

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

McCowan v. McKeown

McCowan · No. 2:21-cv-0369-DAD-CKD P · Decided March 6, 2025

OPINION

(PC) McCowan v. McKeown

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10

11 RAYMOND MCCOWAN, No. 2:21-cv-0369-DAD-CKD P

12 Plaintiff,

13 v. FINDINGS AND RECOMMENDATIONS

14 L. MCKEOWN, et al., 15 Defendants. 16 17 Plaintiff Raymond McCowan is a state prisoner
proceeding pro se with a civil rights 18 action filed pursuant to 42 U.S.C. § 1983. Defendants’
motion for summary judgment is before 19 the court. (ECF No. 70.) The motion should be granted
because plaintiff fails to raise a genuine 20 issue of material fact for trial on any remaining
excessive force or deliberate indifference claim. 21 In light of this determination, and in the
interests of judicial economy, the court need not address 22 defendants’ remaining argument based
on qualified immunity.

23 PROCEDURAL BACKGROUND

24 Plaintiff filed the operative second amended complaint on May 23, 2022. (ECF No. 31.) 25
After the court’s screening of the complaint required by 28 U.S.C. § 1915A(a), this case 26
proceeded on his Eighth Amendment excessive force claim against defendants McKeown and 27
Stephens-Merrill and his Eighth Amendment deliberate indifference claim against defendants 28
McAllister, Ota, and Harris. (ECF Nos. 35, 40.) 1 On July 25, 2024, defendants filed the motion
for summary judgment presently before the 2 court. (ECF No. 70.) Plaintiff opposed the motion.
(ECF Nos. 77, 90.) Defendants filed a reply. 3 (ECF No. 92.)

4 LEGAL STANDARDS FOR SUMMARY JUDGMENT

5 Summary judgment is appropriate when the moving party shows there is “no genuine 6 dispute
as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. 7 Civ. P.
56(a). In order to obtain summary judgment, “[t]he moving party initially bears the burden 8 of
proving the absence of a genuine issue of material fact.” In re Oracle Corp. Sec. Litig., 627 9 F.3d
376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The 10

moving party may accomplish this by “citing to particular parts of materials in the record, 11 including depositions, documents, electronically stored information, affidavits or declarations, 12 stipulations (including those made for purposes of the motion only), admission, interrogatory 13 answers, or other materials” or by showing that such materials “do not establish the absence or 14 presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to 15 support the fact.” Fed. R. Civ. P. 56(c)(1)(A), (B). 16 “Where the non-moving party bears the burden of proof at trial, the moving party need 17 only prove that there is an absence of evidence to support the non-moving party’s case.” Oracle 18 Corp., 627 F.3d at 387 (citing Celotex, 477 U.S. at 325); see also Fed. R. Civ. P. 56(c)(1)(B). 19 Summary judgment should be entered “after adequate time for discovery and upon motion, 20 against a party who fails to make a showing sufficient to establish the existence of an element 21 essential to that party’s case, and on which that party will bear the burden of proof at trial.” 22 Celotex, 477 U.S. at 322. “[A] complete failure of proof concerning an essential element of the 23 nonmoving party’s case necessarily renders all other facts immaterial.” Id. at 323. 24 If the moving party meets its initial responsibility, the burden then shifts to the opposing 25 party to establish that a genuine issue as to any material fact does exist. Matsushita Elec. Indus. 26 Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). In attempting to establish the existence 27 of this factual dispute, the opposing party may not rely upon the allegations or denials of its 28 pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or 1 admissible discovery material, in support of its contention that the dispute exists. Fed. R. Civ. P. 2 56(c)(1); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in 3 contention is material, i.e., a fact “that might affect the outcome of the suit under the governing 4 law,” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific 5 Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., 6 “the evidence is such that a reasonable jury could return a verdict for the nonmoving party,” 7 Anderson, 447 U.S. at 248. 8 In the endeavor to establish the existence of a factual dispute, the opposing party need not 9 establish a material issue of fact conclusively in its favor. It is sufficient that ““the claimed factual 10 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at 11 trial.”” T.W. Elec. Serv., 809 F.2d at 630 (quoting First Nat’l Bank v. Cities Serv. Co., 391 U.S. 12 253, 288-89 (1968)). Thus, the “purpose of summary judgment is to pierce the pleadings and to 13 assess the proof in order to see whether there is a genuine need for trial.” Matsushita, 475 U.S. at 14 587 (citation and internal quotation marks omitted). 15 “In evaluating the evidence to determine whether there is a genuine issue of fact, [the 16 court] draw[s] all inferences supported by the evidence in favor of the non-moving party.” Walls 17 v. Central Contra Costa Transit Auth., 653 F.3d 963, 966 (9th Cir. 2011) (citation omitted). It is 18 the opposing party’s obligation to produce a factual predicate from which the inference may be 19 drawn. Richards v. Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). The opposing party 20 “must do more than simply show that there is some metaphysical doubt as to the material facts.” 21 Matsushita, 475

