Case No. 18-1517

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JAY F. VERMILLION, Plaintiff-Appellant, v. **CORIZON HEALTH, INC, *et al.*,** Defendants-Appellees.	Appeal from the U.S. District Court Southern District of Indiana Case No. 1:16-cv-01723-JMS-DLP The Hon. Jane E. Magnus-Stinson, District Judge.

BRIEF OF APPELLANT

Jay F. Vermillion #973683
Appellant *Pro Se*
Pendleton Correctional Facility
4490 W. Reformatory Rd.
Pendleton, IN 46064-9001

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JAY F. VERMILLION,

Plaintiff-Appellant,

v.

CORIZON HEALTH, INC, *et al.*,

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Southern District of Indiana

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The Hon. Jane E. Magnus-Stinson,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

JURISDICTIONAL STATEMENT

District Court Jurisdiction:

Because the Appellant, (hereinafter Vermillion), raised questions of whether the defendant's violated his rights conferred by the United States Constitution, the district court had subject matter jurisdiction under Title 28 U.S.C. §§ 1331, and 1343.

Moreover, because Vermillion's state law medical malpractice and breach of contract claims were so inextricably related to the claims in the action within such original jurisdiction that they formed a part of the same case and controversy, supplemental jurisdiction was conferred under Title 28 U.S.C. § 1367.

Appellate Court Jurisdiction:

Because the district court's disposal of Vermillion's Complaint is a final judgment, this U. S. Court of Appeals has appellate jurisdiction under Title 28 U.S.C. § 1291.

Moreover, because this appeal involves review of certain of the district court's interlocutory rulings, appellate jurisdiction is also conferred by Title 28 U.S.C. § 1292.

Date of Entry of Judgment:

The district court entered final judgment on March 5, 2018.

Motion to Reconsider:

Vermillion did not file a Motion to Reconsider.

Filing Date of Notice of Appeal:

Vermillion filed his Notice of Appeal on March 6, 2018.

Finality of Appealed Judgment:

The judgment sought to be reviewed is final with respect to all parties.

STATEMENT OF THE ISSUES

I. The district court abused its discretion in all of its interlocutory rulings.

II. Summary judgment was improper.

STATEMENT OF THE CASE

Nature of the case:

Vermillion appeals the March 5, 2018, summary judgment in favor of the defendants on all of his claims, a final judgment, and all of the district court's interlocutory rulings.

Course of Proceedings:

On June 29, 2016, Vermillion filed his Verified Complaint under Title 42 U.S.C. §

1983, wherein he alleged that certain of his health services providers had, *inter alia*, violated certain of his State and Federally protected rights. [DE 1], [R. 19], [App. p. 1]

On June 30, 2016, the court granted Vermillion leave to proceed *in forma pauperis*, [DE 4], and on September 8, 2016, ordered that he would be allowed to proceed on *all* of his stated claims against *all* of his named defendants. [DE 7], [R. 42], [App. p. 14]

On November 15, 2016, the court issued its Pretrial Scheduling Order, thereby establishing December 7, 2016, as the deadline for filing amendments and adding new parties. [DE 17], [R. 73], [App. p. 17]

On January 6, 2017, Vermillion sought leave to amend his Complaint to include additional claims and defendants. [DE 19, 19-2], [R. 79, 83], [App. pp. 21, 25]

On February 14, 2017, however, the same was denied. [DE 21], [R. 114], [App. p. 54]

On February 21, 2017, Vermillion filed his Verified Motion for a Preliminary Injunction. [DE 23], [R. 118], [App. p. 57]

On April 28, 2017, the defendants filed their "combined" Response in Opposition to Vermillion's Motion for Preliminary Injunction/Motion for Summary Judgment. [DE 55], [R. 242], [App. p. 107]

On May 16, 2017, however, the court instructed that said "combined" response is not permitted under Local Rules; ordered the combined Motion stricken; and gave the defendant's until May 19, 2017, in which to submit their "stand-alone" Response in Opposition to Vermillion's Request for Injunctive Relief. [DE 60], [R. 392], [App. p. 169]

On the same May 16, 2017, the defendants filed their stand-alone Response in Opposition to Vermillion's Motion for Preliminary Injunction, [DE 61], [R. 394], [App. p.

171]; their Designation of Evidence, [DE 62], [R. 420], [App. p. 197]; and supporting Affidavits. [DE 62-1 thru DE 62-4], [R. 422-523], [App. pp. 199-208]

Meanwhile, on May 3, and May 9, 2017, Vermillion served his discovery request(s), [DE 25, 26], [R. 136, 142], [App. pp. 75, 81], and on June 16, and June 27, 2017, moved to compel compliance with the same. [DE 63, 64], [R. 524, 528], [App. pp. 209, 212]

On July 13, 2017, however, before Vermillion was able to obtain relevant discovery, his Motion for a Preliminary Injunction was denied. [DE 72], [R. 636], [App. p. 260]

On the same July 13, 2017, the defendants filed their "stand-alone" Motion for Summary Judgment, [DE 68], [R. 547], [App. p. 225]; their Supporting Memorandum, [DE 69], [R. 552], [App. p. 228]; their Designation of Evidence, [DE 70], [R. 574], [App. p. 250]; and their Affidavits and Evidence. [DE 70-1 thru 4], [576-627], [App. pp. 252-257]

On August 11, 2017, the court ordered the defendants to provide him a copy of the contract between defendant Corizon and the IDOC for the years 2015-17, but denied the remainder of Vermillion's discovery request. [DE 79], [R. 670], [App. p. 272]

On September 25, 2017, the court denied Vermillion's discovery request of May 3, 2017, [DE 63], and his Motion to Reconsider, [*aka* DE 79]. [DE 89], [R. 715], [App. p. 291]

On October 25, 2017, Vermillion filed his *Amended* Verified Brief in Opposition to Summary Judgment, (the operative rendition), [DE 100], [R. 818], [App. p. 340]; and his *Amended* Designation of Evidence. [DE 101], [R. 847], [App. p. 369]

On November 14, 2017, the defendants filed their Reply Brief in Support of their Motion for Summary Judgment, [DE 107], [R. 973], [App. p. 388]; and their Designation of Evidence. [DE 108-1], [R. 1008-1078]

On November 15, 2017, Vermillion filed his *Amended* Declaration in Opposition to the Defendants Motion for Summary Judgment. [DE 111], [R. 1117], [App. p. 431]

On November 22, 2017, Vermillion filed his Verified Surreply Brief in Response to the Defendants Summary Judgment Reply Brief. [DE 117], [R. 1165], [App. p. 474]

Disposition:

On March 5, 2018, the court entered final judgment thereby granting summary judgment in favor of the defendants, [DE 150], [R. 1423], [App. p. 612], and on March 6, 2018, Vermillion filed his Notice of Appeal. [DE 151], [R. 1425], [App. p. 613]

Statement of the Facts – Part I

Vermillion's Verified § 1983 Complaint of June 29, 2016:

At roughly 10AM on June 23, 2015, Vermillion began experiencing severe pain in his pelvic region. He then reported the same to Officer Sparks, who contacted the Infirmary for instructions. Officer Sparks then advised that he was instructed to send Vermillion to the Infirmary, and the same was done. [DE 111, ¶¶5-7], [R. 1117], [App. p. 431]

Once at the Infirmary, however, Vermillion was instructed to complete a Health Care Request, which he did, but was thereafter turned-away without any treatment whatsoever. [DE 111, ¶8], [R. 1118], [App. p. 432]

For the ensuing ten (10) months Vermillion continued to suffer severe abdominal pain. And, each and every time he was able to make contact with PCF Medical staff, he was instructed that they were not authorized to discuss any medical problems outside

the scope of his established Chronic Care issues.[1] [DE 111, ¶10], [R. 1118], [App. p. 432]

On April 8, 2016, Vermillion began urinating blood, and as such, he collected a sample and proceeded to his job, where he then passed and collected more bloody urine. Vermillion's Supervisor then escorted him, and his bloody urine samples, to the Infirmary, where Vermillion explained the morning's events to Nurse Beeny, who in turn had him place his collected urine samples into the bio-hazard trash container. [DE 111, ¶¶11-12], [R. 1118], [App. p. 432]

Nurse Beeny then collected a urine sample from Vermillion and proceeded to perform a "dip-stick test" on his "uncontaminated specimen," at which time she announced that the same "tested positive for blood." Nurse Beeny then contacted Dr. Talbot by telephone and apprised him of Vermillion's situation and the positive "dip-stick test." [DE 111, ¶13], [R. 1118], [App. p. 432]

Nurse Beeny then drew blood samples; recorded Vermillion's vital signs; issued a prescription for an antibiotic; provided nothing for Vermillion's complained of pain; and sent him away with instructions that he would be "called-out" to see the doctor in a week to ten (10) days or so. [DE 111, ¶¶14-15], [R. 1119], [App. p. 433]

In the "Nurse Protocol Report" she created thereafter, Nurse Beeny documented that on April 8, 2016, Vermillion was peeing blood; experiencing abdominal pain; experiencing painful urination; that she performed a "Urine dipstick" which indicated the presence of WBC's and blood; and that she referred Vermillion to the provider with

[1] Vermillion is seen in the MSU every ninety (90) days for his blood pressure, cholesterol, Type II diabetes, and his enlarged prostate, aka "Chronic Care," or "CCC." However, Vermillion's "Chronic Care" issues ***are not***, and ***were not***, the physical ailments about which he complained.

signs and symptoms of a UTI.[2] [DE 62-4, p. 23], [R. 456], [App. p. 205]

On April 12, 2016, Vermillion received a 1PM Medical pass, and was thereafter seen by Dr. Talbot, who advised that Vermillion was there for "Chronic Care." Vermillion then informed Dr. Talbot that he was *not* there for Chronic Care, but was instead there for follow-up on, and/or treatment for, his bloody urine/severe abdominal pains of April 8, 2016. [DE 111, ¶¶16-17], [R. 1119], [App. p. 433]

Dr. Talbot then stated: "Oh, maybe it's for that too," and asked Vermillion to refresh his memory on that matter. Dr. Talbot then began to search his computer for the results of the Lab work he ordered on April 8, 2016, but advised that there were none. [DE 111, ¶¶18-19], [R. 1119], [App. p. 433]

Dr. Talbot then volunteered that the absence of test results was likely Nurse Beeny's failure to send Vermillion's urine specimen to the Lab in accordance with his instructions of April 8, 2016, and as such, Dr. Talbot proceeded to review the Report from Vermillion's "Chronic Care" lab work of *March 16, 2016*, after which, he renewed all of Vermillion's "Chronic Care" meds. [DE 111, ¶¶20-21], [R. 1119], [App. p. 433]

Vermillion then voiced his concern about the conversation having turned away from the problems about which he was complaining, *i.e.* the constant and severe pain in his lower pelvic region and his bloody urine. [DE 111, ¶22], [R. 1120], [App. p. 434]

Dr. Talbot then informed Vermillion that because there was no evidence of blood in

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[2] In her Affidavit of March 13, 2017, however, Nurse Beeny testified that she is a licensed practical nurse, and that Licensed practical nurses "do not diagnose or make treatment plans or decisions; that has to be done by the doctor or nurse practitioner." [DE 70-2, ¶5], [R. 581], [App. p. 257]

his urine on April 8, 2016, there was nothing he could do. Vermillion then offered to provide a urine sample that could be tested right then and there. However, Dr. Talbot refused Vermillion's offer and stated that the only thing he could do was "...wait for it to happened again." [DE 111, ¶¶23-24], [R. 1120], [App. p. 434]

Vermillion then suggested that maybe his current problem was a product of his ongoing kidney stones and/or prostate problems. However, Dr. Talbot reiterated that the lack of evidence of blood in his urine on April 8, 2016, precluded the possibilities of treatment. [DE 111, ¶25], [R. 1120], [App. p. 434]

