

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

COBY TOWNSEND HURST (Prisoner ID 27751)

PLAINTIFF

v.

Civil No. 5:21-cv-05029

DR. MARK RUCKER, Mercy Hospital
Northwest Arkansas; DR. CALEB J. MILLER,
Mercy Hospital Northwest Arkansas; NURSE
DANIEL BURSON, Mercy Hospital Northwest
Arkansas; and NURSE ANGIE L. NACHTIGAL,
Mercy Hospital Northwest Arkansas

DEFENDANTS

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants Caleb J. Miller¹, Nurse Daniel Burson, Nurse Angie L. Nachtigal, and Mercy Hospital Rogers d/b/a Mercy Hospital Northwest Arkansas (“Mercy Hospital”) (collectively “Defendants”) and for their brief in support of motion for summary judgment, state:

I. INTRODUCTION

Plaintiff Coby Hurst (“Hurst”) has brought a Section 1983 claim against various medical providers alleging rape and violation of his Fourth Amendment rights for the placement of a catheter while he was a level 2 trauma patient in the hospital Emergency Room. Hurst was being treated and worked up for his altered mental status and trauma. This work-up included various radiology studies, EKG, and multiple laboratory studies, including a urine drug screen. The urine sample

¹ Incorrectly referred to as “Dr.” Caleb J. Miller in Plaintiff’s Complaint.

was obtained from an intermittent catheter placed by Daniel Burson. The ER physician, Dr. Mark Rucker, rendered a primary diagnosis of methamphetamine abuse for Hurst. According to his testimony, Hurst was admittedly high on methamphetamine laced with other drugs, and had also been into a fight with an officer and had tried to run through a fence prior to arriving at Mercy Hospital.

Plaintiff's Complaint must be dismissed for various deficiencies: (1) Hurst failed to exhaust his administrative remedies; (2) the Defendants were not state actors and thus not acting under the color of state law; regardless, Defendants would be entitled to qualified immunity; (3) the medical care and treatment Hurst received was not an unreasonable search or seizure in violation of the Fourth Amendment; (4) rape is not a viable cause of action under these circumstances; (5) Plaintiff's claims do not meet the required "deliberate indifference" threshold for a Section 1983 claim; (6) Plaintiff has failed to show a physical injury or sexual act as required to sustain a Section 1983 claim; and (7) Plaintiff admittedly only intended to sue the individual that catheterized him (Daniel Burson) and the ordering physician (Dr. Mark Rucker); the other defendants must be dismissed.

II. LEGAL STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "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." Fed. R. Civ. P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 321 (1986). The nonmoving

party may not rely on allegations or denials but must demonstrate the existence of specific facts that create a genuine issue for trial. *Mann v. Yarnell*, 497 F.3d 822, 825 (8th Cir. 2007). “[T]he court should grant summary judgment if any essential element of the prima facie case is not supported by specific facts sufficient to raise a genuine issue for trial.” *Register v. Honeywell Fed. Mfg. & Techs., LLC*, 397 F.3d 1130, 1136 (8th Cir. 2005) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

“A dispute over an issue of fact is ‘genuine’ if there is sufficient evidence to allow a reasonable jury to find for the non-moving party on that issue.” *Marksmeier v. Davie*, 622 F.3d 896, 900 (8th Cir. 2010). No issue for trial is present “unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *See Scott v. Harris*, 550 U.S. 372, 380 (2007). Disputes that are not genuine or that are about facts that are not material will not preclude summary judgment. *Sitzes v. City of West Memphis, Ark.*, 606 F.3d 461, 465 (8th Cir. 2010).

III. STATEMENT OF FACTS

Defendants have separately filed a Statement of Facts, pursuant to Local Rule 56.1, and incorporate those facts herein by reference.

IV. DISCUSSION

Plaintiff has attempted to bring a Section 1983 lawsuit against privately employed personnel who provided medical care and treatment to Hurst, a level 2 trauma with altered mental status. The catheterization was performed to obtain a urine sample for a urine drug screen, which was one of many tests ordered that day as part of Hurst's medical care and treatment. The catheterization was not part of a law enforcement function or to detect evidence that could later be used against Hurst in a criminal case; it was for the benefit of his own care, treatment, and well-being. Plaintiff's Complaint must be dismissed against Defendants for numerous reasons as set forth below in detail.

