

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted May 2, 2024*

Decided May 31, 2024

BeforeDIANE S. SYKES, *Chief Judge*ILANA DIAMOND ROVNER, *Circuit Judge*JOSHUA P. KOLAR, *Circuit Judge*

Nos. 22-2052 & 23-1882

WILLIAM BUCK,
*Plaintiff-Appellant,**v.*DENNIS YOUNG, et al.,
*Defendants-Appellees.*Appeals from the United States District
Court for the Southern District of
Illinois.

No. 17-cv-00270-SPM

Stephen P. McGlynn,
*Judge.***ORDER**

William Buck, an Illinois prisoner, sued prison officials under 42 U.S.C. § 1983 raising Eighth Amendment violations relating to allegations about unsanitary conditions in his cells and a claimed hand injury. The case proceeded to trial, and at the close of the evidence the district judge entered judgment as a matter of law for the defendants. Buck's appeal centers on that decision; he contends that the evidence was

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

sufficient to submit his claims to the jury. He also challenges the judge's refusal to recruit new volunteer counsel after Buck's first pro bono lawyer withdrew and the exclusion of five unidentified witnesses at trial. We affirm.

We recount the facts from the evidence at trial, construed in the light most favorable to Buck and drawing all reasonable inferences in his favor. *See Ruiz-Cortez v. City of Chicago*, 931 F.3d 592, 601 (7th Cir. 2019). The first set of facts concern Buck's claim about the conditions of his cells in the "crisis-watch" and segregation units of Menard Correctional Center. In late 2016, Buck attempted suicide and was evaluated in the health unit by three mental health professionals—Melissa Pappas, Jacob Weatherford, and Courtney Meyer. They admitted Buck to the health unit, and he spent two weeks there but refused to speak with the mental health staff. At that point, Pappas, acting on the authority of medical professionals, signed off on Buck's transfer to the crisis-watch floor. Correctional officers selected a cell for Buck. Buck claimed that from within that cell he saw "blood all over the place," along with urine, feces, and saliva, and he developed skin rashes. While Buck remained in this cell, Meyer visited him briefly every 30 minutes, but he refused to speak to her. After about ten days, Meyer allowed officers to move Buck to a cell in the segregation unit, where he stayed for two weeks. The cells in that unit are smaller than those on the crisis-watch floor. According to Buck, his new cell was also soiled with urine, feces, saliva, and blood. While housed in this new cell, Weatherford saw Buck briefly every 30 minutes, and Buck refused to speak to him as well. At trial Buck submitted color photos that he tells us on appeal accurately depict how his cells appeared to him. They show generally clean surfaces with some minor defects like peeling paint. A few blemishes on the wall can be seen, but it is not possible to tell whether they are rust or something else. No obvious evidence of blood, soilage, or other human waste appears in the photos.

Pappas, Meyer, and Weatherford testified about these cells. All three said that they saw no feces, blood, urine, or evidence of contamination during their visits to Buck's cells. Further, because Buck refused to talk to them, he never told them about any human waste in his cell or rashes on his skin. Finally, they did not decide which cells Buck would be housed in after he left the health unit; they determined only the floor or unit.

The next set of facts concerns Buck's claim that a nurse was deliberately indifferent to an alleged injury to his hand. Shortly after he left the health unit, Buck clashed with correctional officers, and, he says, he injured his hand, foot, and knee. Medical records from the day of the clash do not reflect any swelling, pain, or trouble

moving his hand. Records from the next day show that Brandy Tripp, a nurse, evaluated him. She noted small abrasions to Buck's left toe and left knee, to which bandages had already been applied, and concluded that he needed no further treatment. According to Buck, Tripp conveyed her conclusion by saying Buck "ain't getting shit" and he was "lucky to have been brought up here." The following day, another nurse thought that his wrist appeared "squished" and ordered an x-ray to assess it. The x-ray showed a "mild irregularity" consistent with an old fracture. This nurse, whose judgment Buck does not question, ordered no treatment.

Two procedural rulings are relevant to this appeal. Shortly before trial, the judge sua sponte recruited pro bono counsel for Buck and reopened discovery. The attorney later moved to withdraw, citing a "fundamental disagreement" with Buck about how to litigate the case and an "irreconcilable breakdown in the attorney-client relationship." The judge granted that motion. Buck did not move for new counsel, and the judge did not sua sponte recruit a new attorney. Also, at trial the judge excluded five of Buck's six witnesses from testifying because Buck had failed to disclose them properly—he described them only as "IDOC staff and inmates"—and he did not identify the subject matter of their testimony.

Finally, on the last day of trial, the defendants moved for judgment as a matter of law. The judge first addressed the motion as it related to Tripp, concluding that no evidence suggested that she was aware that Buck suffered from a serious medical condition. He granted the motion in her favor. Later that same day, after the evidence closed, the judge granted the motion for Pappas, Meyer, and Weatherford. He explained that Buck failed to put forth evidence that could persuade a reasonable jury that the defendants knew about unsanitary conditions in his cells.