U.S. at 586 (citations omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’”

23 Id. at 587 (quoting *First Nat’l Bank*, 391 U.S. at 289).

24 EVIDENCE

25 Plaintiff’s opposition to the motion for summary judgment responds to defendants’ 26 statement of undisputed facts but does not cite any disputing competent evidence as required by 27 Local Rule 260(b). (ECF No. 77 at 15-21.) Nevertheless, this court affords leniency to pro se 28 litigants, particularly in civil rights cases. See, e.g., *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th

1 Cir. 2012) (quoting *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010)). Accordingly, the court 2 will consider the entire record. 3 Defendants’ motion asserts the operative second amended complaint is unverified and that 4 plaintiff failed to submit competent evidence in opposition to the motion. (ECF No. 70-1 at 26.) 5 To the contrary, the court finds plaintiff signed the pleading under the penalty of perjury. (ECF

6 No. 31 at 29.) The court considers the allegations therein as evidence in opposition to summary 7 judgment to the extent they are based on plaintiff’s personal knowledge of specific facts that are 8 admissible. See *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004); *Lopez v. Smith*, 203 F.3d 9 1122, 1132 n. 14 (9th Cir. 2000). Plaintiff has also submitted two brief declarations signed under 10 penalty of perjury in opposition to the motion. (ECF No. 77 at 21-24.) 11 Plaintiff attempts to dispute many of defendants’ facts by claiming they are false and 12 fabricated. However, argumentative statements unsupported by competent evidence do not create 13 issues of fact for trial. See *Flaherty v. Warehousemen, Garage & Service Station Employees’ 14 Local Union No. 334*, 574 F.2d 484, 486 n. 2 (9th Cir. 1978) (assertions made in legal 15 memoranda are not evidence); *Burch v. Regents of Univ. of California*, 433 F. Supp. 2d 1110, 16 1119 (E.D. Cal. 2006) (“statements in declarations based on speculation or improper legal 17 conclusions, or argumentative statements, are not facts and likewise will not be cideder on a 18 motion for summary judgment”). Thus, neither a mere claim that a matter is disputed nor an 19 unsworn argument will suffice to dispute a proposed undisputed fact that is supported by 20 competent evidence. 21 I. Plaintiff’s Verified Allegations1 22 In the first cause of action, plaintiff alleges both defendants McKeown and Stephens- 23 Merrill maliciously and sadistically sprayed him directly in the face with pepper spray on March 24 1, 2018, while plaintiff was being held in a choke hold by another inmate who had attacked 25 plaintiff. (ECF No. 31 at 3, 6, 7.) Plaintiff posed no threat to anyone when he was pepper sprayed. 26 1 Statements that are legal conclusions, speculative assertions, and statements of hearsay evidence 27 do not satisfy the standards of personal knowledge, admissibility, and competence required by Federal Rule of Civil Procedure 56(c)(4). *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 28 (9th Cir. 2007) (citations omitted). 1 (Id.) The actions of defendants McKeown and Stephens-Merrill assisted plaintiff’s attacker by 2 pepper spraying plaintiff in his face while his attacker kept on with the