Vermillion then inquired into the possibilities of receiving something for the severe pain in the area of his prostate/bladder. However, Dr. Talbot simply dismissed him with his usual: "We are done here, good day." [DE 111, ¶26], [R. 1120], [App. p. 434]

In the "Provider Report" that he created thereafter, Dr. Talbot offered *no* diagnoses; made *no* mention of a "UTI" or "urinary tract infection," but instead reported that on April 12, 2016, that there was *no* documentation of blood in his urine specimen; that his "urine culture" was *negative*; and that there was *no* evidence of "Gross Hematuria," meaning that there was no evidence of blood in Vermillion's urine that could be seen with the naked eye. [DE 56-4, p. 29], [R. 313], [App. p. 152]

At about 5PM on that same April 12, 2016, however, Vermillion's lower abdominal pain increased to unbearable, and he began to experience a startling and uncontrollable urination that he had to manually repress. [DE 111, ¶27], [R. 1120], [App. p. 434]

Vermillion then grabbed a cup, ran to the restroom, released the manual repression, and began to pass blood until the flow was terminated by an obstruction. It was at this

point in time when Vermillion met with the realization that a kidney stone was trying to make its way through his urethra. [DE 111, ¶¶28-29], [R. 1120], [App. p. 434]

Accordingly, Vermillion again manually repressed the potential flow for a few seconds to build some pressure, and then forcefully expelled an enormous jagged obstacle which lacerated its way through his penile urethra causing pain that was so great he felt as though he would pass out. [DE 111, ¶¶29-30], [R. 1121], [App. p. 435]

Vermillion then discovered, (and collected), a kidney stone roughly ten millimeters (10mm) in length and five millimeters (5mm) in diameter, after which, he continued to pass blood for roughly six (6) hours, and urination was excruciating for the ensuing twenty-four (24) hours.[3] [DE 111, ¶¶31-32], [R. 1121], [App. p. 435]

Thereafter, despite having shown his gigantic kidney stone to everyone willing to look at it,[4] (including Nurse Beeny and other PCF Medical Staff), Vermillion was not called upon for blood work or any other interaction with the PCF Medical Services between April 12, 2016, and July 26, 2016. [DE 111, ¶¶33-34], [R. 1121], [App. p. 435]

Accordingly, on June 29, 2016, after an entire year of having yet to be diagnosed or treated for his complained of potentially life-threatening medical condition, Vermillion filed a lawsuit wherein he alleged that certain of his health services providers had, *inter*

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[3] Because the adult male "ureter," (the duct through which urine (and stones) travels from the kidneys to the bladder), is roughly 3.5mm in diameter, and given that Vermillion's stone of April 12, 2016, was at least twice the size of the tube through which it had to travel, these facts together could explain the extreme pain he suffered for the preceding ten (10) months.

[4] Vermillion did finally manage to obtain a color photograph of his kidney stone collection, which he would be happy to provide the Court upon request. However, Vermillion's collection of kidney stones can be seen in a photocopied depiction in their actual size at p. 321 of his accompanying Appellant's Appendix.

alia, violated the Eighth Amendment's proscription against cruel and unusual punishment; breached the contract that they entered with the IDOC and third party beneficiary Vermillion; and had engaged in conduct that was reckless and grossly negligent in violation of Indiana's Medical Malpractice Act. [DE 1], [R. 19], [App. p. 1]

On June 30, 2016, the court ordered that Vermillion would be allowed to proceed on *all* of his stated claims against *all* of his named defendants, [DE 7], [R. 42], [App. p. 14], and on November 15, 2016, established December 7, 2016, as the deadline for filing amendments and adding new defendants. [DE 17], [R. 73], [App. p. 17]

Statement of the Facts – Part II

Vermillion's Verified Motion for Leave to Amend his Complaint:

A. Dr. Talbot's continuing disregard for Vermillion's complained of medical problems:

On July 20, 2016, still suffering from the previously reported/untreated severe abdominal pain, Vermillion submitted another Health Care Request, wherein he stated: "I desperately need to see a real doctor, (and more than likely a gastroenterologist),[5] so that something can be done about this severe and unrelenting pain in the area of my prostate/bladder, and/or my sigmoid flexure/rectum, as something in said region feels as though it is about to rupture." [DE 111, ¶36], [R. 1122], [App. p. 436]

On July 26, 2016, Vermillion received an 8AM Medical pass, at which time he explained his condition to Nurse Davis, who then recorded his vital signs; took a urine sample and "dip-stick tested it;" gave him some Tylenol and a Fecal Immunochemical

[5] At this point in time Vermillion assumed that gastroenterology *included* urology.

Test (aka FIT packet); and advised that she would talk to the doctor herself about getting Vermillion seen ASAP. [DE 111, ¶37], [R. 1122], [App. p. 436]

On June 28, 2016, Vermillion received an 8AM Sick Call pass, at which time he was called in to speak with Dr. Talbot. [DE 111, ¶38], [R. 1122], [App. p. 436]

Once again, however, Dr. Talbot had absolutely no idea why Vermillion was there, and thus proceeded to review his most recent Lab work as though Vermillion was there for Chronic Care. Vermillion then explained that he was *not* there for Chronic Care, but that he was there to be seen for the urgent medical condition as described in his Health Care Request of July 20, 2016. [DE 111, ¶¶39-40], [R. 1122], [App. p. 436]

Vermillion then described his medical ailment; the approximate location thereof; his past experiences with his extremely swollen and infected prostate; and explained that the discomfort that he was currently experiencing is very similar in nature to the discomfort he had previously experienced, but that it felt as though it was up a little higher than his prostate, perhaps in the area of his bladder or sigmoid colon. Vermillion then attempted to show Dr. Talbot some illustrations that he had photocopied from a Medical Encyclopedia showing the prostate and its proximity to the bladder and sigmoid colon, such that would aid in Vermillion's description of the area where he believed his problems originated. [DE 111, ¶¶41-42], [R. 1122-23], [App. p. 436-37]

Dr. Talbot, however, simply laughed and stated that *he* was the doctor and that he was not interested in Vermillion's medical opinions. Dr. Talbot then advised that he was going to order the same things Nurse Davis had ordered the week before, (*i.e.* "FIT testing" and a urinalysis), and once again dismissed Vermillion with his customary,

"We are done here, good day." [DE 111, ¶¶43-44], [R. 1123], [App. p. 437]

B. The proposed "new defendants" disregard for Vermillion's complained of medical problems:

(1) Nurse Linda Stewart:

Upon Vermillion's above-stated departure of June 28, 2016, Nurse Linda Stewart, (Dr. Talbot's assistant and scheduling coordinator), asked: "How'd it go?" To which, Vermillion responded: "Dr. Talbot had absolutely no idea why I was here. He just ordered the same things Nurse Davis already ordered." [DE 19-2, ¶¶52-53], [R. 95], [App. p. 37]

Ms. Stewart then looked at Vermillion with obvious embarrassment, because, as it turns out, the very reason Dr. Talbot had no idea why Vermillion was there, was because Vermillion's Health Care Request of July 20, 2016, was still laying on her desk. [DE 19-2, ¶54], [R. 96], [App. p. 38]

Ms. Stewart then advised that she would see Vermillion next week, and in the meantime, she would cause the substance of Vermillion's July 20, 2016, Health Care Request to be communicated to Dr. Talbot. [DE 19-2, ¶55], [R. 96], [App. p. 38]

On August 1, 2016, Vermillion received another 8AM Sick Call pass, and, upon his arrival, was met at the door by Ms. Stewart, who exchanged "FIT packets," and advised that those were "FIT packets" 1 and 2 of 3. [DE 19-2, ¶56], [R. 96], [App. p. 38]

On August 5, 2016, Vermillion was "called-out" to drop-off "FIT packet" #2, and to pick-up "FIT packet" #3, and was advised that he would receive a pass the following Friday, (8/12/16), to drop off "FIT packet" #3. [DE 19-2, ¶57], [R. 96], [App. p. 38]

(2) Aleycia McCullough, Camay Francum, Nikki Tafoya, and Linda Van Natta:

Accordingly, because being seen for the potentially life-threatening medical problem as described in his Health Care Request of July 20, 2016, was shaping-up to be delayed for an entire month, Vermillion pursued his "Administrative Remedies," which resulted in the counterproductive exchanges with "the new defendants," as follows:

On August 5, 2016, Vermillion filed an Informal Grievance, wherein he stated:

> "On 7/20/2016, I submitted a HC Request wherein I described an emergency situation. Almost a week later, Ms. McCullough herself sent me a pass. On 7/26/2016, the UCC nurse saw me, took and "dip-stick tested" a urine sample, gave me a "FIT" packet, and advised that she would talk to Dr. Talbot on this matter. On 7/28/2016, I saw Dr. Talbot, who had no idea why I was there, as my HC Request was still on Ms. Stewart's desk. I'm now being strung-out for a week per "FIT," so by next Friday, it will be going on a month since I reported this potentially life-threatening situation." [DE 19-2, ¶58a.], [R. 96], [App. p. 38]

On August 23, 2016, Health Services Administrator Aleycia McCullough filed her response to Vermillion's Informal Grievance of August 5, 2016, wherein she stated:

> "After 7/20, you saw the provider on 7/28 for a full chronic care visit. You were scheduled for another follow-up on 8/9 and then seen on 8/19. Any new concerns please fill out a HCRF." [DE 19-2, ¶58b.], [R. 97], [App. p. 39]

However, because he *was not* complaining about ***chronic care***, but was instead complaining about the fact that *an entire month would pass* before he would be seen for the potentially life-threatening problems as described in his Health Request of July 20, 2016, and because Ms. McCullough's response evinced a complete disregard for these facts, on August 24, 2016, Vermillion filed his Formal Grievance, wherein he stated:

> "As stated in my Informal Grievance of August 5, 2016, (attached hereto), I have been strung-out for over a month for the potentially life-threatening medical problem that I reported on July 20, 2016." [DE 19-2, ¶58c.], [R. 97], [App. p. 39]

On August 31, 2016, PCF Grievance Specialist Camay Francum filed her response to Vermillion's Formal Grievance of August 24, 2016, wherein she simply parroted Ms. McCullough's response, as follows:

> "A. McCullough states, 'after 7/20, you saw the provider on 7/28 for a full chronic care visit. You were scheduled for another follow-up on 8/9 and then seen on 8/19. Any new concerns please fill out a HCRF.' Based on this information there is no other relief I can offer." [DE 19-2, ¶58d.], [R. 97], [App. p. 39]

Accordingly, because Ms. Francum's response also evinced a complete disregard for the fact that Vermillion was complaining about the fact that *an entire month would pass* before he would be seen for his potentially life-threatening urogenital problems, on September 2, 2016, Vermillion filed his Grievance Appeal, wherein he stated:

> "On 7/20/2016, I submitted a "Health Care Request Form" wherein I described an emergency medical situation. Per Policy, I was required to be seen immediately. However, I was not seen until 7/28/2016. And, because my HCRF was still lying on Ms. Linda Stewart's desk, Dr. Talbot had no idea why I was there, so he proceeded as though I was there for chronic care. I then explained that I was there for the emergency situation as described on 7/20/2016, i.e. the severe pains in the area of my prostate/bladder/sigmoid colon, and he then issued the same instructions Nurse Davis ordered on 7/26/2016, i.e. blood work, a urinalysis, and a series of "FIT" tests, for which, I was then unnecessarily strung-along for an entire month before having my potentially life-threatening medical situation addressed. [DE 19-2, ¶58e.], [R. 97-98], [App. p. 39-40]

On September 21, 2016, IDOC Quality Assurance Manager Nikki Tafoya filed her response to Vermillion's Grievance Appeal of September 2, 2016, (#93136), as follows:

> "You are being seen for CCC (*i.e.* chronic care), and follow ups as needed. If you require further assessments please submit a HCRF." (Vermillion's emphasis) [DE 19-2, ¶58f.], [R. 98], [App. p. 40]

On that same September 21, 2016, IDOC Grievance Specialist Linda Van Natta filed

her final response to Vermillion Grievance Appeal of September 2, 2016, (#93136), wherein she stated:

> "Your appeal was referred to the health care professionals at Central Office and the response from the Director [of] Health Services will serve as the response for the final level of review. Appeal denied." [DE 19-2, ¶58g.], [R. 98], [App. p. 40]

In the meantime, on August 9, 2016, Vermillion received another 8AM Sick Call pass, which he assumed was for dropping off "FIT packet" #3. Upon his arrival, however, Vermillion was advised that he'd been scheduled to see the doctor, but that: "Dr. Talbot is in a staff meeting for who knows how long, so you'll be rescheduled." And as such, Vermillion gave "FIT packet" #3 to Ms. Stewart and returned to his job. [DE 19-2, ¶¶60-61], [R. 99], [App. p. 41]

On August 16, 2016, however, after another week without being seen, and without being "rescheduled" to be seen, for his potentially life-threatening medical condition, Vermillion again pursued his "Administrative Remedies," which resulted in the counterproductive exchanges with "the new defendants," as follows:

On August 16, 2016, Vermillion filed his second Informal Grievance, wherein he stated:

> "On 8/9/2016, I received an 8AM Sick Call pass, which I assumed was for dropping off "FIT" packet #3. After 45 minutes, I managed to give "FIT" #3 to Ms. Stewart, who advised that I was there to see Dr. Talbot. I was then informed that Dr. Talbot chose instead to attend a staff meeting, and that I would be rescheduled. As of today's date, however, I have not been rescheduled. I now feel like I'm being punished for the Doctor's planning and scheduling mismanagement/failures." [DE 19-2, ¶62a.], [R. 99], [App. p. 41]

On August 24, 2016, Health Services Administrator Aleycia McCullough filed her

response to Vermillion's Informal Grievance of August 16, 2016, wherein she stated:

> "You were rescheduled and seen by provider on 8/19. Unfortunately on 8/9 provider was needed at a meeting unexpectedly." [DE 19-2, ¶62b.], [R. 99], [App. p. 41]

However, because Ms. McCullough's response evinced another complete disregard for the basis of Vermillion's complaint, in that Vermillion was complaining that it had already been ***three (3) weeks*** since he submitted his Health Care Request describing his potentially life-threatening medical situation, and it was about to be another ***ten (10) days*** before he would be seen by the doctor, on August 24, 2016, Vermillion filed his Formal Grievance, wherein he stated:

> "As stated in my Informal Grievance of Aug. 16, 2016, (attached), I feel as though I am being punished for the doctor's planning and scheduling mismanagement/failures." [DE 19-2, ¶62c.], [R. 99-100], [App. p. 41-42]

On September 16, 2016, PCF Grievance Specialist Camay Francum filed her response to Vermillion's Formal Grievance of August 24, 2016, wherein she simply parroted Ms. McCullough's response, as follows:

> "A. McCullough states, 'you were rescheduled and seen by provider on 8/19. Unfortunately on 8/9 provider was needed at a meeting unexpectedly.' Based on this information there is no other relief I can offer." [DE 19-2, ¶62d.], [R. 100], [App. p. 42]

Accordingly, because Ms. Francum's response also evinced a complete disregard for the basis of Vermillion's complaint and a complete lack of investigation on her behalf, on September 19, 2016, Vermillion filed his Grievance Appeal, wherein he stated:

> "As stated in my Informal Grievance of August 16. 2016, I was given a pass to specifically see Dr. Talbot on August 9, 2016. However, Dr. Talbot chose instead to hold and attend a "staff meeting," so my potentially life-threatening medical problems were being ignored for another week or two because of the Dr.'s

planning and scheduling mismanagement/failures." [DE 19-2, ¶62e.], [R. 100], [App. p. 42]

However, neither IDOC Quality Assurance Manager Nikki Tafoya nor IDOC Final Review Grievance Specialist Linda Van Natta provided a response to this of Vermillion's Grievance Appeals, (#93339). [DE 19-2, ¶62f.], [R. 100], [App. p. 42]

In the meantime, on August 19, 2016, (*an entire month after submitting his Health Care Request describing a potentially life-threatening medical situation*), Vermillion received a 9AM "Sick Call" pass to see Dr. Talbot, who proceeded to advise Vermillion that his "FIT tests" were positive for blood, (in his stool), but that the urine tests were either not taken or not tested. Dr. Talbot then advised that because Vermillion's PSA numbers were normal, there is no reason to suspect that his prostate is the source of his problems. [DE 19-2, ¶¶63-65], [R. 100-101], [App. p. 42-43]

Vermillion then informed Dr. Talbot that everyone, including Vermillion, is aware of the fact that PSA testing has been deemed useless and is no longer relied upon by the entire medical community, and that a digital rectal exam followed by cystoscopy examination and biopsy are the only reliable methods for confirming the absence or existence of potentially serious prostate problems. [DE 19-2, ¶66], [R. 101], [App. p. 43]

Vermillion then explained that approximately five (5) years earlier, (December 2011), he had experienced similar pains, visible blood in his stool, positive "FIT tests," and that when he was sent out for a colonoscopy, two (2) hyperplasic polyps were discovered and removed from his colon. [DE 19-2, ¶67], [R. 101], [App. p. 43]

Dr. Talbot then reviewed the Report from Vermillion's colonoscopy of December 9, 2011, which provided confirmation that Vermillion does in fact have a history of

internal hemorrhoids, diverticulosis, and hyperplasic polyps. Dr. Talbot then instructed that because Vermillion's polyps of five (5) years ago were non-cancerous, there is no reason to suspect that any news one might be. [DE 19-2, ¶69], [R. 101], [App. p. 43]

Dr. Talbot then advised that because Vermillion had been diagnosed as having hemorrhoids five (5) years ago, hemorrhoids are his current problem, which in turn prompted Vermillion to inquire as to Dr. Talbot's plans for ruling-out hemorrhoids, as his complained of pains were approximately eight (8) to ten (10) inches above and beyond where hemorrhoids would be located. [DE 19-2, ¶¶70-71], [R. 101], [App. p. 43]

However, Dr. Talbot just laughed and said: "There's no need to rule it out. It's right here in the evidence. You had hemorrhoids five years ago and you still have them." Vermillion then inquired as to how Dr. Talbot could arrive at such a conclusion without having performed any kind of physical examination, or without having sought the opinion of someone who specializes in that area? However, Dr. Talbot once again stated: "We are done here, good day." [DE 19-2, ¶¶72-74], [R. 102], [App. p. 44]

Vermillion thereafter received a five (5) day prescription for a suppository medication, the administration of which is to provide relief from itching, burning, and swelling of hemorrhoidal tissue, which are conditions that Vermillion neither suffers nor complains. [DE 19-2, ¶75], [R.102], [App. p. 44]

On August 22, 2016, Vermillion sent a request to Health Services Administrator Aleycia McCullough asking to consult with her concerning the medical treatment that he was ***not receiving***, and requested copies of the "Provider Reports" for his July 28, and August 19, 2016, visits with Dr. Talbot. [DE 19-2, ¶76], [R. 102], [App. p. 44]

On August 25, 2016, Vermillion received the requested Provider Reports, at which time he discovered that Dr. Talbot had falsely documented that he had performed a thorough physical examination of Vermillion and concluded that his bladder was normal; that he had no CVA tenderness; no flank mass; and that he had no suprapubic tenderness. [DE 19-2, ¶¶77], [R. 102], [App. p. 44]

Accordingly, because Vermillion knew that "CVA tenderness" and "suprapubic tenderness" could only be detected by a physical examination, and because Dr. Talbot had conducted no such examination, Vermillion again pursued his "Administrative Remedies," which resulted in more counterproductive exchanges with "the new defendants," as follows:

On August 29, 2016, Vermillion filed his third Informal Grievance, wherein he stated:

> "On August 25, 2016, I received a copy of what is referred to as a "Provider Sheet," at which time I discovered that Dr. Talbot had falsely documented that he had performed a physical examination of me on August 19, 2016, during which he found that my bladder was normal; that I had no CVA tenderness; no flank mass; and that I had no suprapubic tenderness. However, the man has never touched me! [DE 19-2, ¶¶78a.], [R. 102-103], [App. p. 44-45]

On September 7, 2016, Health Services Administrator Aleycia McCullough filed her response to Vermillion's Informal Grievance of August 29, 2016, wherein she stated:

> "This was the provider's medical assessment of the visit. Information can be derived by other means besides touch." [DE 19-2, ¶78b.], [R. 103], [App. p. 45]

However, because Vermillion knew that the **only way** "CVA tenderness" and "suprapubic tenderness" can be detected is by a physical examination, *i.e.* touch, on September 15, 2016, Vermillion filed his Formal Grievance, wherein he stated:

> "As stated in my Informal Grievance of August 29, 2016, Dr. Talbot reported that I had no CVA tenderness or suprapubic tenderness. The only way these determinations can be made is by touch, and this did not occur." [DE 19-2, ¶78c.], [R. 103], [App. p. 45]

On September 16, 2016, PCF Grievance Specialist Camay Francum filed her response to Vermillion's Formal Grievance of August 29, 2016, again simply parroting Ms. McCullough's Informal Grievance response of September 7, 2016, as follows:

> "[Ms.] McCullough states, 'This was the provider's medical assessment of the visit. Information can be derived by other means besides touch.' Based on this information there is no other relief I can offer.'" [DE 19-2, ¶78d.], [R. 103], [App. p. 45]

Accordingly, because Ms. Francum's response again evinced a simple parroting of Ms. McCullough's incompetent response of September 7, 2016, and a complete lack of investigation on her behalf, on September 19, 2016 Vermillion filed his Grievance Appeal, wherein he stated:

> "As stated in my Informal Grievance of August 29, 2016, Dr. Talbot reported that he had conducted a thorough physical examination of me, and that I had no "CVA tenderness" and no "suprapubic tenderness." However, in order for these determinations to be made, he would have had to probe those areas, and he has never touched me." [DE 19-2, ¶78e.], [R. 104], [App. p. 45-46]

On November 16, 2016, Vermillion received IDOC Quality Assurance Manager Nikki Tafoya's response to his Grievance Appeal of October 27, 2016, (#93342), wherein she stated:

> "Grievance denied. Your provider completes the documentation in your medical record during and after your visit. You may request a review of your medical records and discuss these with your provider as well as site administrator." [DE 19-2, ¶78f.], [R. 104], [App. p. 46]

On that same November 16, 2016, IDOC Grievance Specialist Linda Van Natta filed

her final response to Vermillion Grievance Appeal of October 27, 2016, (#93342), wherein she stated:

> "Your appeal was referred to the health care professionals at Central Office and the response from the Director [of] Health Services will serve as the response for the final level of review. Appeal denied." [DE 19-2, ¶78g.], [R. 104], [App. p. 46]

In the meantime, on October 24, 2016, Vermillion received a pass for his quarterly Chronic Care visit, at which time he shared all of his medical problems, (and the lack of attention thereto), with Nurse Practitioner Dawn Antle, who, rather than taking the position that she was not at liberty to discuss these matters as the others had, *agreed* that Vermillion *had not* received appropriate attention to his potentially life-threatening medical problems, and ordered that he undergo a colonoscopy, if for no other reason but to commence a process of elimination. [DE 111, ¶¶45-46], [R. 1123], [App. p. 437]

On December 13, 2016, in accordance with Ms. Antle's instructions, Vermillion was transported to the office of Dr. Rod Nisi in Anderson, IN, (a local gastroenterologist), who then and there performed a colonoscopy for the stated reason he was "...acting on instructions to determine the cause of the blood in [Vermillion's] stool," and *not* the blood in his urine. [DE 111, ¶47], [R. 1123-24], [App. p. 437-38]

To be sure, prior to the commencement of the colonoscopy procedure, Vermillion described his condition to Dr. Nisi, who in turn advised, based upon Vermillion's description of his problems, that he should have been sent to someone who specializes in *urology* as opposed to *gastroenterology*.

