22-2698

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMEL UPSON,

Plaintiff-Appellant,

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on appeal from the United States District Court
for the Northern District of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION
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Dated: July 29, 2024
New York, New York

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v.

GERALDINE WILSON, Nurse, Upstate Correctional Facility,
ELIZABETH WHITE, Upstate Correctional Facility, FKA Nurse White,

Defendants-Appellees,

NURSE TRAVERSE, Upstate Correctional Facility, SHAWN WOODS, Correction Officer; Upstate Correctional Facility, JOHN DOE #1, C.O.; Upstate Correctional Facility, JOHN DOE #2, C.O.; Upstate Correctional Facility, DEBORAH SHIPMAN, Nurse, Upstate Correctional Facility,

Defendants

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PRELIMINARY STATEMENT

The key issue on this appeal is not whether Defendants' version of events might be true but whether it must be. To win, they must show evidence ruling out any possibility a rational jury could find for Mr. Upson on his deliberate indifference claims against Nurse Wilson or Nurse White. Defendants cannot meet that exacting standard here.

Arguing otherwise, Defendants deny a jury could find either nurse acted with deliberate indifference towards Mr. Upson. But to reach that conclusion, Defendants construe disputed facts against Mr. Upson and discount reasonable inferences a jury could draw in his favor. And that is the opposite of how summary judgment works. Consider in its proper light, the evidence here permits an alternate conclusion: that Nurses Wilson and White each knew of a substantial risk Mr. Upson was seriously ill, yet failed to respond accordingly, contributing to an excruciating, hours-long delay in the emergency treatment he needed.

The record reflects sharp disagreement among the parties on core questions of fact. After trial, a jury might resolve those questions in Defendants' favor. At this stage, however, those questions preclude

summary judgment. This Court should reverse the district court's decision and remand for trial.

ARGUMENT

I. A Rational Jury Could Infer Nurse Wilson's Deliberate Indifference from the Record.

Defendants argue summary judgment was proper here because the record "failed to support the subjective element" of a deliberate indifference claim against Nurse Wilson. Opp. at 20. Defendants are mistaken. Upending the summary judgment standard, they assume their own version of contested facts and decline to draw rational inferences in Mr. Upson's favor. Construed properly, the record permits the rational conclusion that Nurse Wilson knew of at least a substantial risk Mr. Upson was experiencing a severe bowel obstruction requiring emergency treatment, and yet failed to respond accordingly.

Defendants identify several factors they say show Nurse Wilson did not appreciate the severity of Mr. Upson's condition and thus could not have been deliberately indifferent. But Defendants confuse what a jury might believe with what it must; None of those factors warrants summary judgment.

First, Defendants note that not every bowel obstruction is an emergency; some resolve on their own. *See* Opp. at 22. But it is just as true that others, like Mr. Upson's, do not.[1] And the mere existence of these competing possibilities does not transform Nurse Wilson's plea of ignorance into irrefutable fact. *See Slolely v. VanBramer*, 945 F.3d 30, 44 (2d Cir. 2019) (concluding movants were not entitled to benefit of one permissible inference on summary judgment, because competing plausible inference existed).

The record provides ample basis for concluding Nurse Wilson was aware of at least a substantial possibility Mr. Upson needed emergency treatment. A jury could find that possibility would have been obvious to Nurse Wilson from the constellation of signs Mr. Upson identifies in the record. *See* Br. at 27–38 (cataloguing indicia of Nurse Wilson's awareness); *see also Farmer v. Brennan*, 511 U.S. 825, 842 (1994) ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."). Or a jury could infer Nurse Wilson deliberately avoided learning facts confirming that possibility,

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[1] Indeed, Defendants have already conceded the objective seriousness of Mr. Upson's bowel obstruction. *See* Opp. at 19.

refusing Mr. Upson's repeated pleas to review his recent prison medical records. *See* Br. at 24–25 (articulating conscious avoidance theory of deliberate indifference); *United States v. Quinones*, 635 F.3d 590, 594 (2d Cir. 2011) ("'A conscious avoidance instruction permits a jury to find that a defendant had culpable knowledge when the evidence shows that the defendant intentionally avoided confirming the fact.'") (quoting *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000)).[2] Rejecting both these theories, Defendants cite Nurse Wilson's testimony denying knowledge of Mr. Upson's condition. *See* Opp. at 22. But Nurse Wilson's say-so, even under oath, does not entitle her to summary judgment.