assault. (Id. at 8.) From 3 the effects of the pepper spray, plaintiff suffered pain and burning sensation which lasted for 24 4 hours. (Id. at 3, 6, 8.) In addition, while trying to free himself from the chokehold, plaintiff 5 slipped from the “over spray of pepper spray” causing serious injury to his left knee which 6 required surgery for repair. (Id. at 4, 6-8.) It took several officers to free plaintiff from his 7 attacker. (Id.) Plaintiff then immediately submitted to the officers’ mechanical restraints and 8 never resisted. (Id.) 9 In the second cause of action, plaintiff alleges defendants McAllister, Ota, and Harris 10 refused to examine his left knee and delayed appropriate medical care in violation of the Eighth 11 Amendment. (ECF No. 31 at 11-14.) After the attack by inmate Robinson, plaintiff had a hole in 12 his left knee and severe swelling. (Id. at 12.) Dr. McAllister walked by plaintiff in the waiting 13 room, and, after nurses explained about plaintiff’s serious knee injury, Dr. McAllister went on a 14 coffee break without examining plaintiff’s left knee. (Id. at 11.) Plaintiff asked a correctional 15 officer to go get Dr. McAllister and the officer returned and stated Dr. McAllister is not coming 16 because he’s drinking coffee. (Id. at 12.) Dr. McAllister did not send plaintiff out to the hospital 17 for an x-ray that night. (Id.) Because Dr. McAllister did not write plaintiff a chrono for lower tier, 18 plaintiff had to climb up the stairs to his housing unit, causing pain and further injury. (Id.) 19 The next day, plaintiff wanted to have his knee examined by his primary care provider, 20 Dr. Ota. (ECF No. 31 at 13-14.) However, Dr. Ota “refuse[d] plaintiff a medical examination” 21 and would not even come into the room for the examination by Nurse Harris. (Id. at 13.) Dr. Ota 22 knew the damage plaintiff had suffered after talking to the x-ray technician, and her only plan was 23 to order an MRI while refusing to personally examine plaintiff. (Id. at 13-14.) Plaintiff asked 24 Nurse Harris what was preventing Dr. Ota from coming in to examine plaintiff and Harris said 25 Dr. Ota is surfing the web online, that’s why she’s not coming. (Id.) Nurse Harris took plaintiff to 26 B2-medical supply in a wheelchair only to give plaintiff a knee brace after which plaintiff had to 27 walk back to Victor-wing. (Id.) After this appointment, plaintiff suffered a further injury in the 28 form of a tear to his right quadricep muscle. (Id.) 1 II. Defendants’ Evidence2 2 At all relevant times, plaintiff was a state prisoner incarcerated at California Medical 3 Facility (“CMF”) and the defendants were employed by CDCR and working at CMF. (ECF No. 4 70-2 at 2; ECF No. 77 at 15.) Defendants McKeown and Stephens-Merrill were Correctional 5 Officers; Defendants McAllister and Ota were physicians; and Defendant Harris was a registered 6 nurse. (Id.) 7 On March 1, 2018, plaintiff and inmate Robinson were physically fighting in the Unit IV 8 V-Wing corridor. (ECF No. 70-4, ¶ 3; ECF No. 70-5, ¶ 3.) Defendants Stephens-Merrill and 9 McKeown verbally ordered the inmates to get down and stop fighting, but the fighting continued. 10 (Id.) Defendant Stephens-Merrill used her radio to call for an emergency staff response and saw 11 defendant McKeown and another officer run toward plaintiff and inmate Robinson. (ECF No. 70- 12 5, ¶ 3.) 13 According to defendant Stephens-Merrill, but disputed by plaintiff’s verified allegations, 14 Stephens-Merrill did not see what force or action was taken by staff to stop the fighting because 15 she was maintaining visual observation of other inmates. (ECF No. 70-5, ¶ 4.) According to 16

defendant Stephens-Merrill, but disputed by plaintiff's verified allegations, Stephens-Merrill did not deploy pepper spray or use physical force on plaintiff at any time. (Id.) As defendant McKeown approached plaintiff and inmate Robinson, McKeown observed Robinson holding plaintiff's head with his left arm and punching plaintiff with his right fist while he held plaintiff's head with his left arm. (ECF No. 70-4, ¶ 3.) When McKeown came within approximately six feet, she deployed her pepper-spray cannister and dispersed spray, striking both plaintiff and inmate Robinson in their faces.³ (Id., ¶ 4.) Inmate Robinson continued to punch plaintiff with his right fist until another officer grabbed Robinson and the inmates were physically separated from each other. (Id.) Defendant McKeown had plaintiff in a prone position and defendant Stephens-Merrill handcuffed plaintiff and conducted a clothed-body search. (Id.)

2 Except where otherwise specifically indicated, these facts are undisputed. 3 Plaintiff attempts to dispute this fact by repeatedly arguing pepper spray was sprayed directly in plaintiff's face, but plaintiff has not submitted any competent evidence disputing that McKeown sprayed both plaintiff and inmate Robinson in their faces and struck both inmates in their faces.

1 Defendants Stephens-Merrill and McKeown escorted plaintiff to an eyewash station for 2 decontamination. (Id.) 3 Defendant Stephens-Merrill issued plaintiff a Rules Violation Report ("RVR") for 4 fighting. (ECF No. 70-5, ¶ 8 & Ex. B; ECF No. 70-3 at 5-6.) Plaintiff was found guilty of the 5 offense. (Id.) 6 Fighting between inmates can be an emergency situation for several reasons, including 7 that it poses a risk of injury to the involved inmates and can jeopardize the safety of other 8 inmates, and can disrupt the order of the prison and pull the focus and attention of correctional 9 officers from other inmates. (ECF No. 70-4, ¶¶ 6-7; ECF No. 70-5, ¶¶ 5-6.) In this instance, 10 defendants McKeown and Stephens-Merrill both assessed the fight to be an emergency situation 11 requiring an immediate response to quickly restore order within the building and to secure the 12 safety of inmates and staff in the vicinity. (Id.) Defendants McKeown and Stephens-Merrill 13 believed the fight could have resulted in serious injury to one or both inmates if it continued or 14 escalated into a larger, more violent situation involving other inmates in the area. (Id.) 15 CDCR policy provides that each option for use of force has specific qualities that should 16 be considered when choosing which option to deploy. (ECF No. 70-4, ¶ 5.) Factors to consider 17 include an option's range of effectiveness, the level of potential injury, staff safety, the option's 18 deployment methodology, the level of threat presented, and the distance between correctional 19 staff and the inmate(s), the number of staff and inmates involved, and the inmates' ability to 20 understand and comply with orders. (Id.) 21 Defendant McKeown chose to deploy her pepper-spray canister when she perceived 22 plaintiff and inmate Robinson were not complying with orders to get down and stop fighting 23 because she believed it was the safest force option at the time. (ECF No. 70-4, ¶ 5.) In making 24 this decision, McKeown considered her location and the fact that she could deploy her pepper- 25 spray from a distance. (Id.) McKeown aimed her pepper-spray burst at the inmates' facial area 26 because spraying to the face is the most effective way to incapacitate the person(s) targeted and 27 thereby