On January 6, 2017, because the original defendants and others, (*i.e.* "the new

defendants"), subsequent to the filing of his original Complaint, had, as described above, continued to act with deliberate indifference to his objectively serious medical problems, Vermillion sought leave to amend his Complaint to include additional claims and additional defendants. [DE 19], [R. 79], [App. p. 21]

On February 14, 2017, however, for the stated reason(s) that it was "untimely," and that he had failed to "show or even argue that he had exercised diligence in seeking to add these defendants," Vermillion's Motion was denied. [DE 21], [R. 114], [App. p. 54]

On February 21, 2017, Vermillion moved the court to reconsider for the stated reason(s) that he did in fact "argue and show that he exercised diligence in seeking to add these defendants," and that he had in fact satisfied both the "when justice so requires" requirement of Rule 15(a)(2), and the "for good cause" requirement of Rule 16(b)(4). [DE 24], [R. 124], [App. p. 63]

On March 8, 2017, however, the court denied reconsideration, but stated that said ruling would not prohibit Vermillion from asserting said claims in a separate lawsuit. [DE 35], [R. 184], [App. p. 89]

Accordingly, on March 29, 2017, Vermillion filed his "separate lawsuit." [See *Vermillion v. Corizon Health, Inc., et al.*, Case No. 1:17-cv-00961-RLY-MPB]

Statement of the Facts – Part III

Vermillion's Verified Motion for a Preliminary Injunction:

On January 13, 2017, because he had yet to be consulted with regard to the results of his colonoscopy of December 13, 2016, Vermillion sent a request to Health Services Administrator Aleycia McCullough, asking for a copy of Dr. Nisi's report so that he

could to review it for himself. [DE 111, ¶48], [R. 1124], [App. p. 438]

On January 26, 2017, in response to the above-stated request, Vermillion received a 2PM Medical pass, which specified that he was being "called-out" for a "Chronic Care." Upon his arrival, however, Dr. Talbot opened with: "Because the results from the lab analysis of the polyps that were removed from your colon on December 13, 2016, were negative for cancer, there was no reason for you to have been consulted any sooner." Dr. Talbot then stated: "And, because Dr. Nisi reported that he could find nothing else wrong within your colon, there's no longer any reason for you and I to continue discussing this matter." [DE 111, ¶¶49-51], [R. 1124], [App. p. 438]

Accordingly, on February 21, 2017, because he was still suffering from the previously reported but untreated urological problems, and because Dr. Talbot had stated unequivocally that he would no longer discuss these of Vermillion's potentially life-threatening urological problems, Vermillion filed his Verified Motion for a Preliminary Injunction, whereby he sought to compel his health service providers to send him to a Urologist, such that his complained of/untreated urological problems might then be indentified and treated. [DE 23], [R. 118], [App. p. 57]

On March 17, 2017, the court stated: "It is not clear whether this request for relief is related to the claims in the operative complaint or those in the rejected amended complaint," [DE 38], [R. 194], [App. p. 91], and instructed that Vermillion would be given until April 3, 2017, in which to clarify whether his Motion was related to the claims as set forth in his operative Complaint. [DE 38], [R. 195], [App. p. 92]

On March 23, 2017, Vermillion clarified that his Motion was in fact related to the

claims in his operative Complaint, and on March 31, 2017, "clarified," *inter alia*, that his reference to his having yet to be consulted about the results of his colonoscopy of December 2016, was only made in the context of describing his exchanges with, and the breakdown in the relationship between, himself and his medical providers. [DE 45, ¶1], [R. 210], [App. p. 93]

On April 28, 2017, the defendants filed their "combined" Response in Opposition to Vermillion's Motion for Preliminary Injunction/Motion for Summary Judgment. [DE 55], [R. 242], [App. p. 107]

On May 16, 2017, however, the court instructed that the defendant's "combined response" is not permitted under Local Rules, and gave the defendant's until May 19, 2017, in which to submit their "stand-alone" Response in Opposition to Vermillion's Request for Injunctive Relief. [DE 60], [R. 392], [App. p. 169]

On the same May 16, 2017, defendants filed their "stand-alone" Response, [DE 61], [R. 394], [App. p. 171]; their Designation of Evidence, [DE 62], [R. 420], [App. p. 197]; and their supporting Affidavits. [DE 62-1 thru DE 62-4], [R. 422-523], [App. pp. 199-208]

In said submissions, the defendants argue that because Vermillion incorrectly speculates that his health is in danger due to undefined urological problems when the "medical evidence" establishes that he experiences an enlarged prostate that is routinely monitored and treated and well-controlled with medication, and because he incorrectly believes that he was passing a kidney stones when the "medical evidence" establishes that he experienced a urinary tract infection ("UTI"), and not a kidney stone, Vermillion would not be able to meet his burden of proving entitlement to emergency

injunctive relief. [DE 61, p. 2], [R. 394], [App. p. 172]

On July 13, 2017, however, before he could obtain discovery relevant to his ability to carry his burden of proof, the court denied his Motion. [DE 72], [R. 636], [App. p. 260]

Statement of the Facts – Part IV

Vermillion's Discovery Motion(s):

On February 21, 2017, in his efforts to obtain evidence to support his request for a preliminary injunction; to oppose summary judgment; and to eventually prove his claims, Vermillion submitted for issuance by the clerk, his Subpoena(s) Duces Tecum and Notice(s) of Records Deposition/Non-Party Request(s) For Production of Documents, whereby he sought to command Dr. Talbot's non-party former employer(s) to produce certain relevant materials. [DE 25-28], [R. 136-149], [App. pp. 75-88]

On April 21, 2017, the court approved the endorsement and service of Vermillion's Notices and Subpoenas, and ordered that Vermillion would in fact be permitted to seek and obtain evidence from Dr. Talbot's former employers related to whether he had been subject to complaints regarding medical treatment he had rendered to others, and Corizon's knowledge of the same. [DE 50], [R. 230], [App. p. 104]

On May 3, 2017, Vermillion served a discovery request on the defendants whereby he sought to obtain a current mailing address for former PCF/Corizon Health, Inc. employee(s) **Nurse** Ruby Beeny, **Nurse** Leah Rose, **Nurse** Wayne Jones, **Nurse** Stacia Hoover, **Nurse** Michayla Preston, **Nurse** Practitioner Deborah L. Perkins, and **Nurse** Practitioner Priscilla T. Rasaki, such that would enable him to substantiate his claims of Corizon's failure to train **nursing staff**. [Not filed with court]

On the same May 3, 2017, Vermillion sought information in the possession, custody, or control of Corizon Health, Inc., as they relate to their hiring, retention, and general employment of Dr. Paul Talbot, such that would enable him to substantiate his **negligent hiring and retention** claims. [Not filed with court]

On May 9, 2017, Vermillion served the defendants with his discovery requests, whereby he sought a complete and up-to-date copy of the Contract between Corizon Health, Inc., and the Indiana Department of Corrections, which shall include all exhibits and attachments thereto, including those referred to as the "State's Request for Proposal, (RPF) 13-51," aka Exhibit A, and the "Contractor's Response to (RPF) 13-51," aka Exhibit B, such would enable him to substantiate his **breach of contract** claims. [Not filed with court]

On June 16, and June 27, 2017, Vermillion moved to compel the defendants to act in accordance with his discovery requests, and warned that his burden of rebutting the defendants opposition to his request for a Preliminary Injunction would be completely thwarted without the requested discovery. [DE 63, 64], [R. 524, 528], [App. p. 210, 212]

On July 11, 2017, the defendants interposed their objections to Vermillion's discovery requests wherein they claim that he has requested confidential information; information that is not relevant or likely to lead to the discovery of admissible evidence; and that his requests seek contact information of persons who are not witness[es] or defendant[s] in this matter. [DE 66], [R. 537], [App. p. 218]

As stated above, however, on July 13, 2017, the court denied his Preliminary Injunction before he could obtain relevant discovery. [DE 72], [R. 636], [App. p. 260]

Thereafter, on August 11, 2017, the court denied Vermillion's request for the personal contact information of the above-stated former PCF/Corizon **nursing staff** for the stated reason that "...Vermillion's speculation that the other individuals whose contact information he requested might have information related to his claim that Corizon "**failed to properly train or supervise Dr. Talbot**" is insufficient to justify his request. [DE 79], [R. 670], [App. p. 272]

On the same August 11, 2017, the court denied Vermillion's request to compel the defendants to act in accordance with his request for documentation relating to the deaths of other inmates under Dr. Talbot's care for the stated reason that "...Vermillion has not shown that documents related to deaths that occurred under Dr. Talbot's care is sufficiently related to his claims that Dr. Talbot failed to treat him and that Corizon "**failed to supervise Dr. Talbot.**" [DE 79], [R. 670], [App. p. 272]

On the same August 11, 2017, the court *granted* Vermillion's discovery request of June 27, 2017, [DE 64], only to the extent that it ordered the defendants to provide him a copy of the contract between defendant Corizon and the IDOC for the years 2015-2017, but *denied* the remainder of Vermillion's request. [DE 79], [R. 670], [App. p. 272]

On August 25, 2017, the defendants filed their Notice of Service of IDOC Contracts in accordance with DE 79, and supplied Vermillion with a copy of said Contract. [DE 82], [R. 682], [App. p. 275] However, said Contract did not contain the specifically designated sections. [DE 84, ¶14], [R. 686], [App. p. 283]

Accordingly, on August 31, 2017, Vermillion filed his "Renewed" request to compel discovery wherein he clarified many things, the first of which was that he had made *no*

claim against Corizon regarding the **failure to train and/or supervise Dr. Talbot**; that his "failure to train and/or supervise" claims are that Corizon **failed to train and/or supervise nursing staff** with regard to properly diagnosing, assessing, and treating medical emergencies and/or the serious medical needs of inmates; that his discovery requests therefore ***do not*** seek information related to a claim that Corizon failed to properly train and/or supervise **Dr. Talbot**; and that his Motion(s) to Compel ***do not*** seek to compel defendants to provide information related to a claim that Corizon failed to properly train or supervise **Dr. Talbot**. [DE 84, ¶7, a. thru f.], [R. 686], [App. p. 277]

Vermillion also clarified that while documents related to inmate deaths that had occurred under Dr. Talbot's care may not be related to his claims that Dr. Talbot failed to treat him for kidney stones and the related pain, said evidence is sufficiently related to his claims of Corizon's negligent **hiring and retention** of the infamously incompetent Dr. Talbot, that he is entitled to said evidence. [DE 84, ¶11, h.], [R. 686], [App. p. 279]

Vermillion also clarified that the very purpose of his having specifically requested those portions of the Contract between the IDOC and Corizon entitled "State's Request for Proposal, (RFP) 13-51," aka Exhibit A, and the "Contractor's Response to (RFP) 13-51," aka Exhibit B," is that said Exhibits are *the only portions of the Contract* that describe the services requested by the IDOC, and the services that Corizon actually agreed to provide, and, without said Exhibits, whether the IDOC actually contracted Corizon to provide the services that Vermillion claims he is being denied, and whether Corizon is failing to act in accordance with its contractual obligations to provide said services, would be left to speculation. [DE 84, ¶15], [R. 686], [App. p. 283]

Vermillion also clarified that his request for financial records was relevant to his **breach of contract** claims, such that the categorical denial of his motion to compel certain financial records was also inappropriate. [DE 84, ¶19], [R. 686], [App. p. 284]

On September 25, 2017, however, the court again denied Vermillion's request to compel relevant discovery. [DE 89], [R. 715], [App. p. 291]

Statement of the Facts – Part V

The Summary Judgment Stage:

The Defendant's Motion for Summary Judgment:

On July 13, 2017, immediately subsequent to the court's Entry denying Vermillion's Preliminary Injunction, the defendants filed their "stand-alone" Motion for Summary Judgment, [DE 68], [R. 547], [App. p. 225]; their Memorandum in Support thereof, [DE 69], [R. 552], [App. p. 228]; their Designation of Evidence, [DE 70], [R. 574], [App. p. 250]; and their Affidavits and Evidence. [DE 70-1 thru 4], [R. 576-627], [App. pp. 252]