A. Hurst failed to exhaust his administrative remedies as required under the Prison Litigation Reform Act.

The doctrine of exhaustion of remedies is well-established. The Prison Litigation Reform Act (PLRA) provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a); *see also Woodford v. Ngo*, 548 U.S. 81, 85, 126 S.Ct. 2378, 2383 (2006). If the administrative remedy process was not completed at the time of filing a complaint, dismissal is mandatory. *Johnson v. Jones*, 340 F.3d 624, 627 (8th Cir. 2003). A prisoner must demonstrate strict compliance with the administrative remedy process; substantial compliance is insufficient. *Austin v. Cotton*, No. CIV. 09-5278, 2012 WL 3135318 (W.D. Ark. Aug. 1, 2012). If the inmate does not allege that he exhausted all available administrative remedies and attach copies of such

evidence that he exhausted such administrative remedies before he filed his § 1983 action, his claim should be dismissed. *See McAlphin v. Morgan*, 216 F.3d 680, 681 (8th Cir. 2000).

The grievance procedure in the Benton County Jail is well-settled and easily accessible to inmates. In order to exhaust his administrative remedies against Defendants, Hurst was required to attempt to resolve the issue informally and then file a complaint through his inmate kiosk prior to filing suit. It is undisputed that he failed to do so. Hurst was warned on the face of the Complaint that “**Failure to complete the grievance procedure may affect your case in federal court**” and that “**FAILURE TO ATTACH THE REQUIRED COPIES MAY RESULT IN DISMISSAL OF YOUR COMPLAINT.**” *See Complaint* (Doc. 1, pg. 2) (emphasis in original). Despite these emphasized blatant warnings on the complaint form, Hurst admittedly did not follow the written prisoner grievance procedure. *Id.* He marked “No” when asked if he followed the written prisoner grievance procedure. *Id.* This is fatal to his complaint and warrants dismissal under the law. *See Johnson, supra* and *Austin, supra*. As such, Hurst failed to exhaust his administrative remedies as required by law, and the Complaint must be dismissed.

B. Defendants were not state actors and were thus not acting under the “color of law;” there can be no constitutional violation by Defendants.

The law is well established that in order to state a claim under Section 1983, “a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and **must show that the alleged deprivation was**

committed by a person acting under color of state law.” *S.J. v. Kansas City Missouri Pub. Sch. Dist.*, 294 F.3d 1025, 1027 (8th Cir. 2002) (quoting *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (emphasis added)). For a defendant in a Section 1983 action to act under color of state law, the defendant must have exercised power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *Broussard v. Waldron Sch. Dist.*, 866 F. Supp. 2d 1042, 1047 (W.D. Ark. 2011) (citing *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941)).

“It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State. Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law.” *Id.* In a Section 1983 case, “the injury complained of must have been caused by the exercise of some right or privilege created by the state, by a rule of conduct imposed by the state, or by a person for whom the state is responsible” and “the party charged with the deprivation must be a person who may fairly be said to be a state actor.” *Id.* (citing *Parker v. Boyer*, 93 F.3d 445, 448 (8th Cir.1996)); *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). “The Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative.” *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 614, 109 S. Ct. 1402, 1411, 103 L. Ed. 2d 639 (1989).

Mercy Hospital is a private institution. *Exhibit G*. It is not owned by the state or the government. *Id.* Caleb Miller, Daniel Burson, and Angie Nachtigal were employees of Mercy Hospital on June 9, 2019, when they were providing services in furtherance of the medical care and treatment of Hurst for his emergent condition that had brought him to the ER. *Id.* They were not employees of the State of Arkansas. *Id.*

Furthermore, Daniel Burson placed the intermittent urethral catheter to obtain Hurst's residual urine in furtherance of complying with the *physician's order* for a urine drug screen. *Nurse's Note, MHNWA-CH.000047, Exhibit F; see also ER Provider Note by Dr. Rucker, MHNWA-CH.000010-16, Exhibit C and Orders / Results, MHNWA-CH.000016-31, Exhibit D.* It is undisputed that the Defendants and Dr. Rucker did not seek to analyze Hurst's urine or place the catheter at the request of the police officer. *Exhibit A*, pgs. 65-66. In fact, the police officer gave no orders or direction to the Mercy Hospital staff to insert the catheter to obtain the urine. *Id.* This was done on their own "free will" in furtherance of the medical evaluation and care and treatment of Hurst. *Id. See also Exhibit C, Exhibit D, and Exhibit F.* The urine drug screen was not done in furtherance of a police function or to obtain evidence against Hurst for a criminal case against him. *Id.*

It is undisputed the Defendants were private actors, not state actors. They are not public employees, and the State of Arkansas is not responsible for them. They were not even following the requests of an officer while providing medical care and treatment to Hurst. The Defendants are entitled to summary judgment, because they

were not state actors and not acting under the color of state law when the alleged incident occurred on June 9, 2019. The Fourth Amendment does not apply to Defendants. *See Skinner, supra*.

i. Assuming arguendo that Defendants were acting under the color of state law, the Defendants would be entitled to qualified immunity, as such conduct was not in clear violation of constitutional rights.