stop the inmates from fighting. (Id.) She aimed at both inmates' faces because they were 28 physically close together and their faces were proximate to one another. (Id.) 1 The practice at CMF in March 2018 for physician assessment of inmates who sustained 2 injuries was to utilize an "on-call" procedure during the evening hours. (ECF No. 70-6, ¶ 3 & Ex. 3 1.) Under this procedure, instead of having a physician always working at CMF, a physician 4 would be assigned to be available by telephone. (Id.) Defendant McAllister was the on-call 5 physician on the evening of March 1, 2018. (Id.) 6 Dr. McAllister's on-call log reflects that at 1814 hours on March 1, 2018, he was called by 7 CMF hospice staff and told that an inmate/patient had died. (ECF No. 70-6, ¶¶ 4-5 & Ex. 2.) 8 While still at CMF that night, Dr. McAllister received eight telephone calls regarding 9 inmate/patient issues which were addressed over the telephone and he saw two inmate patients. 10 (Id., ¶ 6 & Ex. 2.) At 2035 hours, Dr. McAllister saw and personally interacted with a high-risk 11 cardiac patient with chest pain. (Id.) At 2130 hours, he sutured an inmate/patient who had 12 sustained a laceration at his upper lip. (Id.) 13 While he was seeing the chest pain patient, and before suturing the patient with the lip 14 laceration, Dr. McAllister received a telephone call about plaintiff. (ECF No. 70-6, ¶ 7 & Ex. 2.) 15 The nurse who called informed Dr. McAllister that plaintiff had sustained a non-serious contusion 16 of his left knee during an altercation and did not need to be seen at the present time. (Id.) Based 17 on the information relayed, Dr. McAllister ordered a prescription for plaintiff to take Ibuprofen 18 for reported pain and ordered that plaintiff be scheduled for a follow up evaluation the next day 19 by the primary care team assigned to treat him. (Id., ¶¶ 7-8.) 20 In Dr. McAllister's opinion, no further treatment of plaintiff was medically indicated at 21 the time he was consulted by telephone concerning plaintiff's condition. (ECF No. 70-6, ¶ 8.) The 22 nurse on whom Dr. McAllister relied was well-trained on what conditions need to be seen by a 23 physician immediately versus what should instead be seen by the primary care team the next day. 24 (Id., ¶ 7.) Additionally, x-rays were not available after hours, and it was important to have these 25 completed with results available at the time of an examination. (Id.) 26 The next day, on March 2, 2018, plaintiff was assessed by Nurse Harris during an in- 27 person appointment. (ECF No. 70-7, ¶ 4 & Ex. 3; ECF No. 71, ¶ 3.) Dr. Ota ordered x-rays of 28 plaintiff's left knee which were completed that day. (ECF No. 70-7, ¶¶ 3-4 & Exs. 1-2.) Dr. Ota 1 prepared a letter informing plaintiff the x-ray results showed no fracture. (Id.) Dr. Ota also 2 ordered crutches for plaintiff which were issued that day. (Id., ¶ 5 & Ex. 3.) 3 In Dr. Ota's medical judgment, crutches were a reasonable and appropriate medical 4 accommodation to facilitate ambulation for a unilateral knee injury of the type presented by 5 plaintiff. (ECF No. 70-7, ¶ 5.) If plaintiff had an issue with using crutches to access his cell, then 6 it was plaintiff's responsibility to notify staff responsible for housing arrangements. (Id., ¶ 5.) In 7 Dr. Ota's opinion, it was not medically necessary for her to also personally examine plaintiff on 8 March 2, 2018. (Id., ¶ 4.) The treatment decisions for plaintiff to have x-rays and be issued 9 crutches were based on Nurse Harris' evaluation of plaintiff and the information relayed to Dr.

