaintiff alleges Defendant Mullen used excessive force in violation of the Eighth Amendment.

"[A]n excessive force claim involves two prongs: (1) an objective prong that asks if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation, and (2) a subjective prong under which the plaintiff must show that the officials act[ed] with a sufficiently culpable state of mind." *Smith v. Cochran*, 339 F.3d 1205, 1212 (10th Cir. 2003) (internal quotation marks and citation omitted).

The first prong of an excessive force claim should be analyzed by determining whether the defendant's actions were objectively reasonable in light of the surrounding facts and circumstances. *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (citing *Graham v. Connor*, 490 U.S. 386, 397 (1989)). The inquiry should cover actions leading up to and at the

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court's analysis of whether Defendant Fauvel was deliberately indifferent to Plaintiff's health and safety immediately following his first seizure.

moment of the use of force. *Id.* The use of force should be judged from the perspective of a reasonable officer on the scene who is often forced to make a split-second judgment regarding the amount of force which is necessary. *Id.* (quoting *Graham*, 490 U.S. at 396–97). Factors to consider include: the severity of the action leading to the officer's response; the potential threat posed to the safety of the officers and others; and the resistance presented to the officers. *See Medina v. Cram*, 252 F.3d 1124, 1131 (10th Cir.2001).

The second, subjective, element of the excessive force analysis asks whether the defendant had a sufficiently culpable mind. Stated differently, this element focuses "on whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm." *Webb v. Sterling Correctional Officer Delaney*, No. 14–cv–1461–RBJ–CBS, 2016 WL 931218, at *3 (D. Colo. Mar. 11, 2016) (citing *Smith*, 339 F.3d at 1212). *Cf. Whitington*, 2009 WL 2588762, at *8 ("Whether pain is wantonly and unnecessarily inflicted depends, at least in part, on whether force could have plausibly been thought to be necessary to maintain order in the institution and to maintain the safety of the prison personnel or inmates.") (quoting *Hickey v. Reeder*, 12 F.3d 754, 758 (8th Cir. 1993). "Other relevant factors include: the objective need for force; the relationship between the need for force and the force used; the threat to others reasonably perceived by the officers; efforts to temper the severity of the force used; and the extent of pain or injury inflicted." *Hickey*, 12 F.3d at 758 (citing *McMillian*, 503 U.S. at 7).

Officers Sherwood, Teter, Cook, Mullen, and Sergeant Munson were among the officers who responded to Plaintiff's second seizure. (Teter Aff., ¶ 5; Mullen Aff., ¶ 3; Munson Aff., ¶ 4; Cook Aff., ¶ 4.) When Officer Cook got to Plaintiff's cell, Officer Teter had already arrived.

(Cook Aff, ¶ 4.) It appeared to Officer Cook that Plaintiff had just had a seizure. (*Id.*, ¶ 5.) Officer Cook states she observed Plaintiff grabbing at Mr. Garlick, Plaintiff's cellmate, and then Plaintiff grabbed her, trying to pull himself up. (Cook Aff. ¶ 7.) Defendant Mullen states he arrived and observed Plaintiff sitting on the cell floor with his back to the door with Officer Cook in front of him. (Mullen Aff., ¶ 5.) Defendant Mullen states that Plaintiff was flailing his arms, but it appeared that the seizure had stopped. (*Id.*, ¶ 6.) Mr. Garlick was standing to the right of Plaintiff, trying to stabilize him. (*Id.*, ¶ 6.) According to Defendant Mullen, Plaintiff was incoherent and unaware of his surroundings. (*Id.*, ¶ 7.) Defendant Mullen states that, in order to stabilize Plaintiff in case of another seizure, Defendant Mullen reached around Plaintiff's chest under his arms, and, stabilizing Plaintiff's head, pulled him away from Officer Cook and onto his back onto the floor. (*Id.*, ¶ 8.) Sergeant Munson and Officer Cook observed Defendant Mullen take hold of Plaintiff and support him as he helped Plaintiff lie on the floor. (Munson Aff., ¶ 7; Cook Aff., ¶ 10.) Defendant Mullen states he did not attempt to restrain or hold Plaintiff down at any time. (Mullen Aff., ¶ 9.) However, Defendant Mullen did see Plaintiff's head make contact with the floor while he was lying on his back and with the cell wall when he sat up. (*Id.*, ¶ 14.) Defendant Mullen states he did not slam Plaintiff's head against a wall or otherwise use force in an attempt to control Plaintiff, and Plaintiff was not placed in handcuffs. (Id., ¶ 15.) The other officers present state they did not observe Defendant Mullen slamming Plaintiff against a wall or otherwise use force in an attempt to control Plaintiff, and none of the officers heard Defendant Mullen yell at Plaintiff to stop fighting or stop resisting. (Teter Aff., ¶ 10; Munson Aff., ¶ 10.; Cook Aff., ¶ 12).