In said submissions, the defendants re-submitted verbatim their arguments as in their recently successful opposition to his request for a preliminary injunction, wherein they reiterate that the "medical evidence" establishes that he experiences an enlarged prostate that is routinely monitored and well-controlled, and a urinary tract infection ("UTI"), not a kidney stone. [DE 69], [R. 552], [App. p. 229]

Vermillion's Verified Response in Opposition to Summary Judgment:

On October 11, 2017, Vermillion filed his Verified Brief in Opposition to Defendant's Motion for Summary Judgment, [DE 93], [R. 723], [App. p. 293]; his Declaration in Opposition to Summary Judgment, [DE 92], [See FN 6, @ p. 35]; and his Designation of

Evidence, w/ Attachments. [DE 94], [See FN 6, @ p. 35], [App. p. 316]

October 25, 2017, Vermillion filed his *Amended* Verified Brief in Opposition to Defendant's Motion for Summary Judgment, (final rendition), [DE 100], [R. 818], [App. p. 340]; and his *Amended* Designation of Evidence. [DE 101], [R. 847], [App. p. 369]

In said pleadings,[6] Vermillion argued, *inter alia*, that the affidavits of Dr. Talbot, Nurse Beeny, and Dr. Fisk were riddled with material misrepresentations and inaccuracies which created issues for trial, which he then identified. [DE 100, pp. 16-22], [R. 834-840], [App. pp. 356-362]

Vermillion then argued that Dr. Fisk's sworn statement is based upon his review of Dr. Talbot's false statement that "Vermillion did not present with kidney stones;" the above-stated highly questionable Lab Reports; and the Report of June 15, 2016, which is a known fabrication. [DE 100, p. 21], [R. 839], [App. p. 361]; and that Nurse Beeny's sworn statement does not clarify whether her failure to "request orders" for his complained of pain was the product of deliberate indifference, corporate policy, or the lack of proper training. [DE 100, p. 22], [R. 840], [App. p. 362]

The Defendants Reply Brief:

On October 30, 2017, the defendants sought leave to file an "oversized" Reply Brief, wherein they argue that because "Plaintiff alleges, for the first time, in support of his opposition [to summary judgment] that he experiences chronic kidney stones," the filing of an over-sized pleading is needed to adequately address his "treatment history." [DE 102], [R. 849], [App. p. 371]

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[6] Because *all* of Vermillion's pleadings are "verified," *all* constitute "testimony."

On October 31, 2017, Vermillion filed his Objection, wherein he took issue with counsel's assertion that Vermillion had "only recently alleged kidney stone problems." [DE 103], [R. 960], [App. p. 380]

On November 14, 2017, the defendants filed their Over-Sized Reply Brief, [DE 107], [R. 973], [App. p. 388]; and their Designation of Evidence. [DE 108], [R. 1008-1078]

In said Reply Brief, the defendants request, (*for the first time*), summary judgment on Vermillion's state law medical malpractice claims; argued that the evidence was insufficient to support his deliberate indifference and *Monell* claims; and insisted that even if they were to accept as true all of Vermillion's stated facts, "*every single one of his lab results were negative for kidney stones.*" [DE 107, p. 1], [R. 978], [App. p. 393]

The defendants then argued that "the Record before the court *does not* establish that the defendants knew he was passing kidney stones and disregarded that risk," and thus a reasonable jury would not have a legally sufficient evidentiary basis to find for him because "*he never presented with symptoms of an acute kidney stone problem.*" [DE 107, p. 1], [R. 978], [App. p. 393]

The defendants then interposed their objection(s) to the majority of Vermillion's Declaration, and most of his Attachments thereto, (*the ones that were missing from the Record*, FN 7 *infra*), [DE 107, pp. 3-7], [R. 980-84], [App. pp. 395-99], and made multiple references to a document entitled "Dr. Talbot Supp. Aff.," aka "Ex. 5," [DE 107, pp. 8, 9, 14-17], [R. 985-84], [App. pp. 400-409], which is a document that had yet to be disclosed, (later introduced as DE 113-1), wherein Dr. Talbot/counsel rolled-out their "I did not know that Mr. Vermillion had passed a stone or was experiencing pain from a kidney

stone on April 12, 2016," nonsense. [DE 113-1, ¶8], [R. 1148], [App. p. 462]

Vermillion's Verified Surreply Brief:

On November 15, 2017, Vermillion filed his *Amended* Declaration in Opposition to Summary Judgment, [DE 111], [R. 1117], [App. p. 431], and his Supplemental Designation of Evidence, [DE 112], [R. 1126], [App. p. 440]

On November 22, 2017, Vermillion filed his Verified Surreply Brief in Response to Defendants Reply Brief. [DE 117], [R. 1165], [App. p. 474]

In said pleadings, Vermillion argued, *inter alia*, that defendant's challenge(s) to his medical malpractice claims fail mainly because summary judgment on said claims was not requested in their Summary Judgment Motion. [DE 117], [R. 1171], [App. p. 480]

Vermillion also testified that the "medical evidence" upon which the defendant's profess to rely is comprised of the "Provider" and "Nurse Protocol Reports" of Dr. Talbot and Nurse Beeny, neither of which provide a *diagnoses* of his complained of condition, [DE 56-4, p. 29, and DE 62-4, p. 23], [R. 313, 456], [App. pp. 152, 205]; and the Affidavits of Dr. Talbot and Nurse Beeny, [DE 70-1, and 70-2], [R. 576, 581], [App. pp. 252, 257], both of which were authored by their attorney and both based upon the author's blatantly erroneous evaluation of the proffered Lab Reports, and both of which were specifically tailored to present the *author's* rendition of what she needed her *client's* personal knowledge to be. [DE 117, p. 14-28], [R. 1181-95], [App. pp. 490-504]

Vermillion brought to the court's attention that Dr. Talbot, in his attorney-drafted Affidavits of April 28, 2017, [DE 56-1], [R. 138], [App. p. 244], May 16, 2017, [DE 62-1], [R. 422], [App. p. 199], July 13, 2017, [DE 70-1], [R. 576], [App. p. 252], October 30, 2017,

[DE 102-2], [R. 890], [App. p. 375], November 14, 2017, [DE 108-1], [1011], [App. p. 423], and November 17, 2017, [DE 113-1], [R. 1147], [App. p. 461], testified that the minerals requisite to the formation of kidney stones, such as **calcium** and **uric acid** were not present. [DE 117, p. 14-28], [R. 1181-95], [App. pp. 490-504]

Vermillion then brought to the court's attention that the Lab Reports upon which Dr. Talbot and counsel profess to rely, expressly *do not* support Dr. Talbot's testimony, as said Reports unequivocally document the *existence* of upper-range levels of **calcium** and **uric acid** in Vermillion's urine, [DE 56-4, p. 26], [R. 310], [App. p. 151], [DE 62-4, p. 26], [R. 459], [App. p. 208], [DE 70-4, p. 26], [R. 613], [DE 102-2, Ex. 7], [R. 945, 947, 949], [DE 108-1], [R. 1011], [App. p. 423], [DE 113-1], [R. 1147], [App. p. 461], and abnormal levels of **Calcium Oxalate Crystals,** which, in humans, are the most common constituent of kidney stones. [DE 102-2], [R. 947], [DE 108-3], [R. 1068], [DE 112-1], [R. 1131], [App. p. 445], [DE 117, p. 14-28], [R. 1181-95], [App. pp. 490-504]

Vermillion also testified that he *had in fact* passed a kidney stone on April 12, 2016; that he *was not* called upon for blood work between April 12, and July 20, 2016; that any Lab Report stating that on or about April 8, 2016, the minerals requisite to the formation of kidney stones were not present is *suspect*; and any Lab Report bearing dates between April 12, and July 20, 2016, is a *fabrication*. [DE 117, p. 18], [R. 1185], [App. p. 494]

Vermillion brought to the court's attention that Dr. Talbot's sworn statement "...on April 12, 2016, I examined Plaintiff in a follow-up appointment. Mr. Vermillion's urine had cleared-up and that he did not present with blood in his urine," [DE 70-1, ¶12], [R. 579], [App. p. 255], is a patently false statement, as Dr. Talbot had informed Vermillion,

(and specifically documented), [DE 56-4, p. 29], [R. 313], [App. pp. 152], that there were no urine test results for him to review. [DE 117, p. 17], [R. 1184], [App. p. 498]

Vermillion brought to the court's attention that Dr. Talbot's sworn statement that on April 12, 2016, "I determined that Plaintiff's enlarged prostate was mild and improving with medication," and that "I told Mr. Vermillion that his testing was negative for kidney stones and he did not present with an acute kidney stone issue," [DE 70-1, ¶12], [R. 579], [App. p. 255], are both patently false statements, as Dr. Talbot was unable to provide Vermillion with any "determinations," as he had yet to receive the results from the testing he ordered on April 8, 2016. [DE 117, p. 23], [R. 1190], [App. p. 499]

Vermillion brought to the court's attention that Dr. Talbot's sworn statement "On June 15, 2016, a follow-up urinalysis was normal with no bacteria or leukocyte, indicating that Mr. Vermillion's UTI had completely resolved," [DE 70-1, ¶13], [R. 579], [App. p. 255], is also a patently false, as Vermillion was not called upon for lab work in June of 2016, and that he'd had absolutely no interaction with PCF Health Services between April 12, and July 20, 2016. [DE 117, p. 24], [R. 1188-91], [App. p. 497, 500]

Vermillion also testified that he had in fact presented to Dr. Talbot with evidence of kidney stones.[7] [DE 117, pp. 20], [R. 1187], [App. pp. 496]

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[7] In addition to the fact that his Complaint, *all* of his subsequent pleadings, and *all* of the defendant's pleadings, make reference to his kidney stones, on May 29, 2017, Vermillion disclosed, and on October 11, 2017, he filed, an Exhibit entitled "Kidney Stone Exhibit," which he created by placing six (6) of the stones that he passed, (and collected), into a copy machine.

For reasons currently unknown, however, his Designation of Evidence, [DE 94], **which contained all the evidence upon which he relied in his Declaration**, including his Kidney Stone Exhibit, [aka Attachment #4], do not appear in the Record that he received from the district court. Accordingly, Vermillion has submitted said pleadings herewith, which can be found in his Appellant's Appendix at pp. 316-327.