10 Ota concerning that evaluation and plaintiff's condition. (Id.) 11 On March 16, 2018, Dr. Ota examined plaintiff to assess injuries to both of plaintiff's 12 knees. (ECF No. 70-7, ¶ 6 & Ex. 4.) Plaintiff complained of pain to his knees and had knee joint 13 laxity. (Id.) On examining plaintiff, and based on her medical judgment, Dr. Ota ordered the 14 following: MRIs of both of plaintiff's knees on an "as soon as possible" basis; that plaintiff be 15 referred to an orthopedic surgeon for further evaluation; knee immobilizer applications (braces 16 and ace wrap) for both knees; pain medications; and that plaintiff be scheduled for a follow up 17 visit after the MRIs and orthopedic consultation had been completed. (Id.) 18 On March 23, 2018, Dr. Ota examined plaintiff at the CMF medical clinic to assess the 19 injuries to both of plaintiff's knees. (ECF No. 70-7, ¶ 7 & Ex. 5.) The results for the MRIs of the 20 knees ordered on March 16, 2018, were not yet available. (Id.) Dr. Ota noted plaintiff's 21 appointment for the referral to an orthopedic specialist was scheduled for the following week. 22 (Id.) Dr. Ota ordered a temporary foam block for plaintiff to elevate his legs. (Id.) Dr. Ota 23 confirmed that plaintiff understood his treatment plan. (Id.) Dr. Ota ordered that plaintiff be 24 scheduled for a follow up appointment in the CMF medical clinic after the orthopedic 25 consultation was completed. (Id.) Dr. Ota instructed plaintiff to use Form 7362 to request health 26 care services if needed. (Id.) 27 After March 23, 2023, all treatment of plaintiff's knee injuries was conducted in 28 accordance with the recommendations of the orthopedic specialists to whom Dr. Ota had referred 1 plaintiff. (ECF No. 70-7, ¶ 8.)

2 DISCUSSION

3 I. Excessive Force 4 A. Legal Standard 5 "[W]henever prison officials stand accused of using excessive physical force in violation 6 of the Cruel and Unusual Punishments Clause, the core judicial inquiry is... whether force was 7 applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to 8 cause harm." *Hudson v. McMillan*, 503 U.S. 1, 7 (1992). The malicious and sadistic use of force 9 to cause harm always violates contemporary standards of decency in violation of the Eighth 10 Amendment. *Whitley v. Albers*, 475 U.S. 312, 327 (1986). 11 The use of pepper spray can implicate a prisoner's Eighth Amendment right to be free 12 from the use of excessive use of force. See *Clement v. Gomez*, 298 F.3d 898, 903-04 (9th Cir. 13 2002); *DeSpain v. Uphoff*, 264 F.3d 965, 978 (10th Cir. 2001). The court's inquiry into an 14 excessive force claim focuses on the extent of the prisoner's injury, the need for application of 15 force, the relationship between that need and the amount of force used, the threat reasonably 16 perceived by the responsible officials, and any efforts made to temper the severity of a forceful 17 response. *Hudson*, 503 U.S. at 7. "Because the excessive force inquiry nearly always requires a 18 jury to sift through disputed factual contentions, and to draw inferences therefrom, [the Ninth 19 Circuit has] held on many occasions that summary judgment or judgment as a matter of law in 20 excessive force causes should be granted sparingly." *Avina v. United States*, 681 F.3d 1127, 1130 21 (9th Cir. 2012) (citation omitted). 22 B. Analysis 23 Viewing the record in the light most favorable to plaintiff, both defendant McKeown and 24 defendant Stephens-Merrill sprayed plaintiff directly in the face with pepper spray while inmate 25 Robinson held plaintiff in a choke

hold and was punching plaintiff. It is undisputed that both 26 defendants had ordered the inmates to get down and stop fighting, but the fighting did not stop. 27 Both McKeown and Stephens-Merrill thus attempted to temper the severity of their forceful 28 response by giving orders to get down and stop fighting before deploying the force at issue, which 1 is a factor tending to indicate the force was applied in a good-faith effort to maintain or restore 2 discipline, rather than maliciously and sadistically to cause harm. See *Williams v. Austen*, No. 3 4:19-CV-06882 YGR, 2021 WL 4222079, at *6 (N.D. Cal. Sept. 16, 2021) (holding a 40 mm. 4 round was fired in a good-faith effort to restore order where neither verbal commands nor the use 5 of chemical agent grenades had stopped the fight). 6 In addition, it is undisputed that inmate Robinson held plaintiff in a choke hold when 7 pepper spray was dispensed directly in plaintiff's face and also in inmate Robinson's face, after 8 the unsuccessful orders were given to get down and stop fighting. Even assuming plaintiff's 9 allegation is true that dispensing pepper spray in this manner did not stop Robinson and instead 10 had the effect of assisting Robinson to continue attacking plaintiff, this allegation alone does not 11 lead to the inference that any defendant used the pepper spray maliciously and sadistically for the 12 very purpose of causing harm. Officials "can have reasonable, but mistaken, beliefs as to the facts 13 establishing the existence of... exigent circumstances... and in those situations courts will not 14 hold that they have violated the Constitution." *Clement*, 298 F.3d at 903 (quoting *Saucier v. Katz*, 15 533 U.S. 194, 206 (2001) (overruled in part on other grounds)). If the evidence only involves a 16 "dispute over the ... existence of arguably superior alternatives," then the plaintiff has not met his 17 burden and the case should not be presented to a jury. *Berg v. Kincheloe*, 794 F.2d 457, 462 (9th 18 Cir. 1986).⁴