Second, Defendants offer the physical examination Nurse Wilson performed as proof she had satisfied herself — genuinely, if incorrectly — that Mr. Upson's condition was not an emergency. *See* Opp. at 20–21. But in defending as "appropriate" and "reasonable" the steps of that examination, *id.*, Defendants mistake the real issue, which is one of

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[2] A jury should decide whether to believe Nurse Wilson's claim that confirming Mr. Upson's history of three severe bowel obstructions in recent years, each requiring hospitalization, would not have informed her treatment approach. *See* Opp. at 22 (citing JA 38 at ¶ 41).

credibility, not medical judgment: Mr. Upson disputes not the propriety of the type of examination Nurse Wilson describes in her declaration but whether she undertook that examination in good faith.

As explained in Mr. Upson's opening brief, the record here, construed in his favor, supports the rational conclusion that she did not, and that the result of her examination — denying further treatment — was instead a fait accompli from the start. *See* Br. at 41–42. Mr. Upson testifies that Nurse Wilson began laughing at him and making light of his situation as soon as he entered her office. *See id.* at 41. From the very outset of the examination, she told him she would not be giving him medication. *See id*. And during the examination she told him she did not care about the symptoms he described or "want to hear anything he had to say." *See id*.

Third, Defendants point to Nurse Wilson's rude behavior towards Mr. Upson — yelling at him, laughing at his pain, calling him "full of shit," and the like — as proof she could not truly have believed his condition

was serious.[3] *See* Opp. at 22. But that is circular reasoning at its worst. A rule that evidence of maltreatment *disproves* deliberate indifference would all but vitiate *any* Eighth Amendment claim for inadequate medical care.

Adopting a different tack, Defendants also blame Mr. Upson for the delay in treatment, arguing he "failed" to follow the prison's sick-call procedure after his encounters with Nurse Wilson. Opp. at 24. But that is not true. The record contains ample basis for concluding Mr. Upson made repeated emergency sick call requests, *see* Br. at 9–12, which Defendants themselves concede are "always" available for medical emergencies. *See* Opp. at 3. And in any event, Mr. Upson would never have needed to make additional requests had Nurse Wilson taken his condition seriously in the first place. Defendants' attempt at deflection thus does not foreclose a finding of Nurse Wilson's deliberate indifference.

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[3] Defendants claim Mr. Upson conceded Nurse Wilson "genuinely believed there was 'nothing wrong' with him." Opp. at 22 (quoting JA 87). But Mr. Upson testified about Nurse Wilson's statements, not her true state of mind. *See* JA 87–88; JA 231; JA 250 at ¶¶ 19–21.

A jury could believe Nurse Wilson's telling of events, but nothing about the heavily contested record here commands that result. Viewed in the light most favorable to Mr. Upson, the evidence permits the alternate inference that Nurse Wilson was aware of at least a substantial risk Mr. Upson was experiencing a medical emergency and yet failed to respond accordingly. It is for a jury, not the district court, to decide which of these competing possibilities is correct. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) ("Credibility, determinations, the weighing of evidence, and the drawing of legitimate inferences are jury functions, not those of a judge."). Summary judgment for Nurse Wilson was thus inappropriate.

II. A Rational Jury Could Infer Nurse White's Deliberate Indifference from the Record.

Defendants also deny the record supports a deliberate indifference claim against Nurse White. *See* Opp. at 24. But here again, Defendants err. They treat the evidence Mr. Upson proffered in a "piecemeal fashion," divorced from surrounding context. *Rupp v. Buffalo*, 91 F.4th 623, 634 (2d Cir. 2024). And they construe contested aspects of the record in their own favor instead of his. Viewed instead in its totality and in the light

most favorable to Mr. Upson, the record permits the conclusion that Nurse White knew of at least a substantial possibility Mr. Upson was seriously ill and yet still declined his request for an emergency sick call, triggering an hours-long delay in the emergency medical care he needed.

Defendants resist this conclusion for several reasons — each flawed, and none foreclosing a finding that Nurse White acted with deliberate indifference.

First, they argue a jury must accept Nurse White's claim that no one made her aware of "any information or complaints that led [her] to believe that Plaintiff was experiencing a medical emergency."[4] Opp. at 25 (quoting JA 41 at ¶ 18). Nurse White's awareness of a risk of harm to Mr. Upson does not rise and fall on the truthfulness of this claim alone. *See infra* at 10 (discussing other evidence of Nurse White's awareness). But even if it did, Defendants discount the contrary inference a jury could draw from the fact that medical care in a prison setting *depends* on

[4] Although Nurse White denies receiving information that led her to believe Mr. Upson was experiencing an emergency, she does not specifically deny receiving information about Mr. Upson's bowel obstruction. *See* JA 41 at ¶ 18.

information sharing between staff from shift to shift.[5] *See* Br. at 50; *Commerzbank AG v. U.S. Bank, N.A.*, 100 F.4th 362, 374 (2d Cir. 2024) (requiring "*all* reasonable inferences" to be drawn in favor of the non-movant on summary judgment) (emphasis added).