“Qualified immunity protects government officials performing discretionary actions from liability in a § 1983 action unless their conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known.” *Meloy v. Bachmeier*, 302 F.3d 845, 848 (8th Cir. 2002) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). To be clearly established, a right's contours must be clear enough that a reasonable official would understand his or her conduct was unconstitutional. *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, —, 122 S.Ct. 2508, 2515, 153 L.Ed.2d 666 (2002)).

The courts apply a “flexible standard, requiring some, but not precise factual correspondence with precedent, and [application of] general, well-developed legal principles.” *Id.* (citing *Burton v. Richmond*, 276 F.3d 973, 976 (8th Cir.2002) (quoting *J.H.H. v. O'Hara*, 878 F.2d 240, 243 (8th Cir.1989)). The courts “look to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this circuit.” *Id.* (citing *Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir.2001)). Although earlier cases need not involve fundamentally or materially similar facts, the earlier cases must give officials “fair warning that their alleged treatment of the plaintiff was unconstitutional.” *Id.* With

respect to an alleged involuntary catheterization, there is a group of cases exemplified by *Tinius v. Carroll County Sheriff Dept.*, 321 F.Supp.2d 1064, 1070, 1074–76 (N.D.Ia.2004), whereby “courts have held that involuntary catheterization to obtain a urine sample for medical purposes—such as determining the proper course of treatment—does not violate the Fourth Amendment.” *Levine v. Roebuck*, 550 F.3d 684, 687–88 (8th Cir. 2008) (summary judgment granted for two nurses on plaintiff’s Fourth Amendment claim regarding an involuntary catheterization where nurses were following direction of officer and used proper technique in attempting this rather common and safe procedure).

Qualified immunity is a question of law, not fact. *McClendon v. Story Cty. Sheriff’s Office*, 403 F.3d 510, 515 (8th Cir. 2005). Thus, issues concerning qualified immunity are appropriately resolved on summary judgment. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

In the present case, it is undisputed that Hurst was brought to the Mercy Hospital ER via an ambulance and classified as a level 2 trauma with a laceration to his head and altered mental status. *ER Arrival Note*, MHNWA-CH.00009, *Exhibit B*. Upon his evaluation, the physician, Dr. Mark Rucker, entered numerous orders, including laboratory studies, radiology studies, and an EKG, for diagnostic and medical purposes. *ER Provider Note by Dr. Rucker*, MHNWA-CH.000010-16, *Exhibit C*; *Orders / Results*, MHNWA-CH.000016-31, *Exhibit D*. The urine drug screen was part of a host of laboratory studies to be run on Hurst. *Id.* To accomplish this drug screen as ordered by the physician, Daniel Burson inserted an “intermittent” urethral

catheter to obtain Hurst’s residual urine. *Nurse’s Note, MHNWA-CH.000047, Exhibit F*. Such conduct in a hospital setting, in the emergency room where a level 2 trauma has been called with altered mental status, in compliance with the orders of a physician, is not a violation of the Fourth Amendment. *See Levine v. Roebuck*, 550 F.3d 684, 687–88 (8th Cir. 2008). As such, the Defendants, in particular Burson, should be entitled to qualified immunity if for some reason they are considered state actors. Therefore, Plaintiff’s Complaint should be dismissed with prejudice.

C. The medical work-up and catheterization were not an unreasonable search and seizure under the Fourth Amendment.

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...” “The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction.” *Skinner v. Ry. Lab. Executives’ Ass’n*, 489 U.S. 602, 613–14, 109 S. Ct. 1402, 1411, 103 L. Ed. 2d 639 (1989) (citing *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967)). See also *Delaware v. Prouse*, 440 U.S. 648, 653–654, 99 S.Ct. 1391, 1395–1396, 59 L.Ed.2d 660 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976)).

