UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Deanna Dwyer, Individually and as Next Friend for Blake Dwyer, a Minor
v.
City of Corinth, Texas, a Texas Home Rule City, et. al.

Case No. 4:09-CV-198

2010 U.S. Dist. Lexis 85334

July 23, 2010, Decided
July 23, 2010, Filed

Summary Judgment granted, in part, summary judgment denied, in part by, and cause dismissed by Dwyer v. City of Corinth, 2010 U.S. Dist. Lexis 85329 (E.D. Tex., Aug. 18, 2010)

Amos L. Mazzant, United States Magistrate Judge. Judge Schneider.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court are Defendant City of Corinth's Motion for Summary Judgment (Dkt. #66), Defendant Carson Crow's Motion for Summary Judgment (Dkt. #67), Defendant Craig Hubbert's Motion for Summary Judgment (Dkt. #68), and Defendant Kevin Tyson's Motion for Summary Judgment (Dkt. #69).

BACKGROUND

On or about July 17, 2007, paramedics responded to a 911 call where Plaintiff, a sixteen-year-old boy, had suffered a seizure. 1 Plaintiff had spent the night at the home of a friend and suffered the seizure shortly after waking. When the paramedics arrived, Plaintiff was in an upstairs bedroom, seated on the floor. Plaintiff was conscious, but the paramedics did not necessarily consider Plaintiff responsive. When the paramedics attempted to place Plaintiff on a gurney, Plaintiff became combative and would not conform to orders from the paramedics. Plaintiff continually attempted to get off the gurney. Plaintiff flailed wildly and resisted any attempts by the paramedics to calm him and physically subdue him as they attempted to transport him down the stairs. Plaintiff hit one of the paramedics in the face, although the parties dispute whether this was intentional. The paramedics found Plaintiff to be very difficult to control physically.

The paramedics described Plaintiff as violent, combative, and massively strong. They were able to communicate with Plaintiff somewhat. Plaintiff told them that if they let him go, he would relax on the gurney. However, as soon as the paramedics loosened their grip on Plaintiff, he would try to get off the gurney and began fighting them again. Plaintiff does not dispute that he was uncooperative and resisting the paramedics, but he does not remember any of the events. He

acknowledges that he was "starting to freak out," and it is not unusual for him to be uncooperative and noncompliant in the time period immediately following a seizure.

At some point, a marijuana pipe was found. The parties dispute whether the pipe was located in Defendant's pocket, on his person, or just found at the home. It is undisputed that Defendant and some of the other teens had smoked marijuana the night before. The paramedics became concerned that they may be dealing with a drug overdose. The paramedics thought that if the marijuana was laced with, or dipped in, another drug, it might explain Plaintiff's resistance and the difficulty in controlling him. Because the paramedics were having such a difficult time restraining Plaintiff, the decision was made to contact the police.

City of Corinth police officers Defendant Kevin Tyson ("Tyson"), Defendant Craig Hubbert ("Hubbert"), and Defendant Carson Crow ("Crow") responded to the scene. When the officers arrived, Plaintiff was downstairs and the paramedics were struggling to secure him to the gurney in order to transport him to the ambulance. The officers ordered the other teens into another room.

Tyson was the only officer that attempted to help the paramedics physically restrain Plaintiff and strap him on the gurney. The other officers were with the other teens in another room. According to Tyson, when he arrived, Plaintiff was resisting the paramedics and swearing and screaming at them. One of the paramedics had tried to insert an IV in Plaintiff's arm, but was unsuccessful due to Plaintiff's resistance. The IV catheter was bent and Tyson could see blood. Tyson was advised that prior to his arrival, Plaintiff had hit one of the paramedics in the face. Tyson attempted to help physically restrain Plaintiff and told him to calm down so the paramedics could help him.

The parties dispute whether or not Tyson knew Plaintiff had suffered a seizure. Plaintiff's friends testified that at least two of Plaintiff's friends told the officers about the seizure. They testified that they were screaming at the officers and paramedics that Plaintiff was suffering from a seizure and could not understand their commands. Tyson testified that he did not learn that Plaintiff suffered a seizure until much later, in a newspaper article. Tyson remembered some of the teens yelling, but he could not hear what they were saying. The record does not reflect whether or not any of the paramedics told Tyson that they believed Plaintiff might have overdosed. The paramedics testified that they did not inform Tyson that Plaintiff suffered a seizure.