19 Moreover, plaintiff's argument that the defendants' actions were improper because 20 plaintiff could have defended himself (ECF No. 77 at 17) must be rejected. Maintaining order in a 21 prison is an important penological interest. See *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) 22 ("Prison administrators ... should be accorded wide-ranging deference in the adoption and 23 execution of policies and practices that in their judgment are needed to present internal order and 24 discipline and to maintain institutional security."). California regulations applicable to CDCR 25 confirm the appropriateness of using force in the situation confronted. See Cal. Code Regs. tit. 15 26 § 3286 ("When incarcerated persons fight, the participants must be separated at once."); § 27 4 Plaintiff does not identify any arguably superior alternatives that defendants McKeown and 28 Stephens-Merrill could have used. 1 3268(b) ("Employees may use reasonable force as required in the performance of their 2 duties...."). 3 Under the undisputed facts in this case, no reasonable jury could find a lack of a need for 4 application of any force or that defendants did not reasonably perceive a serious ongoing threat to 5 plaintiff's safety as well as institutional security. Nothing before the court indicates defendant 6 McKeown or defendant Stephens-Merrill intended any harm toward plaintiff other than the harm 7 normally associated with pepper spray. The physical injury plaintiff suffered as a result of the 8 pepper spray—a knee injury from slipping and

falling—is not one that a reasonable officer would 9 necessarily have foreseen as a result of deploying the pepper spray. There is no evidence before 10 the court that either defendant’s use of pepper spray was malicious or sadistic.⁵ 11 Considering the relevant factors and looking at the relationship between the need for force 12 and the amount of force used, the amount of force used by defendants in deploying pepper spray 13 was reasonable. See *Mayes v. Edwards*, No. 2:19-CV-2236 CKD P, 2022 WL 463396, at *4 14 (E.D. Cal. Feb. 15, 2022), report and recommendation adopted, No. 2:19-CV-02236-TLN-CKD, 15 2022 WL 891607 (E.D. Cal. Mar. 25, 2022) (“Generally, the use of pepper-spray to stop inmates 16 from fighting does not violate the Eighth Amendment”); *Billups v. Ramirez*, No. 1:07-CV-00062- 17 CKJ, 2009 WL 1456641, at *7 (E.D. Cal. May 22, 2009) (use of pepper spray and batons on an 18 inmate in an attempt to stop a fight did not violate the Eighth Amendment). There is no genuine 19 issue of material fact for trial on the issue whether the force used by defendants Stephens-Merrill 20 and/or McKeown was excessive in violation of the Eighth Amendment. Accordingly, the 21 defendants’ motion for summary judgment should be granted as to the excessive force claims. 22

II. Deliberate Indifference 23

A. Legal Standard 24

Denial or delay of medical care for a prisoner’s serious medical needs may constitute a 25 violation of the prisoner’s Eighth Amendment rights. *Estelle v. Gamble*, 429 U.S. 97, 104-05 26 5 Plaintiff argues he also took “baton strikes” from defendant McKeown which constituted 27 excessive force. (ECF No. 77 at 14.) However, plaintiff neither pleaded the baton strikes in his complaint (see ECF No. 31 at 4 [“other officers were delivering strikes to the attacking inmate 28 with their expandable batons”]) nor submitted competent evidence supporting such an argument. 1 (1976). An individual is liable for such a violation only when the individual is deliberately 2 indifferent to a prisoner’s serious medical needs. *Id.*; see *Jett v. Penner*, 439 F.3d 1091, 1096 (9th 3 Cir. 2006); *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002); *Lopez*, 203 F.3d at 1131-32.