The Fourth Amendment prohibits only unreasonable searches. *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447 (1979). “The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the

particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.” *Id.*

With respect to an alleged involuntary catheterization, there is a group of cases exemplified by *Tinius v. Carroll County Sheriff Dept.*, 321 F.Supp.2d 1064, 1070, 1074–76 (N.D.Ia.2004), whereby “**courts have held that involuntary catheterization to obtain a urine sample for medical purposes—such as determining the proper course of treatment—does not violate the Fourth Amendment.**” *Levine v. Roebuck*, 550 F.3d 684, 687–88 (8th Cir. 2008) (emphasis added). The court in *Tinius* further explained that local police officers frequently engage in what, for want of a better term, may be described as “community caretaking” functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. *Tinius v. Carroll Cty. Sheriff Dep’t*, 321 F. Supp. 2d 1064, 1074 (N.D. Iowa 2004) (citing *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973)).

In the *Tinius* case, the plaintiff was found walking along the roadway in rural Iowa in the midst of winter without proper attire. *Id.* at 1074-1076. He had taken marijuana and methamphetamine in the previous days. *Id.* The officer transported him to the hospital for non-investigatory purposes of providing him with medical and/or psychological assistance. *Id.* The officers did not request hospital personnel perform any specific tests and remained there at the facility to keep the peace. *Id.*

The officers intervened during the catheterization procedure in order to provide protection to the hospital staff, who obtained a urine sample for diagnostic purposes only. *Id.* The court held that the officers' actions "were reasonable and in keeping with their community caretaking functions when they detained Tinius and later restrained him during the catheterization procedure and did not violate the Fourth Amendment by their actions." *Id.*

In the present case, the circumstances show that Hurst's Fourth Amendment rights were not violated. Hurst was found to be publicly naked, combative, and in an altered mental state, bringing chaos to his neighborhood – attempting to beat up his neighbor, pouring oil on top of cars, and laying naked in a neighbor's kiddie pool. *Exhibit A*, pgs. 50-53. In addition to his altered mental status, he also had a head injury (either from his scuffle with the officer or the fact that he tried to run through a fence). *Id.* at pgs. 53-55. Hurst was brought to the Mercy Hospital ER via an ambulance and classified as a level 2 trauma with a laceration to his head and altered mental status. *ER Arrival Note*, MHNWA-CH.00009, *Exhibit B*. Upon his evaluation, the physician, Dr. Mark Rucker, entered numerous orders, including laboratory studies, radiology studies, and an EKG, for diagnostic and medical purposes. *ER Provider Note by Dr. Rucker*, MHNWA-CH.000010-16, *Exhibit C; Orders / Results*, MHNWA-CH.000016-31, *Exhibit D*. The urine drug screen was part of a host of laboratory studies to be run on Hurst. *Id.*

To accomplish this drug screen as ordered by the physician, Daniel Burson inserted an "intermittent" urethral catheter to obtain Hurst's residual urine. *Nurse's*

Note, MHNWA-CH.000047, Exhibit F. It is clear from the record that the Defendants and Dr. Rucker did not seek to analyze Hurst's urine or place the catheter at the request of the police officer. *Exhibit A*, pgs. 65-66. In fact, the police officer gave no orders or direction to the Mercy Hospital staff to insert the catheter to obtain the urine. *Id.* This was done on their own "free will" in furtherance of the medical evaluation and care and treatment of Hurst. *Id. see also Exhibit C, Exhibit D, and Exhibit F.*

Like *Tinius*, the police had transported Hurst to Mercy Hospital, and Hurst had received care and treatment from the Mercy Defendants, for non-investigatory purposes of providing him with medical and/or psychological assistance. *See Tinius, supra.* The catheterization and urine drug screen were not part of the police officer's investigatory function. *Id.* This catheterization was not done for the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. *Id.* Such conduct in a hospital setting, in the Emergency Room where a level 2 trauma has been called with altered mental status and head injury, in compliance with the orders of a physician, is not a violation of the Fourth Amendment. *See Levine v. Roebuck*, 550 F.3d 684, 687–88 (8th Cir. 2008); *Tinius v. Carroll Cty. Sheriff Dep't*, 321 F. Supp. 2d 1064, 1074 (N.D. Iowa 2004). Therefore, Defendants are entitled to summary judgment.

D. Rape is not a recognized or cognizable civil claim in this instance.

Rape is not now, and has never been, a cognizable civil cause of action in Arkansas courts. Defendants are aware of no state or federal cases in Arkansas in

which a plaintiff has successfully brought a civil cause of action for “rape.” Summary judgment is therefore appropriate as to Mr. Hurst’s rape claim because no reasonable jury could find in favor of Mr. Hurst on a nonexistent cause of action. The claim should be dismissed as a matter of law. *See* Fed. R. Civ. P. 12 and 56.