On appeal, Buck contests the two procedural rulings, but neither one requires a remand. First, he argues that the district judge unreasonably and prejudicially barred five of his witnesses from testifying at trial. Yet Buck does not deny that he failed to identify these witnesses or explain the subject matter of their testimony, as he was required to do in his pretrial disclosures under Rule 26(e)(1) of the Federal Rules of Civil Procedure. When a party fails to supply required witness information, exclusion of those witnesses is automatic and mandatory unless the delinquent party can show good cause for the violation. FED. R. CIV. P. 26(e)(1), 37(c)(1); *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003). Buck does not contend that he had good cause.

Next, Buck asserts that the district judge abused his discretion by failing to recruit new counsel following the withdrawal of Buck's pro bono counsel. Litigants do

not have a right to counsel in civil cases; it is a privilege. *See Pruitt v. Mote*, 503 F.3d 647, 657 (7th Cir. 2007) (en banc). And district judges need not recruit new counsel to litigants who squander this privilege by refusing to cooperate with their lawyers. *See Dupree v. Hardy*, 859 F.3d 458, 462–63 (7th Cir. 2017). The judge found that such a refusal occurred, and his initial decision to recruit counsel did not bind him to do so again. *See Wilborn v. Ealey*, 881 F.3d 998, 1008 (7th Cir. 2018). Further, Buck did not even ask for new counsel, and for that additional reason, he cannot fault the judge's inaction. *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012).

On the merits, Buck contends that the judge wrongly granted judgment as a matter of law for the defendants. We review that decision de novo. *See Bohanon v. City of Indianapolis*, 46 F.4th 669, 674 (7th Cir. 2022). We will affirm that ruling if the evidence at trial was insufficient to persuade a jury to find for Buck. *See* FED. R. CIV. P. 50(a).

We begin with the judge's ruling that no reasonable jury could find that Pappas, Meyer, and Weatherford violated Buck's Eighth Amendment rights based on the conditions in his cells. To overcome their motion for judgment as a matter of law, Buck needed to point to evidence that would allow a reasonable jury to find that the conditions in his cells created an excessive risk to his health and safety, *see Isby v. Brown*, 856 F.3d 508, 521 (7th Cir. 2017), and that the defendants knew of and deliberately disregarded this risk, *see Farmer v. Brennan*, 511 U.S. 825, 834 (1994). He first argues that, based on his evidence, the conditions of his cell endangered his health. He also claims that the defendants (1) must have known about the unsanitary conditions because they visited him there; (2) chose these cells to retaliate for his silence; and (3) admitted that the conditions in his cells were poor.

After carefully reviewing the evidence, we conclude that the evidence was insufficient for a reasonable jury to find that the conditions in Buck's cells created an excessive risk to his health and safety and that the defendants knew of and deliberately disregarded the risk. The color photographs, which Buck says accurately depict the conditions of his cells, generally show clean (if worn) surfaces. Even if we assume for the sake of argument that there were contaminants in his cells, there is no evidence that the defendants were aware of any contamination. Where the photos show a few blemishes, an observer could not know from mere observation if they reflect dangerous contaminants or just rusty or worn surfaces. When visual evidence accurately depicts what an observer would see (or not see), it should prevail, *see Scott v. Harris*, 550 U.S. 372, 380–81 (2007), and here that evidence would not tell an observer that Buck's cell was soiled.

Consistent with the photographic evidence, Pappas, Meyer, and Weatherford all testified that, although they visited him frequently (if briefly), they observed no feces, blood, urine, or other waste in Buck's cells. Furthermore, apart from the defendants' own observations, Buck—who concedes that he said nothing to the defendants—never told them about any waste or contaminants. Accordingly, the defendants could not have learned about any soilage from Buck. Beyond this, even if we assume (as Buck argues) that the defendants were angered by Buck's refusal to talk with them, nothing about their reaction to his silence implies that they knew his cell was contaminated. Though they authorized his floor or unit placement, they did not select his individual cell. Finally, contrary to Buck's argument, the defendants did not admit that the conditions in his cells were poor; they said only that the cells in the segregation unit were smaller than his crisis-watch cell. With no evidence that the defendants were aware that his cells endangered his health (assuming for the argument's sake that his cells were in fact contaminated), judgment as a matter of law was correct. *See Daugherty v. Page*, 906 F.3d 606, 611 (7th Cir. 2018).

That brings us to Buck's contention that a reasonable jury could find that Tripp, the nurse, was deliberately indifferent to "broken bones" in his hand. To overcome her motion for judgment as a matter of law, Buck needed evidence showing that she knew of and consciously disregarded a serious medical need. *See Farmer*, 511 U.S. at 837. He produced no such evidence. The medical records from the day before Buck saw Tripp—the accuracy of which he does not challenge—do not mention swelling, pain, or trouble moving his hand. And the x-ray from the day after detected only an old fracture that required no treatment. There is no evidence to support his claim of broken bones in his hand from the clash with corrections officers.