Vermillion then reiterated that Dr. Talbot, Nurse Beeny, and Dr. Fisk's Affidavits were all authored by their attorney; specifically tailored to present the *author's* rendition of what she needed her *client's* personal knowledge to be; and based upon the author's blatantly erroneous evaluation of *questionable* Lab Reports, and one in particular that is *known* to be fabricated. [DE 117, pp. 16-28], [R. 1183-1195], [App. pp. 492-504]

Vermillion then brought to the court's attention that the defendant's Reply Brief was also riddled with material misrepresentations and assertions that were not supported by the evidence; comprised of testimony from their yet to be disclosed "Supplemental Affidavit of Paul Talbot, M.D.;" and that all of the "evidence" expressly ***confirms*** the presence of high levels of calcium, uric acid, and calcium oxalate crystals. [DE 117, pp. 16-28], [R. 1183-95], [App. p. 492-504]

Vermillion also interposed his objection to the defendants' multiple references to, and their reliance upon, the Supplemental Affidavit of Paul Talbot, M.D., as not having been previously disclosed. [DE 117, p. 16-17], [R. 1183-84], [App. p. 492-93]

Statement of the Facts – Part VI

Dr. Talbot's Supplemental Affidavit and the "Sur" and "Sur-Sur" Replies Imbroglio:

On November 17, 2017, in response to Vermillion having interposed his objection to their reliance upon the undisclosed "Supplemental Affidavit of Paul Talbot, M.D.," the defendant's filed their "…Motion to Correct Error in Filing of Exhibit 5/Motion to Supplement their Designation of Evidence…," wherein they confirmed that, because of a "clerical error" on behalf of "office staff," the Supplement Affidavit of Paul Talbot, M.D., ***had <u>not</u> been filed***. [DE 113, ¶¶5-6], [R. 1145], [App. p. 459]

On the same November 17, 2017, the defendant's moved to file "Sur-Replies" and to Set a Briefing Schedule for such Sur-Replies, wherein they assert that because of *their* reliance upon "new evidence," *Vermillion* should be given leave to file a "Sur-Reply" to address said evidence, and that *they* should be given leave to file a "Sur-Sur-Reply" to respond to Vermillion's Sur-Reply. [DE 113, 114], [R. 1144-55], [App. pp. 458, 466]

On November 22, 2017, Vermillion's objection notwithstanding, the court granted the defendant's requests, and ordered that the parties would have until December 18, and 29, 2017, in which to file their respective "Sur" and "Sur-Sur" Replies. [DE 116], [R. 1163], [App. p. 473]

On the same November 22, 2017, the defendant's re-submitted their Supplement Affidavit of Paul Talbot, M.D., now referred to as DE 118-1. [R. 1200], [App. p. 509]

On November 30, 2017, Vermillion sought clarification of the court's instructions with regard to the filing of another Sur-Reply, wherein he argued, *inter alia*, that the defendant's reliance upon Local Rule 56.1 was misplaced, and that the first order of business should be to resolve any questions concerning the admissibility of their recently disclosed evidence. [DE 119], [R. 1268], [App. p. 514]

Vermillion's Verified Motion for *Ex Parte* Hearing and *In Camera* Inspection:

On the same November 30, 2017, Vermillion filed his Motion for *Ex Parte* Hearing on, and *In Camera* Inspection of, Dr. Talbot's supplemental affidavit, wherein he argued that because Dr. Talbot and his employers have a history of relying upon affidavits that are not based upon "personal knowledge," the court should examine and evaluate their proposed evidence, and, to prevent the defendant's and their attorneys from having an

opportunity to collude on a cover story, said examination and evaluation should be conducted *ex parte* and *in camera*. [DE 120], [R. 1273], [App. p. 519]

On December 4, 2017, defendant's objected to Vermillion's request for *ex parte/in camera* inspection, wherein they argued, *inter alia*, that if he believes that Dr. Talbot's testimony should be excluded because it does not comply with Federal Rules of Civil Procedure, he may state as much in his Sur-Reply. [DE 122], [R. 1284], [App. p. 530]

On December 12, 2017, the court clarified that Vermillion need not re-file his entire Sur-Reply Brief, but should instead focus on the "re-filed" Exhibit 5; that his request for an *ex parte* hearing is denied; and that he may submit any objection to the admissibility of the re-filed Exhibit 5 in his limited sur-reply. [DE 123], [R. 1288], [App. p. 534]

Vermillion's Verified Sur-Reply:

On December 19, 2017, Vermillion filed his Verified Sur-Reply/Objection to the Defendant's "Re-filed Exhibit 5," wherein he reiterated that the defendant's had made a number of material misrepresentations and assertions that are not supported by the evidence, and that all of the proffered "evidence" expressly ***confirms*** the presence of upper-range levels of calcium, uric acid, and calcium oxalate crystals. [DE 125], [R. 1292-1301], [App. p. 536]

The Defendant's Sur-Sur-Reply:

On December 28, 2017, the defendant's filed their Sur-Sur-Reply, wherein they interposed their objections to Vermillion's Supplemental evidence, and wherein they continue to argue that Vermillion had a UTI, and not kidney stones. [DE 129], [R. 1312], [App. p. 553]

Vermillion's Verified Objection to the Supplemental Affidavit of Paul Talbot:

On December 19, 2017, Vermillion again objected to defendant's use of, and reliance upon, Dr. Talbot's supplemental affidavit, for the reason that it bears the *re-used "10/19/17" verification, date, and signature from Dr. Talbot's previous Affidavits,*[8] and thus does not comport with the requirement that it must be subscribed by the declarant as true under the penalty of perjury. [DE 125], [R. 1301], [App. p. 545]

Vermillion's Verified Motion to Strike the Supplemental Affidavit of Paul Talbot:

On December 21, 2017, Vermillion filed his Verified Motion to Strike Dr. Talbot's supplemental affidavit, for the reason that it is invalid/inadmissible for the reason that it clearly bears a "re-used signature." [DE 126], [R. 1303], [App. p. 547]

On December 22, 2017, the defendant's objected to Vermillion's motion, and insisted that they have "explained," to the Court and Vermillion, that the "incorrect" affidavit was the result of a "clerical error," [DE 127, ¶5], [R. 1307], [App. p. 551]

Counsel then stated: "Dr. Talbot executed his supplemental affidavit on October 19, 2017. Thereafter, Dr. Talbot emailed counsel the **signature page** for his supplemental affidavit." [DE 127, ¶8], [R. 1307], [App. p. 551]

On January 3, 2018, Vermillion filed his Verified Response to the Defendant's Objection to his Motion to Strike, wherein he reiterated that the defendant's had ***confirmed*** that Dr. Talbot's signature was obtained independent from the Affidavit itself, which is the equivalent of having clients sign incomplete documents and reusing

[8] Compare, preferably side-by-side, the date and signature that appears on the very last page of DE 102-2, [R. 894], DE 108-1, [R. 1015], and DE 113-1, [R. 1151].

clients signatures. [DE 131], [R. 1329], [App. p. 565]

On January 8, 2018, defendant's filed their Motion to file yet another "Sur-Reply," this one in opposition to Vermillion's Motion to Strike, [DE 134], [R. 1353], [App. p. 572], and insist that Vermillion, ***without evidence***, argues that Dr. Talbot's signature was obtained independent of the Affidavit itself. [134-1, ¶1], [R. 1357], [App. p. 576]

On January 10, 2018, Vermillion filed his Verified Response to the defendant's Motion to file another Sur-Reply, wherein he reiterated that ***counsel's own words*** are the ***"evidence upon which he relies"*** in support of his position that Dr. Talbot's signature was obtained independent of the Affidavit itself. [DE 135], [R. 1362], [App. p. 579]

On the same January 10, 2018, the court accepted counsel's misrepresentations as gospel; concluded that Dr. Talbot's Supplemental Affidavit was properly authenticated and admissible; *denied* Vermillion's Motion to Strike; and *denied* the defendant's Motion to file a Sur-Reply as unnecessary. [DE 136], [R. 1367], [App. p. 584]

On January 29, 2017, Vermillion filed his Verified Motion to Reconsider, wherein he took issue with the fact that the court, in denying his Motion to Strike, had made no mention of the fact that counsel had stated explicitly that the signature page of Dr. Talbot's Supplemental Affidavit was emailed to counsel independent of the Affidavit itself. [DE 142], [R. 1395], [App. p. 587] On January 30, 2018, however, the same was denied. [DE 143], [R. 1398], [App. p. 590]

Vermillion's Verified Motion to Take Judicial Notice:

On January 30, 2018, Vermillion filed his Verified Motion to Take Judicial Notice, wherein he argued that because the Record does not reflect the court's awareness of

counsel's admission, the court should take judicial notice of counsel's admission at DE 127, ¶ 8. [DE 144], [R. 1400], [App. p. 591]

On January 31, 2017, defendant's objected to Vermillion's Motion, and argued, *inter alia*, that counsel's admission is not a fact that can be judicially noticed under Rule 201. [DE 145], [R. 1403], [App. p. 594]

On February 1, 2018, the court *denied* Vermillion's Motion for Judicial Notice, and in doing so stated that Vermillion had asked the court to take judicial notice of *the fact* that the signature page of Dr. Talbot's Supplemental Affidavit was emailed to counsel independent of the Affidavit itself. [DE 146], [R. 1406], [App. p. 597]

Vermillion's Verified Motion for a Hearing on his Request for Judicial Notice:

On the same February 1, 2018, Vermillion moved the court to conduct a hearing on his Request for Judicial Notice, wherein he clarified that he ***had not*** asked the court to take judicial notice of ***the fact*** that the signature page of Dr. Talbot's affidavit was emailed to counsel independent of the affidavit itself, but that he had asked the court to take judicial notice of ***counsel's admission*** in ¶ 8 of DE 127, that the signature page was emailed independent of the Affidavit itself. [DE 147], [R. 1408], [App. p. 598]

Final Judgment:

On March 5, 2018, the court entered judgment against Vermillion for the stated reasons that he had not presented evidence to permit a conclusion that no reasonably competent professional would have performed as Nurse Beeny and Dr. Talbot performed in April of 2016. [DE 149], [R. 1412], [App. p. 601]

The court then denied Vermillion's Motion for Assistance in Obtaining a Color

Photograph of his Kidney Stone Exhibit and his Motion to Conduct a Hearing on his Request for Judicial Notice as moot, [DE 149], [R. 1412], [App. p. 601], and thereupon issued its Final Judgment in favor of the defendants. [DE 150], [R. 1423], [App. p. 612]

SUMMARY OF THE ARGUMENTS

"Good cause" and "interests of justice" required that his request for leave to amend his Complaint should have been granted. Thereafter, his ability to carry his burden of persuasion with regard to his request for a preliminary injunction was ultimately thwarted, as was his ability to oppose defendants summary judgment motion, and thus Vermillion was substantially prejudiced by the court's denial of (1) his motion(s) to compel discovery; (2) his motion for *ex parte* hearing/*in camera* inspection of Dr. Talbot's supplemental affidavit; (3) his motion to strike Dr. Talbot's supplemental affidavit; (4) his motion to take judicial notice; and (5) his motion for a hearing on his request for judicial notice. Summary judgment on his medical malpractice claims was improper for the reason that the same was not requested until the defendant's Rule 56 reply brief. And, summary judgment prior to ruling on his motion(s) to compel discovery was an abuse of discretion, as was the trying and deciding of issues of material fact.

ARGUMENTS

I. The district court abused its discretion in all of its interlocutory rulings.

a. Denying Vermillion Leave to Amend his Complaint was an abuse of discretion.

Standard of Review:

We review the denial of a motion for leave to amend for an abuse of discretion. *Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 524 (7th Cir. 2015).

Under Federal Rule of Civil Procedure 15(a)(2), a court should grant leave to amend a pleading when justice so requires. However, the court need not allow an amendment when there is undue delay [or] undue prejudice to the opposing party. *Bethany Pharmacal Co., Inc. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001).

Civil Rule 15(a) requires courts to allow amendment unless there is a good reason for denying leave to amend, [*i.e.*] futility, undue delay, undue prejudice, or bad faith. *Life Plans, Inc. v. Security Life of Denver Ins.*, 800 F.3d 343, 358 (7th Cir. 2015)

To amend a pleading after the expiration of the trial court's scheduling order deadline, the moving party must show good cause. *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005).

In making this determination, the primary consideration is the diligence of the party seeking the amendment. *Alioto v. Town of Lisbon*, 651 F.3d 715, 720 (7th Cir. 2011).