E. Assuming arguendo that Plaintiff has made a claim under the Eighth Amendment, Plaintiff’s claims do not meet the required “deliberate indifference” threshold for this Section 1983 claim.

Hurst has not made a claim under the Eighth Amendment. But assuming that he has, his claim does not meet the “deliberate indifference” standard required to prevail. To prevail on an Eighth Amendment deliberate-indifference claim, a prisoner must, first, be exposed to a substantial risk of serious harm so grave that it violates the Eighth Amendment’s ban of cruel and unusual punishments. *See Farmer v. Brennan*, 511 U.S. 825, 832-34 (1994). Second, the state actors (which these Defendants are not) the prisoner sues must be aware of that risk and deliberately disregard it by taking no action or grossly inadequate action that they know is adequate to abate it. *See Washington v. Denney*, 900 F.3d 549, 559 (8th Cir. 2018); *Langford v. Norris*, 614 F.3d 445, 460 (8th Cir. 2010).

Deliberate indifference is “more than negligence, more even than gross negligence, and mere disagreement with treatment decisions does not rise to the level of a constitutional violation.” *Jolly v. Knudsen*, 205 F.3d 1094, 1096 (8th Cir. 2000) (quoting *Estate of Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir.1995)); *see also Hartsfield v. Colburn*, 491 F.3d 394, 396–98 (8th Cir.2007) (month-long treatment delay caused, in part, by doctor and nurse miscommunication was “evidence of negligence that does not rise to unconstitutional deliberate indifference”); *Logan v.*

Clarke, 119 F.3d 647, 650 (8th Cir.1997) (“Although the prison doctors may not have proceeded ... as quickly as hindsight perhaps allows us to think they should have, their actions were not deliberately indifferent. The doctors made efforts to cure the problem in a reasonable and sensible manner.”); *McRaven v. Sanders*, 577 F.3d 974, 982 (8th Cir.2009) (“Negligent misdiagnosis does not create a cognizable claim under § 1983”); *Estelle v. Gamble*, 429 U.S. 97, 104–05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (deliberate indifference includes intentional interference with prescribed treatment; inadvertent or negligent failure to provide adequate medical care cannot be said to constitute “unnecessary and wanton infliction of pain”). “Deliberate indifference may be found where medical care is so inappropriate as to evidence intentional maltreatment.” *Fourte v. Faulkner Cty., Ark.*, 746 F.3d 384, 386–90 (8th Cir. 2014) (citing *Smith v. Jenkins*, 919 F.2d 90, 92 (8th Cir.1990); *See also Vaughn v. Gray*, 557 F.3d 904, 908 (8th Cir.2009) (“In order to demonstrate that a defendant actually knew of, but deliberately disregarded, a serious medical need, the plaintiff must establish a ‘mental state akin to criminal recklessness: disregarding a known risk to the inmate's health.’”). Only such indifference offending “evolving standards of decency” can violate the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285 (1976).

“Medical malpractice is not deliberate indifference.” *Fourte v. Faulkner Cty., Ark.*, 746 F.3d 384, 386–90 (8th Cir. 2014) (citing *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (“Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.”); *Dulany*, 132 F.3d

at 1242 (“[S]howing that another physician might have ordered different tests and treatment does not show deliberate indifference.”); *White v. Farrier*, 849 F.2d 322, 327 (8th Cir.1988) (“Although White's experts diagnosed White's condition differently ... this does not establish deliberate indifference. Physicians are entitled to exercise their medical judgment.”); *Noll v. Petrovsky*, 828 F.2d 461, 462 (8th Cir.1987) (“Noll has only shown ... that another physician in the same circumstance might have ordered different tests and treatment. This evidence raises questions of medical judgment; it does not show deliberate indifference.”)

Even assuming *arguendo* that these Defendants were state actors, which they are not, Hurst fails both elements. First, Hurst was not subjected to a substantial risk of serious harm to where it would be an Eighth Amendment violation. As expressed in the case law, it is recognized that while uncomfortable, a catheterization is a relatively common and safe procedure that is performed in hospitals all across the country. *See Levine v. Roebuck*, 550 F.3d 684, 687–88 (8th Cir. 2008) (summary judgment granted for two nurses on plaintiff's Fourth Amendment claim regarding an involuntary catheterization where nurses were following direction of officer and used proper technique in attempting this rather common and safe procedure). Furthermore, the Defendants' actions were taken in furtherance of providing medical care and treatment to Hurst, who was in an emergent condition – level two trauma with a head injury and altered mental status. Ordering medical diagnostic tests and accomplishing those tests to treat an emergent patient like Hurst is far from

deliberate indifference. Catheterization is a routine medical procedure throughout the United States. This cannot be considered cruel and unusual punishment.