Buck has two responses, but neither one is persuasive. First, he argues that Tripp used ill-mannered language. But without evidence of a serious medical condition, her attitude alone does not violate his Eighth Amendment rights. *See Beal v. Foster*, 803 F.3d 356, 358 (7th Cir. 2015). Buck also contends that the judge wrongly granted judgment in her favor without hearing testimony from her. But Tripp was not one of Buck's identified witnesses, and a court may enter judgment as long as the *non-moving party* has been fully heard, *see* FED. R. CIV. P. 50(a), as here.

AFFIRMED

Rovner, J., *concurring in part and concurring in judgment*. I agree with the entirety of the majority's well-reasoned order except for its use of photographic evidence to make factual conclusions regarding the condition of Buck's cell. I concur rather than dissent because although I would not have based any part of the decision on fact finding regarding what the photographic evidence showed, I believe Buck failed to demonstrate that the relevant defendants had any knowledge of the conditions of his cell as required by *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

As I view the record, this court need not engage in any fact finding regarding the photographic evidence. The district court's grant of judgment as a matter of law appears to rely primarily on the fact that the defendants could not have been aware of the condition of the cell. See Memorandum and Order of March 8, 2022, R. 319 at 5-10. The district court relates that Buck "did not notify [the defendants] about the conditions of his cell. He stated that he refused to talk to them." R. 319 at 6. The court's order also notes that when some of the defendants visited his cell, they could not see into it, they did not ever enter the cells, and did not have keys to do so. R. 319 at 9. The district court does engage in some fact finding about the conditions of the cell as displayed in the photographs. For the reasons I elucidate below, that fact finding was not appropriate, but more importantly, it was not necessary to support the district court's grant of judgment as a matter of law. Moreover, the defendants, in their brief, do not rely on the photographs as evidence that the conditions in Buck's cell did not create an excessive risk to his health and safety. In fact, they say nothing about the photographs or what they demonstrate, but rather make alternative arguments about why the defendants could not have known of any risk to Buck's health and safety.

The majority opinion asserts that the photographs of Buck's cell "show generally clean surfaces with some minor defects like peeling paint. A few blemishes on the wall can be seen, but it is not possible to tell whether they are rust or something else. No obvious evidence of blood, soilage, or other human waste appears in the photos." *Supra* at 2. When I viewed the photographs in the record, my first impression was that the photos could suggest that the walls were covered with rust, but they could just as likely suggest that they were covered with blood or feces. If my fellow panel members and I were on a jury, it is not at all clear that we would agree on what these photographs depict. And where reasonable jurors might differ, a case must not be decided as a matter of law; it must go to a jury. *See Gupta v. Melloh*, 19 F.4th 990, 998 (7th Cir. 2021).

When ruling as a matter of law, a district court may not resolve facts, make credibility determinations, weigh the evidence, or decide which inferences to draw from

the facts; its only task is “to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial,” *Johnson v. Advoc. Health & Hosps. Corp.*, 892 F.3d 887, 893 (7th Cir. 2018) (quoting *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003)).¹ As the majority astutely points out, the Supreme Court has carved out a “narrow, pragmatic exception” to the prohibition on fact finding in summary judgment proceedings, but only where video or photographic evidence “utterly discredit[s]” the non-movant’s version of the facts such that there could be no reasonable disagreement about what the video depicts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). *Scott* does not allow a district court to reject a non-movant’s account merely because documentary evidence, such as a video, offers some support for the movant’s version of events. *Gant v. Hartman*, 924 F.3d 445, 450 (7th Cir. 2019). Rather, the exception may be applied only in very rare circumstances where the video evidence is clear, definitive, and not subject to dispute. *Id.* See also *Kailin v. Vill. of Gurnee*, 77 F.4th 476, 481 (7th Cir. 2023) (declining to apply the *Scott* exception when video does not clearly show the events in question).

This is not such a definitive case. As I explained above, it is not at all clear to me what the photographs depict. Moreover, despite Buck’s contention, it is also not obvious what or how much relevance the photos have. The photographs Buck submitted were taken, not while Buck was in the cells at issue, but in preparation for trial many years later. The majority says, “At trial Buck submitted color photos that he tells us on appeal accurately depict how his cells appeared to him.” *Supra* at 2. I am not certain that this is Buck’s contention. In his brief he states, “At Petitioner’ trial, he and witness were testified to his cell conditions. Also it was uncontroverted evidence used of photos to show how the cells were.” Plaintiff’s brief at 5.² But he also says that conditions in the cell grew worse and worse. *Id.* In other words, Buck notes that the condition of the cells was not static, and therefore, we can assume that photographs depicted “how the cells were” at some point in time, but not at all relevant times.

A reasonable jury could conclude that the photographs depict the conditions as alleged by Buck, and therefore this is the type of factual determination that must be made by a jury—not by a district court judge granting judgment as a matter of law, or an appellate court on review of that decision. In my view the district court should not have made any factual determinations about the photographic evidence.

¹ The standard for judgment as a matter of law mirrors that of the summary judgment standard—it is merely employed at a different time and in light of the trial record rather than the discovery record. *Dupree v. Younger*, 598 U.S. 729, 731–32 (2023).

² I have intentionally quoted the original text without correction or notation of error.