In his January 6, 2017, Motion for Leave to Amend his Complaint, Vermillion explained that since the date of his original filing, the defendants and others had committed additional violations of his rights, such that justice required that he amend his Complaint to add defendants and claims concerning events that were inextricably related to his original claims. He then directed the court to his contemporaneously submitted proposed Amended Complaint, which, when read together with his Motion for Leave to Amend, explained in great detail the reasons why he had not sought to amend any sooner. [DE 19], [R. 79], [App. p. 21]

On February 14, 2017, however, the court denied Vermillion's Motion for the stated reasons that "…he did not show or even argue that he exercised diligence in seeking to

add [new defendants and claims], and that he had in fact alleged acts the he was aware of and that took place before the deadline..." [DE 21], [R. 114], [App. p. 54]

In his February 21, 2017, Motion to Reconsider, Vermillion acknowledged that his proposed Amended Complaint did in fact allege acts that he was aware of and that took place before the deadline for amendments, but that for the reasons as explained therein, he could not have amended his Complaint any sooner, not because he was seeking to cause delay or undue prejudice, but because he was simply waiting for the mandatory "exhaustion of the grievance process" to run its course. [DE 24], [R. 124], [App. p. 63]

Vermillion also explained that the November 15, 2016, Entry establishing December 7, 2016, as the deadline for filing amendments created a very narrow twenty-one (21) day window of opportunity in the first place. And, when taking the holidays, weekends, and other unexpected law library closings into the equation, his *actual* window of opportunity was only thirteen (13) days. [DE 24, p. 7], [R. 130], [App. p. 69]

Vermillion then explained that despite his fully detailed diligence, (*i.e.* his four (4) month long battle with four (4) of the "new defendants" to exhaust the grievance process), his window of opportunity, whether twenty-one (21) days or thirteen (13), had expired *prior* to the completion of the exhaustion process. [DE 24], [R. 130], [App. p. 69]

It is also significant that Vermillion was only twenty-nine (29) days beyond the exceptionally restrictive deadline. (Compare with other case affirming denial under Rule 15, such as *Trustmark, Id. supra*, at 553, (nine months after the prescribed deadline); *Alioto, Id. supra*, at 720, (more than eight months beyond the deadline); and *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674, 684 (7th Cir. 2014) (six months after original

counterclaims had been dismissed, noting "the unexplained delay looks more like procedural gamesmanship than legitimate ignorance or oversight")).

Accordingly, because the district court was supposed to have accepted as true the allegations in Vermillion's *pro se* pleadings, but did not, and was supposed to have drawn all reasonable inferences in his favor, but did not, and given that Vermillion's proposed amendments were *not* futile,[9] were *not* intended to cause undue delay or prejudice, and were *not* brought in bad faith, and given that the primary consideration is his diligence, which he clearly was, Vermillion respectfully submits that the decision to deny his request for leave to file his Amended Complaint was an abuse of discretion.

b. Denying Vermillion's Motion for a Preliminary Injunction was an abuse of discretion.

Standard of Review:

When considering a preliminary injunction order, the court's legal conclusions are reviewed *de novo*, its fact-findings for clear error, and its balancing of harms for abuse of discretion. *Coronado v. Valleyview Pub. Sch. Dist.* 365-U, 537 F.3d 791, 795 (7th Cir. 2008)

A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion. *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997)

To determine whether a situation warrants such a remedy, a district court engages in an analysis that proceeds in two distinct phases: a threshold phase and a balancing

[9] Vermillion's proposed additional claims and defendants, (now the subject of the "separate lawsuit" as discussed at p. 24, *supra*), have survived both the § 1915A screening process *and* a Rule 12(b)(6) Partial Motion to Dismiss.

phase. To survive the threshold phase, a party seeking a preliminary injunction must satisfy three requirements. First, that absent a preliminary injunction, it will suffer irreparable harm in the interim period prior to final resolution. Second, that traditional legal remedies would be inadequate. And third, that its claim has some likelihood of succeeding on the merits. *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)

When the moving party surpasses the threshold on at least one of its claims, the Court need not discuss the moving party's likelihood of success on the remainder of its claims. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.*, 549 F.3d 1079 (7th Cir. 2008)

However, if the court determines that the moving party has failed to demonstrate any one of these three threshold requirements, it must deny the injunction. *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992).

In the case at bar, and contrary to the defendants repeated reference to this suit as nothing more than "a" claim about Vermillion having passed "a" kidney stone, the first of Vermillion's five (5) operative claims is as follows:

> Defendant Corizon, by their custom, practice, and policy, whereby they do not adequately train **nursing staff** to properly diagnose, assess, and treat medical emergencies and/or the serious medical needs of inmates, resulted in Vermillion being denied treatment for his kidney stones and the extreme pain associated therewith, in violation of the Eighth Amendment's proscription against cruel and unusual punishment. [DE 1, p. 9, ¶ 1]

Accordingly, on May 3, and 9, 2017, Vermillion requested, and on June 16, and 27, 2017, he sought to compel, discovery in the form of mailing addresses for a number of former PCF/Corizon **nursing staff**, which was information absolutely essential to his

ability to contact the witnesses whose testimony concerning their personal knowledge of Corizon's training inadequacies would enable Vermillion to *substantiate* this of his claims against Corizon, and to *carry his burden of persuasion* that he was likely to succeed on the merits of said claims. [DE 63, 64], [R. 524, 528], [App. pp. 209, 212]

On July 13, 2017, however, before Vermillion could obtain the discovery relevant to his ability to carry his initial burden of persuasion, the court issued an Order thereby denying his request for a preliminary injunction.

Accordingly, because of the rule that denial is mandatory if he failed demonstrate any one of the three threshold requirements, and because he could not make said demonstration *without* the requested discovery, Vermillion's motion was doomed.

And as such, Vermillion submits that denying his Motion for a preliminary injunction before he could obtain relevant discovery was an abuse of discretion.

c. Denying Vermillion's Motion(s) to Compel Discovery was an abuse of discretion.

Standard of Review:

We review a district court's decision to deny a motion to compel for abuse of discretion. *James v. Hyatt Regency Chi.*, 707 F.3d 775, 784 (7th Cir. 2013)

We will only reverse a district court's ruling after a clear showing that the denial of discovery resulted in actual and substantial prejudice. *Id.* (citing *Packman v. Chi. Tribune Co.*, 267 F.3d 628, 646 (7th Cir. 2001)).

The lack of discovery, (as discussed in paragraph b. above), resulted in actual and substantial prejudice, in that the failure to *compel* discovery resulted in the denial of Vermillion's motion for a preliminary injunction, and the ultimate *denial* of his motions

to compel discovery resulted in his inability to adequately oppose summary judgment.

Accordingly, Vermillion respectfully submits that the court's denial of his request(s) to compel discovery was an abuse of discretion.

d. Denying Vermillion's Motion for *Ex Parte* Hearing and *In Camera* inspection was an abuse of discretion.

Standard of Review:

Upon reasonable argument from counsel, there is a presumption that the court should conduct an *in camera* inspection of documents to determine whether the documents are producible. [And as such], we review the district court's ruling,..., under an abuse of discretion standard. *United States v. Allen*, 798 F.2d 985, 993 (7th Cir. 1986)

Having discovered that Dr. Talbot's supplemental affidavit was inadmissible for the reason that it bore a re-used signature, Vermillion moved the court to conduct an examination and evaluation of the defendants proposed evidence. And, to ensure that the they would not gain yet another unfair procedural or tactical advantage, Vermillion requested that said examination and evaluation be conducted *ex parte* and *in camera*.

Accordingly, because his argument was perfectly reasonable, and because of the presumption that an *in camera* inspection should be conducted, denying Vermillion's motion for *ex parte* hearing and *in camera* inspection was an abuse of discretion.

e. Denying Vermillion's Motion to Strike the Supplement Affidavit of Paul Talbot was an abuse of discretion.

Standard of Review:

We review a district court's ruling on a motion to strike an affidavit for an abuse of

discretion. *Magyar v. Saint Joseph Reg'l Med. Ctr.*, 544 F.3d 766, 770 (7th Cir. 2008)

For declarations and statements to be valid under 28 U.S.C. § 1746, they must be subscribed by the declarant as true under penalty of perjury, which does not happen when the signature is affixed to the document prior to the recordation of the factual representation the signature represents to be true. *In re Husain*, 533 B.R. 658, 696 LEXIS 2288, (Bankr. N.D. Ill. 2015)

Causing clients to sign documents prior to the documents completion and reusing clients' signatures for different, subsequent documents is prohibited by the requirement of 28 U.S.C. § 1746 that declarants sign their declarations, verifications, certificates, …, and affidavits. *In re Husain, Id.* at 696; Affd. by *In re Husain,* 866 F.3d 832 (7th Cir. 2017)

In the case at bar, once Vermillion discovered that Dr. Talbot's Supplemental Affidavit bore a "re-used signature" and was therefore inadmissible, Vermillion moved to strike the same. [DE 126], [R. 1303], [App. p. 547]

The district court, however, accepting as gospel defense counsel's assurance that the same was properly authenticated, denied Vermillion's motion.

However, because it is clear, by a side-by-side comparison of the signature pages of DE 102-2, 108-1, and 113-1, that Dr. Talbot's supplemental affidavit does in fact bear a "re-used signature" and is therefore inadmissible,[10] and because it is clear that the district court relied upon information contained in Dr. Talbot's inadmissible affidavit in

[10] It should also be noted that Vermillion has recently discovered that the "facsimile transmission header" on the last page of DE 56-1, 62-1, and 70-1, (which states "PAGE 01/01," meaning page 1 of 1, as opposed to page 5 of 5), indicates that the signature page of these affidavits were faxed to counsel independent of the affidavits themselves, which means that that Dr. Talbot more than likely never saw anything but the signature pages of theses affidavits either, thus calling the admissibility of theses affidavits in to question as well.

ruling on the defendants summary-judgment motion, prejudice to Vermillion's ability to oppose the defendants summary-judgment motion was substantial.

Accordingly, denying Vermillion's motion to strike Dr. Talbot's supplemental affidavit was an abuse of discretion.

f. Denying Vermillion's Motion(s) to Take Judicial Notice and to Conduct a Hearing on his Request for Judicial Notice were abuse(s) of discretion.

Standard of Review:

We review the district court's refusal to take judicial notice for an abuse of discretion. *Crawford v. Countrywide Home Loans, Inc.*, 647 F.3d 642, 649 (7th Cir. 2011).

A court may take judicial notice of an adjudicative fact that is both not subject to reasonable dispute and either 1) generally known within the territorial jurisdiction of the trial court, or 2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b)

In order for a fact to be judicially noticed, indisputability is a prerequisite, and, Courts routinely take judicial notice of the contents of other court filings. *General Electric Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997)

Judicial notice is premised on the concept that certain facts exist which a court may accept as true without requiring additional proof from the opposing parties. *Id.*

In the case at bar, Vermillion moved the court to take judicial notice of an admission that the defendant's counsel had made in paragraph #8 of DE 127, (*i.e.* the defendants Response in Opposition to Vermillion's Motion to Strike Dr. Talbot's Supplemental Affidavit), which is a court filing capable of accurate and ready determination by resort

to sources whose accuracy cannot reasonably be questioned.

The defendants, however, responded that said admission is not a fact that can be judicially noticed under Rule 201, [DE 146], [R. 1406], [App. p. 597], and the court promptly *denied* Vermillion's motion for the stated reason that he had asked the court to take judicial notice of *the fact* that the signature page of Dr. Talbot's affidavit was emailed to counsel independent of the Affidavit itself. [DE 146], [R. 1406], [App. p. 597]

Vermillion then clarified that he ***had not*** asked the court to take judicial notice of ***the fact*** that the signature page of said affidavit had been emailed to counsel independent of the Affidavit itself, but that he had asked the court to take judicial notice of counsel's ***admission*** in ¶ 8 of DE 127. [DE 147], [R. 1408], [App. p. 598]

Vermillion then moved the court to conduct a hearing on his Request for Judicial Notice, however, said request was also promptly denied.

However, because counsel's admission was not a disputed fact, but was instead a court filing capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, and because Rule 201(d) provides that a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be notice, the court abused its discretion when it denied Vermillion's Motion, and when it denied his subsequent request to conduct a hearing on the same.

II. Summary Judgment was improper.

Standard of Review:

We review a decision granting summary judgment *de novo*. *Walker v. Sheahan*, 526 F.3d 973, 976 (7th Cir. 2008).

When reviewing a motion for summary judgment, the court must view the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

At summary judgment, the court's role is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Nat'l Athletic Sportswear, Inc. v. Westfield Ins. Co.*, 528 F.3d 508, 512 (7th Cir. 2008), (quoting *Donohue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54, 57 (2d Cir. 1987) (the court cannot try issues of fact; it can only determine whether there are issues to be tried).