4 In the Ninth Circuit, the test for deliberate indifference consists of two parts. *Jett*, 439 F.3d 5 at 1096, citing *McGuckin v. Smith*, 974 F.2d 1050 (9th Cir. 1991), overruled on other grounds by 6 *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc). First, the plaintiff must 7 show a “serious medical need” by demonstrating that “failure to treat a prisoner’s condition could 8 result in further significant injury or the ‘unnecessary and wanton infliction of pain.’” *Id.*, citing 9 *Estelle*, 429 U.S. at 104. “Examples of serious medical needs include ‘[t]he existence of an injury 10 that a reasonable doctor or patient would find important and worthy of comment or treatment; the 11 presence of a medical condition that significantly affects an individual’s daily activities; or the 12 existence of chronic and substantial pain.’” *Lopez*, 203 F. 3d at 1131-1132, citing *McGuckin*, 974 13 F.2d at 1059-60. 14 Second, the plaintiff must show the defendant’s response to the need was deliberately 15 indifferent. *Jett*, 439 F.3d at 1096. This second prong is satisfied by showing (a) a purposeful act 16 or failure to respond to a prisoner’s pain or possible medical need and (b) harm caused by the 17 indifference. *Id.* Under this standard, the prison official must not only “be aware of facts from 18 which the inference could be drawn that a

substantial risk of serious harm exists,” but that person 19 “must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). This “subjective 20 approach” focuses only “on what a defendant’s mental attitude actually was.” *Id.* at 839. 21 A showing of merely negligent medical care is not enough to establish a constitutional 22 violation. *Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir. 1998), citing *Estelle*, 429 U.S. at 105- 23 106. A difference of opinion about the proper course of treatment is not deliberate indifference, 24 nor does a dispute between a prisoner and prison officials over the necessity for or extent of 25 medical treatment amount to a constitutional violation. See, e.g., *Toguchi v. Chung*, 391 F.3d 26 1051, 1058 (9th Cir. 2004); *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). Furthermore, 27 mere delay of medical treatment, “without more, is insufficient to state a claim of deliberate 28 medical indifference.” *Shapley v. Nev. Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1 1985). When a prisoner alleges that delay of medical treatment evinces deliberate indifference, 2 the prisoner must show that the delay caused “significant harm and that [d]efendants should have 3 known this to be the case.” *Hallett*, 296 F.3d at 745-46; see also *McGuckin*, 974 F.2d at 1060. 4 B. Analysis 5 Defendants do not dispute that plaintiff had a serious medical need with respect to his 6 knee injuries. (ECF No. 70-1 at 18.) The court therefore focuses on their responses to plaintiff’s 7 serious medical need. 8 1. Dr. McAllister 9 As the on-call physician on the evening of March 1, 2028, Dr. McAllister reasonably 10 relied on the nurse who called him and relayed information about plaintiff in determining the 11 course of treatment that plaintiff be given a prescription for Ibuprofen for reported pain and be 12 scheduled for a follow up evaluation the next day by his primary care team. Plaintiff argues he 13 had “a hole in his left knee with severe bruising and bleeding...” and that the nurses knew he 14 needed “immediate x-rays” and that they conveyed these facts to Dr. McAllister, who 15 intentionally denied or delayed treatment. (ECF No. 90 at 10; see also ECF No. 31 at 12.) 16 However, the facts viewed in the light most favorable to plaintiff do not support the argument. 17 Plaintiff fails to dispute with competent evidence that the nurse who called Dr. McAllister 18 informed him plaintiff did not need to be seen by the doctor that night. It is also undisputed that 19 x-rays were not available after hours. Plaintiff’s disagreement with the course of treatment 20 chosen, and specifically, his personal opinion that he should have been taken to the hospital that 21 night for x-rays, does not suffice to show Dr. McAllister chose a course of treatment that was 22 medically unacceptable under the circumstances, or that he was otherwise deliberately indifferent. 23 See *Toguchi*, 391 F.3d at 1058; *Sanchez*, 891 F.2d at 242. 24 Plaintiff fails to raise a genuine dispute of material fact for trial regarding Dr. McAllister’s 25 alleged purposeful failure to respond to plaintiff’s pain or medical need. There is also no evidence 26 that defendant McAllister knew a delay in treatment until the following day would cause 27 significant harm. See *Farmer*, 511 U.S. at 837 (the defendant must not only “be aware of facts 28 from which the inference could be drawn that a substantial risk of serious harm exists,” but “must 1 also draw the inference”); *Hallett*, 296 F.3d at 745-46; *McGuckin*, 974 F.2d at 1060. Thus, the 2 defendants’ motion for summary judgment should be granted as to plaintiff’s deliberate 3 indifference claim