Plaintiff was not conscious during the second seizure and has no recollection of what happened. (Mot., Ex. A [Oslund Dep.] at 13:12–24.) Thus, Plaintiff bases his claims against Defendant Mullen on what Mr. Garlick told him. In his deposition taken on September 8, 2016, Mr. Garlick testified that when Defendant Mullen came into Plaintiff's cell, Plaintiff "was not seizing, but he was still like he was unconscious." (Mot, Ex. F [Garlick Dep.], 18:9–15.) Defendant Mullen took plaintiff, who had been moved to a sitting position, under the arms and "slid" or "pushed [Plaintiff] physically off the [locker] box into the wall." (*Id.*, 19:14–17, 20:12–14.) Plaintiff's "body hit [the wall] first and his head snapped back and hit the wall." (*Id.*, 21:19–24.) Defendant Mullen then straddled Plaintiff, face-to-face, while yelling at Plaintiff to stop fighting. (*Id.*, 23:4–19.) At this time, Defendant Mullen was the only officer in the cell. (*Id.*, 24:11–14.)

In his affidavit signed December 2, 2016, Mr. Garlick states,

> Officer Mullen then came into the room, forced Jayson into the wall back first causing his head to strike the wall, then slid Jayson down the wall to hit on the floor, again back first. Officer Mullen held Jayson Oslund on the ground by his shoulders and straddling his abdomen, not caring and ignoring the fact that Jayson was banging his head on the ground, while he screamed at Jayson, "OSLUND! STOP FIGHTING OSLUND!"

(Resp., Ex. 1 [Garlick Aff. at 2.) Mr. Garlick also states, "Jayson Oslund was not fighting, he was having a seizure, so screaming at Jayson was pointless, [a]s a seizure victim does not have their faculties about them and is not aware of what's happening." (*Id.*)

Mr. Garlick testified he was told to leave the cell, and he went to sit outside the cell where he was still able to look in and see what was happening. (*Id.*, 24:20–22, 25:8–13.) Mr. Garlick sat there for a period of less than 30 seconds, during which was able to see Cook standing just inside the entrance of the cell. (25:17–26:5.)

On March 8, 2013, the day after Plaintiff's seizures, Sergeant Munson spoke with Mr. Garlick regarding statements he made indicating that Defendant Mullen had "slammed" Plaintiff to the cell floor while trying to control him during the seizure. (Munson Aff., ¶ 11.) Mr. Garlick admits that his statement that Defendant Mullen took Plaintiff down like a "WWF take-down" was an exaggeration. (Mot., Ex. F [Garlick Dep.], 30:8–31:2.)

Mr. Garlick states in his affidavit that he was later written up by Lieutenant Hoffman, who wrote, "Oslund was grabbing at Officer Cook's pant legs trying to stand up." (Garlick Aff. at 2.) Mr. Garlick states that Plaintiff

> was on his back, and Officer Cook was standing . . . a few feet away. There is no way Jayson Oslund from on his back, could have used anything . . . , with his hands straight over his head to use as leverage, in an effort to stand. Especially due to the fact that [his] arms were flailing to the side and straight in front of him . . . .

(*Id.*) Mr. Garlick surmises that "Officer Mullen, and all who would support his story are trying to say Jayson was no longer having a seizure and 'coming to' in an effort to justify his inappropriate use of physical force." (Garlick Aff. at 2.) Contrary to his deposition testimony, Mr. Garlick states that "Jayson Oslund was not coming to. However, he was still having a seizure." (*Id.*)

As to the objective component, Defendants argue that, "[g]iven Inmate Garlick's inconsistent statements and the other officers' observations that Mullen merely moved [Plaintiff] to the floor in order to prevent him from hurting himself during the seizure, no evidence supports that Mullen used force." (Mot. at 17.) However, "[i]t is axiomatic that a judge may not evaluate the credibility of witnesses in deciding a motion for summary judgment." *Seamons v. Snow*, 206 F .3d 1021, 1026 (10th Cir. 2000); *see also Burns v. Bd. of Cnty. Comm'rs of Jackson Cnty.*, 330 F.3d

1275, 1283 (10th Cir. 2003) (crediting only favorable aspects of plaintiff's inconsistent testimony for summary judgment purposes). This evidence, if admissible, is something defendants can present at trial. But the court cannot consider it at the summary judgment stage. *See Todd v. Montoya*, 877 F. Supp. 2d 1048, 1100 (D.N.M. 2012) (denying plaintiff's request for additional discovery because the requested evidence was only relevant for impeachment purposes, which the court would not consider on summary judgment) (citing *Anderson*, 477 U.S. at 255).