On the second, subjective element, even if the Court were to find that a substantial risk of grave, serious harm to Hurst existed, the Defendants hardly disregarded that risk. In fact, the actions they took were in direct response to a much clearer and more present risk and emergency imposed by Hurst upon himself. Defendants were taking actions in furtherance of diagnosing Hurst's emergent condition and providing him medical care and treatment. It is undisputed that Dr. Rucker rendered a correct diagnosis and that Hurst left the hospital in a stable condition. The Defendants' conduct was medically reasonable, amply justified by concerns for Mr. Hurst's well-being, and, at most, only amounts to a disagreement with Hurst about the best course for his treatment. The law is well established that a disagreement over the course of the medical care and treatment is not deliberate indifference.

F. Plaintiff has failed to show a physical injury or sexual act as required to sustain a Section 1983 claim.

Another well-settled tenet of the PLRA is that, before a prisoner can recover for mental or emotional injury under a § 1983 claim, he must make a showing of "physical injury" or "the commission of a sexual act." 42 U.S.C.A. § 1997e. The term "sexual act" means "the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person...." 18 U.S.C.A. § 2246. This requirement exists for good reason and serves "to reduce the number of

frivolous cases filed by imprisoned plaintiffs, who have little to lose and excessive amounts of free time with which to pursue their complaints.” *Day v. Vaughn*, 56 F. Supp. 3d 1377 (S.D. Ga. 2014).

Hurst has not presented evidence that he was physically injured as a result of the catheterization. Further, there was no sexual act by the Defendants in this case. The catheterization was done to collect residual urine for the urine drug screen, part of many diagnostic tests performed in furtherance of the medical care and treatment of Hurst. Likewise, there was certainly no evidence of intent on the part of Defendants, who are medical professionals, to abuse, humiliate, harass, degrade, or arouse or gratify Hurst. Federal district courts have routinely held that catheterizations like Hurst’s, done for medical purposes, do not constitute physical injuries or sexual acts giving rise to § 1983 claims. *See Saulsberry v. Maricopa County*, 151 F. Supp. 2d 1109 (D. Ariz. 2001) (inmate who was forcibly catheterized to obtain a urine sample did not have claim under the Fourth Amendment because he was catheterized solely for medical reasons); *Tinius v. Carroll County Sheriff Dep’t*, 321 F. Supp. 2d 1064 (N.D. Iowa 2004) (detainee’s substantive due process rights were not violated where he was restrained for purposes of inserting a catheter because the restraint was necessary to collect a urine sample for medical diagnostic purposes). There was no physical injury or sexual act, and therefore Mr. Hurst fails to make a claim for emotional or mental harm under § 1983.

G. Plaintiff has admitted that he did not intend to sue Mercy Hospital, Caleb Miller, and Nurse Nachtigal, as none of them were the individuals who placed the catheter or ordered the catheter placement.

Hurst intended his lawsuit to only “be against the doctor and the individual that catheterized [him].” *Exhibit A*, pgs. 46-47. He did not intend to sue Mercy Hospital, Caleb Miller, and Nurse Nachtigal, as none of them were the individuals who placed the catheter or ordered the urine drug test. *See Exhibit A*, pgs. 45-47, 100. The record is clear that Daniel Burson was the individual that performed the catheterization of Hurst and that the ER doctor was Dr. Mark Rucker. *See Exhibit B, Exhibit C, and Exhibit F*. The remaining Defendants, Mercy Hospital, Caleb Miller, and Angie Nachtigal, RN, must be dismissed with prejudice. *See also* Fed. R. Civ. P. 12(b)(6).

V. CONCLUSION

Based upon the foregoing, Defendants respectfully request that their Motion for Summary Judgment be granted, that Plaintiff take nothing, and for all other just and proper relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing on the CM/ECF system which shall provide notice to the attorneys of record. Because Plaintiff represents himself pro se and it is unclear whether he has access to the CM/ECF system, I do hereby certify that I forwarded a copy of the foregoing via US Mail on January 13, 2022, to the following:

Coby Townsend Hurst, No.99103
ADC - DELTA REGIONAL UNIT
880 East Gaines
Dermott, AR 71638-9505



Glenn S. Ritter