Tyson positioned himself to help hold one of Plaintiff's arms and continued to attempt to persuade Plaintiff to relax and stop fighting. Tyson observed one of the paramedics unsuccessfully attempting to insert another IV and saw blood on Plaintiff's arm. Tyson decided that trying to hold him down wasn't working. "So I told him to stop fighting or I was going to tase him." Tyson took the Taser out of his holster and removed the cartridge. He then test fired the Taser one time to make sure it was working. Then he once again asked Plaintiff to stop and relax. Plaintiff continued to resist. Tyson "drive stunned" Plaintiff with the Taser on the back of his arm or the back of his shoulder. When the cartridge is removed no probes are deployed, and the Taser must be touched to a person's body, which is known as "drive stunning." The parties dispute how many times Tyson drive stunned the Plaintiff.

After the first drive stun, Plaintiff stopped struggling, but only for the period of time that the Taser was actually applied to Plaintiff. Tyson and the paramedics determined that they would attempt to move Plaintiff from the house to the ambulance. According to Tyson, he touched the Taser to Plaintiff "five or six times," but only once in the house. The other times were in the ambulance. Records from the Taser show that the Taser was fired fifteen times, and Plaintiff disputes that he was only tased five or six times, due to the number of taser burns on his body. Tyson explains this as the Tazer going off inadvertently, but not touching Plaintiff, during the struggle, because he remembers accidentally turning the Taser on and off with his thumb while trying to help hold Plaintiff down. Tyson also states that due to Plaintiff's struggling, the Taser would move off of Plaintiff's body after he applied it, and then it would quickly come back into contact with Plaintiff.

According to Tyson, in the back of the ambulance a paramedic tried to start another IV, and Plaintiff grabbed the paramedic's chest and the paramedic yelled out in pain. Plaintiff would calm down for a few seconds and then start fighting again after each tase. Then Tyson "would reapply it trying to gain compliance." Eventually, restraints were applied to Plaintiff in the back of the ambulance. An IV was started and Plaintiff was given a sedative. The record does not reflect whether or not the application of the Taser allowed Plaintiff to be restrained or if Plaintiff was held down by Tyson and the paramedics. Plaintiff relaxed at this time and was taken to the hospital.

Plaintiff testified that he did not recall any of the events that day and only remembered a feeling like he was being stung by bees and feeling trapped. Two of Plaintiff's friends that were present during the incident filed a complaint with the City of Corinth Police Department, but they were never contacted about their complaint. Plaintiff's mother testified that she spoke with an officer at the police station to complain, but was told they were very busy with other cases and that he was leaving on vacation. She went back to the police station when the officer said he would return, but he was still out of the office.

PROCEDURAL HISTORY

Defendants Tyson, Crow, Hubbert, and the City of Corinth filed motions for summary judgment on January 25, 2010. On February 10, 2010, the Court ordered (Dkt. #73) Plaintiff to respond to Defendants' summary judgment motions no later than February 17, 2010. On February 17, 2010, Plaintiff filed a Motion to Continue Deadline to Respond to Defendants' Summary Judgment Motions (Dkt. #77) and a Motion to Continue Trial Setting (Dkt. #78). The Court granted Plaintiff's motions (Dkt. #83) and ordered Plaintiff to respond to Defendants' Motions for Summary Judgment by April 19, 2010. On April 19, 2010, Plaintiff filed a second Motion to Continue Deadline to Respond to Motions for Summary Judgment (Dkt. #85). On April 23, 2010, the Court conducted a telephonic hearing on the motion. The Court entered an Order (Dkt. #87) granting the second motion to continue and ordered Plaintiff to respond to Defendants' Motions for Summary Judgment by June 3, 2010. On June 3, 2010, Plaintiff filed a third Motion to Continue (Dkt. #93). On June 4, 2010, the Court entered an Order (Dkt. #94) ordering Plaintiff to file a response to the motions for summary judgment by June 11, 2010. On June 11, 2010, Plaintiff filed a fourth Motion to Continue (Dkt. #95), citing illness. The Court entered an Order

(Dkt. #96), ordering Plaintiff to file responses by June 14, 2010. On June 16, 2010, Plaintiff filed a Response 2 (Dkt. #98) and Motion for Leave for Late Filing of Plaintiff's Response (Dkt. #97). On June 23, 2010, Defendant Tyson filed a reply (Dkt. #99). On July 12, 2010, the Court granted Plaintiff's motion for leave (Dkt. #103).