Defendants also argue that "[t]he force allegedly used against Plaintiff was both *de minimis* and not of a nature that is repugnant to mankind, suggesting deliberate sadism." (Reply at 8 [citing *Hudson McMillian*, 503 U.S. 1, 10 (10th Cir. 1992); *Whitley v. Albers*, 475 U.S. 312, 322 (1986)].) However, there is a dispute about whether Defendant Mullen "[m]erely push[ed] Plaintiff to the ground and straddle[ed] him while he was having a medical emergency," as Defendants suggest, or whether Defendant Mullen "forced [Plaintiff] into the wall," causing Plaintiff's head to strike the wall, and then straddled Plaintiff and screamed at Plaintiff while "ignoring the fact that [Plaintiff] was banging his head on the ground," as Mr. Garlick states (Garlick Aff. at 2).

Moreover, though Defendants argue that "Plaintiff presents no evidence of any injury resulting from Mullen's use of force" (Reply at 7), Defendants did not provide the medical records from Defendant Fauvel's treatment of the two seizures at issue, and it is not clear from the other medical records provided by the defendants that Plaintiff's injuries, including his postconcussion syndrome and gait instability, did not occur when he was allegedly subdued by Defendant Mullen. *See Celotex*, 477 U.S. at 325 Defendant Fauvel states in his affidavit that he checked Plaintiff's previous head wound for further injuries after the second seizure, but he does not state the results of the examination. (Fauvel Aff., ¶ 11.) From the court's review of the briefing and records, and construing them in the light most favorable to Plaintiff, the court finds that Plaintiff has presented

evidence that raises a factual dispute as to Defendant's use of force in restraining and/or moving Plaintiff during and/or after his second seizure, and therefore Plaintiff has satisfied the objective component of his excessive force claim.

As to the subjective component, Defendants argue that "under the circumstances—[Plaintiff] found in his cell in the midst of a seizure, flailing his arms, grabbing at a female officer, and attempting to stand up, causing prison staff to declare a medical emergency and take him to the clinic—this was a reasonable use of force that caused little injury, if any." (Mot. at 19.) The Supreme Court has outlined several factors relevant to determining whether force was inflicted wantonly and unnecessarily, including "the need for application of force, the relationship between that need and the amount of force used, the threat 'reasonably perceived by the responsible officials,' and 'any efforts made to temper the severity of a forceful response.' " *Hudson*, 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321); *see also Mitchell v. Maynard*, 80 F.3d 1433, 1440 (10th Cir. 1996) ("In making [the excessive force] determination, it is necessary for us to balance the need for application of force with the amount of force used."). Moreover, "[w]here no legitimate penological purpose can be inferred from a prison employee's alleged conduct, the conduct itself constitutes sufficient evidence that the force was used maliciously and sadistically for the very purpose of causing harm." *DeSpain v. Uphoff*, 264 F.3d 965, 978 (10th Cir.2001) (internal quotations, citations, and alterations omitted).

Under Mr. Garlick's version of the events in the cell, Defendant Mullen "forcefully [took Plaintiff] down, he drug his head down the wall landing almost on top of him right where the floor meets the wall." (Garlick Aff. at 2.) At the time, Plaintiff was unaware of what was happening because he was still seizing. (*Id.*) Then, according to Mr. Garlick, Defendant Mullen held Plaintiff on the ground, while straddling him and yelling at him, as Plaintiff banged his head

on the ground. (*Id.*) Mr. Garlick's version of the facts sets forth an exaggerated response to the situation in which Defendant Mullen did not need to apply such force and in which Defendant Mullen made no efforts "to temper the severity of the forceful response." *Hudson*, 503 U.S. at 7. At this stage of the proceeding, Plaintiff has carried his burden to demonstrate a genuine dispute of material fact on the question of whether Defendant Mullen violated his constitutional rights.