Second, Defendants argue testimony Mr. Upson told Nurse White about his bowel obstruction cannot, considered "alone," establish her awareness that Mr. Upson was truly in harm's way.[6] Opp. at 25 (emphasis added). But that evidence is not *supposed* to be considered alone. To the contrary, this Court has consistently warned against "atomistic consideration" of evidence on summary judgment. *McMahan & Co. v.*

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[5] Defendants argue this fact is "unsupported by the record," Opp. at 25, but that is not true. The record establishes both that Mr. Upson was incarcerated and that medical staff at his prison worked in shifts. *See* JA 13–14 at ¶¶ 4–11. It would be reasonable — indeed, obvious — to conclude that medical staff in such a setting would share patient information across shifts, rather than siloing that information and diagnosing each patient anew after every shift change.

[6] Defendants claim Mr. Upson conceded he "did not speak with Nurse White about his symptoms." Opp. at 10. But in fact, he conceded only the reverse: that *Nurse White* did not speak *with him* about those symptoms. *See* JA 30 at ¶ 35; JA 240 at ¶ 34.

Wherehouse Ent., Inc., 900 F.2d 576, 579 (2d Cir. 1990); *see also Rupp*, 91 F.4th at 634.

Considered in its totality and in Mr. Upson's favor, the record instead permits the inference that Nurse White would have known at least a substantial possibility Mr. Upson was seriously ill. On top of his desperate pleas to Nurse White for help, Mr. Upson proffered evidence suggesting he was drifting in and out of consciousness, *see* Br. at 9; his cell neighbors were collectively screaming at her to help him, *see id.* at 11–12; Nurse White *saw* his vomit, *see id.* at 49; and both he and his cell neighbors had spent hours over the course of two preceding shifts pleading for help from various prison employees — including several of Nurse White's colleagues on the nursing team. *See* Br. at 9–12, 40–41. This is a far cry from a record "so overwhelming[ly]" favorable to Defendants' position on Nurse White's state of mind as to warrant summary judgment. *Hathaway v. Coughlin*, 37 F.3d 63, 68 (2d Cir. 1994).

Finally, Defendants argue Nurse White's instruction for Mr. Upson to follow the non-emergency sick call process cannot equate to a

constitutional violation.[7] Opp. at 27–28. But this presupposes a disputed fact — Nurse White's lack of awareness — in their favor. Instructing Mr. Upson to make a non-emergency sick call request would not necessarily show deliberate indifference *if* Nurse White was unaware of a potential medical emergency. But her awareness is the very question at issue. And were that question resolved in Mr. Upson's favor, it would not be irrational for a jury to conclude that forcing Mr. Upson to wait some 8.5 hours until the next regular sick call before receiving treatment for a life-threatening bowel obstruction reflected deliberate indifference.[8]

A jury could believe Nurse White had no idea when she denied his emergency sick call request that Mr. Upson was seriously ill. But the

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[7] It is irrelevant whether such an instruction violated prison policy or whether the district court found that it did. Mr. Upson's Eighth Amendment claim does not hinge on a finding either way on these issues.

[8] Nurse White's claim that she could not have evaluated Mr. Upson for a bowel obstruction "from the outside of [his] cell" responds to an argument Mr. Upson has not made. JA 43 at ¶ 26; *see also* Opp. at 28. Mr. Upson has argued that Nurse White should have granted his emergency sick call request, which her own testimony confirms would have resulted in a trip to the infirmary or the nurse's station. *See* JA 43 at ¶ 256. Nowhere does he argue that Nurse White acted with deliberate indifference by failing to conduct a cell-side medical examination.

record permits an alternate conclusion: Viewed in the light most favorable to Mr. Upson, the evidence permits the inference that she was aware of at least a substantial possibility Mr. Upson was experiencing a medical emergency and yet failed to respond accordingly. Again, a jury, rather than the district court, must decide which of these competing possibilities is correct. *See Reeves*, 530 U.S. at 150. Summary judgment for Nurse White was thus also inappropriate.

CONCLUSION

For these further reasons, a rational jury could find that Defendants Wilson and White each acted with deliberate indifference towards Mr. Upson's serious medical needs. This Court should reverse the decision below granting Defendants' motion for summary judgment and remand this case for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The Reply Brief for Plaintiff-Appellant complies with the word limit of Local Rule 32.1(a)(4)(B) because, excluding the parts of the document exempted by Rule 32(f) of the Federal Rules of Appellate Procedure ("FRAP"), the brief contains 2,741 words.

The brief also complies with the typeface and typestyle requirements of FRAP Rules 32(a)(5) and 32(a)(6) because it was prepared in 14-point font in Century Schoolbook typeface using Microsoft Word.

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