On summary judgment, a party must show the Court what evidence it has that would convince a trier of fact to accept its version of the events. *Johnson v. Cambridge Indus.*, 325 F.3d 892, 901 (7th Cir. 2003).

Affidavits used to support a motion for summary judgment must be made on personal knowledge. *Fed. R. Civ. P.* 56(e)(1)

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is **no** genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Hunter v. Amin*, 583 F.3d 486, 489 (7th Cir. 2009)

In ruling on a motion for summary judgment, the admissible evidence presented by the nonmoving party must be believed and all reasonable inferences must be drawn in

the non-movant's favor. *Hunter, Id.* at 489

Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *Ponsetti v. GE Pension Plan*, 614 F.3d 684, 691 (7th Cir. 2010).

On appeal, we accept as true the allegations in a *pro se* [litigant's] pleadings and draw all reasonable inferences in his favor. See *Erickson v. Pardus*, 551 U.S. 89, 90, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), *McGowan v. Hulick*, 612 F.3d 636, 638, (7th Cir. 2010).

a. Summary judgment on Vermillion's state law medical malpractice and breach of contract claims was improper.

In their July 13, 2017, Motion for Summary Judgment, the defendants requested summary judgment on Vermillion's Eighth Amendment deliberate indifference claims against Dr. Talbot and Nurse Beeny, and his *Monell* claim against Corizon.

In their November 14, 2017, Rule 56 Reply Brief, however, the defendant's requested summary judgment on Vermillion's claims of medical malpractice.

Accordingly, because summary judgment on his medical malpractice claims was requested for the first time in their Rule 56 Reply Brief, (and summary judgment on his breach of contract claims was never requested), the court was required to deny the defendant's request as untimely. See *Costello v. Grundon*, 651 F.3d 614, 635 (7th Cir. 2011) (reversing summary judgment that had been granted based on issue first raised by moving party in his [Rule 56] reply brief), quoting *Hardrick v. City of Bolingbrook*, 522 F.3d 758, 763 n.1 (7th Cir. 2008) Also see *Venters v. City of Delphi*, 123 F.3d 956, 969 (7th Cir. 1997) (reversing decision to consider statute of limitations defense never asserted in pleading and first raised in reply brief).

b. The granting summary judgment before the court had ruled on Vermillion's Motion(s) to compel discovery was an abuse of discretion.

In spite of the considerable latitude that the abuse of discretion standard gives to the district court, it is plain that in some circumstances an immediate ruling on a summary judgment motion will cross the line from the permissible to the impermissible. *Farmer v. Brennan*, 81 F. 3d 1444, 1449 (7th Cir. 1995)

As an example of the impermissible, this Court cites *Dean v. Barber*, 951 F.2d 1210, 1213-14 (11th Cir. 1992), wherein the Court held that it was an abuse of discretion to grant summary judgment where a district court had never ruled on a motion to compel discovery. Summary judgment, it explained, should not be granted until the party opposing the motion has had an adequate opportunity for discovery. *Farmer, Id.* at 1449

In the case at bar, the record is clear that the defendants had not furnished complete responses to Vermillion's discovery requests, and that the district court had denied Vermillion's requests to compel the same.

Accordingly, because the denial of discovery resulted in actual and substantial prejudice, in that the failure to *compel* discovery resulted in the denial of his motion for a preliminary injunction, and the ultimate *denial* of his motions to compel discovery resulted in his inability to adequately oppose summary judgment, the court abused its discretion when it granted summary judgment on an inadequate record.

c. The existence of triable issues precluded the entry of summary judgment.

On March 5, 2018, the court made roughly ten (10) factual findings and conclusions, as follows:

1. "Vermillion has a history of an enlarged prostate that was well controlled on Flomax and Aspirin for the associated pain," and "Vermillion was routinely prescribed Flomax for urinary issues and Aspirin for the associated pain and reported relief from these medications." [DE 149, p. 2], [R. 1413], [App. p. 602]

However, Vermillion *testified* that he had never been prescribed Aspirin for pain; that his Aspirin prescription for the past 12-14 years had been for hypertension and hyperlipidemia management; and that the only relief he ever reported was that, with Flomax he can urinate, without it he cannot. [DE 117, p. 15], [R. 1182], [App. p. 491]

2. "Medical staff monitored Vermillion's enlarged prostate through monthly appointments and systematic treatment for his pain complaints." [DE 149, p. 3], [R. 1414], [App. p. 603]

However, Vermillion *testified* that he has not received an actual "prostate exam" since 2011, which is two (2) years prior to his arrival at PCF, and that "examined" in the context of a PCF Chronic Care visit simply means that he was "asked" how the Flomax is working, and that regardless of his response, his prescription is refilled. [DE 117, p. 18], [R. 1185], [App. p. 494]

3. "On April 12, 2016, Vermillion did not have excess chemicals in his blood that contribute to the formation of stones, such as calcium or uric acid." [DE 149, p. 5], [R. 1416], [App. p. 605]

However, Vermillion *testified* that he had in fact passed kidney stones, and he directed the court to the Lab Reports upon which defendants rely, which expressly do not support their arguments, in that said Lab Reports reflect the *existence* of upper-range levels of calcium and uric acid. [DE 117, pp. 17-28], [R. 1182-1196], [App. p. 493-504]

4. "On that same April 12, 2016, Vermillion did not complain of blood in his urine or difficulty urinating that day." [DE 149, p. 5], [R. 1416], [App. p. 605]

However, Vermillion *testified* that on April 12, 2016, he expressed to Dr. Talbot his

concerns about the conversation having turned away from the problems for which he was there, (*i.e.* the constant and severe pain in his lower pelvic region and the blood in his urine), and that he had offered to provide a urine sample for on-the-spot testing, but Dr. Talbot refused said offer. [DE 111, pp. 22-24], [R. 1120], [App. p. 434]

Also problematic for this of the court's findings, is that the court "**determined**" that there is a "disputed fact" as to whether Dr. Talbot possessed the April 12, 21016, Lab Report when he saw Vermillion on April 12, 2016, but then "**decided**" that there is no dispute as to whether said Report existed or whether they reflected abnormalities that would indicate the presence of kidney stones. [DE 149, p. 6], [R. 1417], [App. p. 606]

Also problematic for this of the court's findings is that, immediately subsequent to its "finding" that Vermillion had in fact requested something for pain, the court "**determined**" that there is [another] "issue of fact" with regard to whether he told Dr. Talbot that he was in pain on April 12, 2016, in that "Dr. Talbot stated Vermillion did not complain of pain, while Vermillion stated that he asked for something for pain." [DE 149, FN 2], [R. 1417], [App. p. 606]

5. "The defendants have presented evidence to show that they reasonably believed that Mr. Vermillion experienced a UTI on April 8, 2016, and treated him appropriately for it. Based on the urine testing, which indicated a UTI, and not kidney stones, and Mr. Vermillion's history of an enlarged prostate, the defendants were not deliberately indifferent in not concluding that he was experiencing kidney stones." [DE 149, p. 6, FN 2], [R. 1417], [App. p. 606]

The problem with this of the court's findings, however, is that it is based upon believing the moving party's evidence, and, Vermillion *testified* that as of the date of his response to the defendant's summary judgment motion, he had received **no treatment**

for his complained of condition. [DE 111, p. 8, ¶53], [R. 1124], [App. 438]

6. "Further, it was reasonable for Nurse Beeny to conclude that any pain Mr. Vermillion experienced when she treated him on April 8, 2016, was a result of the UTI and that treatment of the UTI would alleviate the associated pain." [DE 149, p. 6, FN 2], [R. 1417], [App. p. 606]

The problem with this of the court's findings, however, is that Nurse Beeny testified that as an LPN she does not diagnose or treat patients. [DE 70-2], [R. 581], [App. p. 257]

7. "When Dr. Talbot saw Mr. Vermillion on April 12, 2016, Mr. Vermillion did not present with blood in his urine of difficulty urinating. Because he did not have these symptoms, Dr. Talbot reasonable advised Mr. Vermillion to return if those symptoms occurred again. While Mr. Vermillion states that he complained to Dr. Talbot of abdominal pain that day, an inmate does not have an Eighth Amendment right to be pain free after appropriate medical attention." (citation omitted) [DE 149, p. 6, FN 2], [R. 1417], [App. p. 606]

The problem(s) with this of the court's findings, however, is that it is also based upon believing the moving party's evidence instead of Vermillion's, and Vermillion *testified* that he has received *no treatment whatsoever* for his complained of condition, let alone *appropriate* treatment. [DE 111, p. 8, ¶53], [R. 1124], [App. 438]

8. "Based on his evaluation of Mr. Vermillion, including his recent UTI and history of an enlarged prostate, it would be reasonable to conclude that, even though he had received appropriate treatment, some pain may be expected." [DE 149, p. 6, FN 2], [R. 1417], [App. p. 606]

The problem with this of the court's findings, however, is that it too is based upon believing the moving party's evidence instead of Vermillion's.

9. "The parties dispute whether Mr. Vermillion passed kidney stones during the evening of April 12, 2016. But even if Mr. Vermillion did pass kidney stones that night, this fact does not change the conclusion that, *when they evaluated him*, Nurse Beeny and Dr, Talbot reasonably believed that he had a UTI and properly treated him for that condition." [DE 149, p. 6, FN 2], [R. 1417], [App. p. 606] [*Vermillion's emphasis*]

Accordingly, the problem(s) with the court's "when they evaluated him" finding, is that it too is based upon believing the movant's evidence as opposed to Vermillion's, and, it *confirms* Vermillion's position that Dr. Talbot's opinion of April 12, 2016, (had he offered one), would be the only relevant opinion, and that Dr. Fisk's after the fact opinion of February 10, 2017, that it was a UTI and not kidney stones, is irrelevant. [DE 117, p. 20], [R. 1189], [App. p. 498]

10. "In sum, Mr. Vermillion has not presented evidence to permit a conclusion that no reasonably competent professional would have performed as Nurse Beeny and Dr. Talbot performed in April of 2016." [DE 149, p. 9], [R. 1420], [App. p. 609]

Accordingly, because the court's findings and conclusions, (a verbatim recitation of the defendant's statement of facts), make clear that it did not "believe" the non-movant's evidence as required, the final judgment based thereon is infirm. And, because the court's final judgment constitutes the impermissible trying and deciding of issues of material fact, the same must be vacated.

CONCLUSION

For the forgoing reasons, the district court should be reversed in all respects and this case remanded with instructions that Vermillion will be allowed to proceed to trial on all of his claims against Corizon Health, Inc., Dr. Paul A. Talbot, and Nurse Ruby Beeny

Also upon remand, counsel should be investigated for engaging in such misconduct as making material misrepresentations, fabricating lab reports, causing clients to sign documents prior to the document's completion, and reusing clients' signatures.

And, because it is difficult to imagine that Judge Stinson, with twenty (20+) years of

trial bench experience, is personally responsible for any of the herein challenged rulings, an investigation should be conducted into the possibilities of the unauthorized use of the Judge's rubber signature stamp.

Respectfully submitted,

Jay F. Vermillion #973683

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32

Vermillion hereby certifies that according to the "document properties" feature of Microsoft® Office Word 2007, this Brief of Appellant complies with the type-volume limitation of Fed. R. App. P. 32(f), because, excluding the parts exempted by Rule, it contains no more than 14,000 words.

Jay F. Vermillion #973683

CERTIFICATE OF SERVICE

Vermillion hereby certifies that the above and forgoing BRIEF OF APPELLANT has been filed with Gino J. Agnello, Clerk of this United States Court of Appeals, and served upon counsel for the defendants, Ms. Adriana Katzen, 8470 Allison Pointe Boulevard, Suite 420, Indianapolis, IN 46250, by depositing the same in the United States Mail for delivery First Class, postage prepaid, on this 22nd day of August, 2018.

Jay F. Vermillion #973683
Pendleton Correctional Facility
4490 W. Reformatory Rd.
Pendleton, IN 46064