against Dr. McAllister. 4 2. Dr. Ota and Nurse Harris 5 Similarly, plaintiff fails to raise a genuine dispute of material fact for trial regarding the 6 alleged deliberate indifference of Dr. Ota and Nurse Harris. Plaintiff was assessed by Nurse 7 Harris during an in-person appointment on March 2, 2018, the day after plaintiff sustained the 8 injury to his left knee. That same day, and based on Nurse Harris' assessment, Dr. Ota ordered x- 9 rays of plaintiff's left knee which were completed that day. Before the end of the day, Dr. Ota 10 prepared a letter informing plaintiff the x-ray results showed no fracture. Dr. Ota also ordered 11 crutches for plaintiff which Nurse Harris issued to plaintiff that day. 12 On March 16, 2018, and again on March 23, 2018, Dr. Ota examined plaintiff again to 13 assess injuries to both knees. On March 16, Dr. Ota ordered MRIs on an "as soon as possible" 14 basis, referred plaintiff to an orthopedic specialist, ordered that plaintiff be issued a knee brace, 15 and ordered that a follow up visit be scheduled. On March 23, Dr. Ota examined plaintiff, noted 16 the MRIs were not yet available, noted that plaintiff's appointment for the referral to an 17 orthopedic specialist was scheduled for the following week, and ordered that plaintiff be 18 scheduled for a follow up appointment in the CMF medical clinic after the orthopedic 19 consultation was completed. After March 23, 2023, all treatment of plaintiff's knee injuries was 20 conducted in accordance with the recommendations of the orthopedic specialists. 21 Plaintiff fails to submit any evidence suggesting Dr. Ota and/or Nurse Harris acted with 22 deliberate indifference to plaintiff's knee injuries. In Dr. Ota's medical judgment, crutches were a 23 reasonable and appropriate medical accommodation to facilitate ambulation for a unilateral knee 24 injury of the type presented by plaintiff, and it was not medically necessary for her to personally 25 examine plaintiff on March 2, 2018, instead of or in addition to the examination by a nurse. 26 Plaintiff has submitted no evidence suggesting that the treatment decisions made were medically 27 unacceptable under the circumstances, or that Nurse Harris or Dr. Ota were otherwise deliberately 28 indifferent. Plaintiff's argument that he was adamant that he did not want crutches and that he 1 instead requested a wheelchair, walker, or cane, and told Nurse Harris he had problems with 2 crutches in the past and would fall (ECF No. 77 at 12-13) would not suggest deliberate 3 indifference on the part of any defendant even if plaintiff had submitted competent evidence to 4 support the argument. There is no evidence Nurse Harris or Dr. Ota knew issuing crutches put 5 plaintiff at a risk of serious harm, or that issuing crutches was medically inappropriate under the 6 circumstances. Plaintiff's personal disagreement regarding the appropriateness of being issued 7 crutches instead of a wheelchair, walker, or cane does not suffice to raise a genuine dispute of 8 material fact for trial. See *Toguchi*, 391 F.3d at 1058; *Sanchez*, 891 F.2d at 242. 9 Viewing the evidence in the light most favorable to plaintiff, there is no evidence that 10 either Dr. Ota or Nurse Harris was aware that a substantial risk of serious harm existed to plaintiff 11 which they purposefully disregarded. See *Farmer*, 511 U.S. at 837. Accordingly, the defendants' 12 motion for summary judgment should be granted as to plaintiff's deliberate indifference claim 13 against Dr. Ota and Nurse Harris.

14 PLAIN LANGUAGE SUMMARY FOR PRO SE PARTY

15 The following information is meant to explain this order in plain English and is not 16 intended
as legal advice. 17 The court has reviewed the evidence submitted in the pending motion for
summary 18 judgment and your oppositions, along with the allegations in your verified second
amended 19 complaint and concluded there is no genuine issue of material fact for trial.
Therefore, the 20 undersigned is recommending the defendants' motion for summary judgment be
granted. You 21 have 14 days to explain to the court why this is not the correct outcome. If you
choose to do so, 22 label your explanation "Objections to Magistrate Judge's Findings and
Recommendations." The 23 district court judge assigned to your case will review any timely
objections filed and make a final 24 decision on the motion for summary judgment. 25 //// 26 ////
27 //// 28 ////

1 CONCLUSION

2 For the reasons set forth above, IT IS RECOMMENDED as follows: 3 1. Defendants' motion
for summary judgment (ECF No. 70) be GRANTED. 4 2. The Clerk of Court be directed to close
this case. 5 These findings and recommendations are submitted to the United States District Judge
6 || assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after
7 || being served with these findings and recommendations, any party may file written objections
with 8 | the court and serve a copy on all parties. Such a document should be captioned
"Objections to 9 || Magistrate Judge's Findings and Recommendations." Any response to the
objections shall be 10 || filed and served within 7 days after service of the objections. The parties
are advised that failure 11 || to file objections within the specified time may waive the right to
appeal the District Court's 12 || order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). 13 | Dated:
March 6, 2025 / ae □□ / a Ly a

4 CAROLYN K DELANEY

15 UNITED STATES MAGISTRATE JUDGE

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