B. Qualified Immunity[4]

Finally, Defendants asserted claims of qualified immunity. Qualified immunity is an affirmative defense against 42 U.S.C. § 1983 damage claims available to public officials sued in their individual capacities. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine protects officials from civil liability for conduct that does not violate clearly established rights of which a reasonable person would have known. *Id.* As government officials at the time the alleged wrongful acts occurred, being sued in their individual capacities, the defendants are entitled to invoke a qualified immunity defense to Plaintiff's malicious prosecution claim. *See id.* at 231; *Johnson v. Jones*, 515 U.S. 304, 307 (1995) (noting that police officers were "government officials – entitled to assert a qualified immunity defense"). In resolving a motion to dismiss based on qualified immunity, a court looks at: "(1) whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and (2) whether the right at issue was clearly established at the time of defendant's alleged misconduct." *Leverington v. City of Colo. Springs*, 643 F.3d 719, 732 (10th Cir. 2011) (quoting *Pearson*, 555 U.S. at 232) (internal

[4] In his response, Plaintiff argues that the doctrine of collateral estoppel forbids the defendants from raising the defense of qualified immunity because it was raised in their motion to dismiss. (Resp. at 6.) However, "a government officer [can] raise the qualified-immunity defense at both the motion-to-dismiss and the summary-judgment stage." *Behrens v. Pelletier*, 516 U.S. 299, 306-07 (1996) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

quotations omitted). Once a defendant invokes qualified immunity, the burden to prove both parts of this test rests with the plaintiff, and the court must grant the defendant qualified immunity if the plaintiff fails to satisfy either part. *Dodd v. Richardson*, 614 F.3d 1185, 1191 (10th Cir. 2010). Where no constitutional right has been violated "no further inquiry is necessary and the defendant is entitled to qualified immunity." *Hesse v. Town of Jackson, Wyo.*, 541 F.3d 1240, 1244 (10th Cir. 2008) (quotations omitted).

The court concluded *supra* that Plaintiff has adduced evidence sufficient to show that the defendants violated his Eighth Amendment rights. Thus, the court next considers whether the defendants' actions violated clearly established law. "The 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). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City & Cnty. of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). But the qualified immunity analysis is not merely "a scavenger hunt for prior cases with precisely the same facts." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). Rather, the "more relevant inquiry" is "whether the law put officials on fair notice" that their actions were unconstitutional. *Id.* As such, "[t]he degree of specificity required from prior case law depends in part on the character of the challenged conduct. The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to establish the violation." *Id.*; *see also Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006) ("[A] general constitutional rule that

has already been established can apply with obvious clarity to the specific conduct in question, even though the very action in question has not been previously held unlawful.") (citations and alterations omitted).

As to Defendant Fauvel, the defendants argue

> it is not clearly established that a prison medical provider can be considered to have acted with deliberate indifference when he or she provides medical examinations, facilitates evaluations by outside specialists and continues to provide and renew medications ordered for a particular condition or that failure to order lengthy or overnight observation following a seizure—particularly when medication is ordered and administered—constitutes a violation of an individual's rights.

The only issue relevant to the claim against Defendant Fauvel is whether he treated Plaintiff with deliberate indifference when, after treating his injuries following the first seizure, he released Plaintiff to his cell instead of placing him under observation, and whether such failure contributed to Plaintiff's later medical issues. "There is little doubt that deliberate indifference to an inmate's serious medical need is a clearly established constitutional right." *See Mata*, 427 F.3d 745 at 427. Thus, Defendant Fauvel is not entitled to qualified immunity.

As to Defendant Mullen, the Defendants argue that

> [n]o Tenth Circuit or United States Supreme Court law alerted Mullen that, in a medical emergency, grabbing [Plaintiff] and sliding him along the wall to the floor, or even straddling his ribcage, while [Plaintiff] was seizing and not in control of his own actions would be a violation of [Plaintiff's] Eighth Amendment Constitutional rights.

The court acknowledges that there are no Supreme Court orTenth Circuit cases with these precise facts. However, the constitution prohibits using excessive force maliciously with the intent to cause harm, *Hudson*, 503 U.S. at 6, and using an amount of force that is not commensurate with the need for force, *Mitchell*, 80 F.3d at 1440. Thus, if Plaintiff's version of

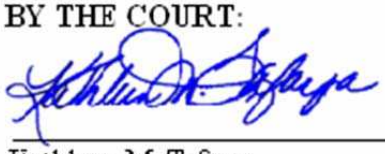
the events is true, it should have been clear to Defendant Mullen that "his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Thus, Defendant Mullen was "put . . . on fair notice" that his alleged actions were unconstitutional. *Pierce*, 359 F.3d at 1298. As such, Defendant Mullen is not entitled to qualified immunity.

WHEREFORE, for the foregoing reasons, it is

ORDERED that Defendants' "Combined Motion and Brief in Support of Summary Judgment" (Doc. No. 51) is **DENIED**.

Dated this 7th day of April, 2017.

BY THE COURT:



Kathleen M. Tafoya
United States Magistrate Judge