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted only "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). The initial burden is placed upon the moving party to identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Stults v. Conoco, Inc., 76 F.3d 651, 655-56 (5th Cir. 1996). The movant's burden is only to point out the absence of evidence supporting the non-movant's case. Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 913 (5th Cir. 1992). When the moving party has carried its burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party bears the burden of presenting "specific facts showing there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp.., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In considering a motion for summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). However, the non-movant may not rest on mere allegations or denials of its pleadings, but must respond by setting forth specific facts indicating a genuine issue for trial. Webb v. Cardio-thoracic Surgery Assocs. of North Texas, P.A., 139 F.3d 532, 536 (5th Cir. 1998). The Court must consider all of the evidence but refrain from making any credibility determinations or weighing the evidence. See Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 343 (5th Cir. 2007).

ANALYSIS

As a preliminary matter, Plaintiff has chosen to voluntarily dismiss all claims against Hubbert and Crow. Plaintiff also voluntarily dismisses his failure- to- intervene claim against Tyson. Therefore, the Court dismisses claims against Defendants Hubbert and Crow for use of excessive force and dismisses claims against Defendants Hubbert, Crow, and Tyson for failure to intervene. The claims remaining for summary judgment consideration are use of excessive force against Defendant Tyson and claims of improper training, supervision, discipline, and retention against the City of Corinth.

Excessive Force and Qualified Immunity

Plaintiff alleges that by using the Taser, Tyson violated Plaintiff's right to be free from excessive force. To establish a claim of excessive force against Tyson, Plaintiff must demonstrate: "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." Deville v. Marcantel, 567 F.3d 156, 167 (5th Cir. 2009) (citations omitted). "Excessive force claims are necessarily fact-intensive; whether the force used is 'excessive' or 'unreasonable' depends on 'the facts and circumstances

of each particular case.'" Id. at 167 (citing Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)).

First, Defendants argue that Plaintiff has failed to establish a cognizable injury sufficient to establish a claim for excessive force. In order to establish a claim for excessive force, Plaintiff's "injury must be more than de minimis." Stanley v. City of Baytown, No. H-04-2106, 2005 WL 2757370, *6 (S.D. Tex. Oct. 25, 2005) (citing Tarver v. City of Edna, 410 F.3d 745, 752 (5th Cir. 2005)). Plaintiff testified that he had bloodshot eyes, bruising on his neck and arms, and burn marks from the Taser on his back and on the inside of his arms. Plaintiff also testified that he suffers from paranoia and a fear of police officers. Plaintiff provided pictures, taken the morning after the incident, which depict burn marks on Plaintiff's back and arms caused by Tyson's application of the Taser. As stated by Tyson, the Taser was applied to Plaintiff five or six times. Plaintiff disputes Tyson's testimony, pointing to the photographs, which Plaintiff argues show more than five or six pairs of burn marks. Tyson explains that the Taser would move around on Plaintiff's body because he was struggling, which accounts for the amount of burn marks. Plaintiff provides a copy of his emergency room records which describe him having "taser burns" and "numerous abrasions, bruises, and puncture wounds."

In the opinion of the Court, Plaintiff has provided sufficient evidence of more than de minimis injuries. Defendants, relying upon Stanley, argue that Plaintiff has failed to show "that his injuries are more than some bruises, burn marks or feeling like he needs counseling, feeling like he is afraid of cops and paranoid of police officers." In Stanley, the plaintiff's injuries were considered de minimis, where the plaintiff complained of psychological injuries and "two red marks" due to the application of a Taser. Stanley, 2005 WL 2757370 at *6. The court reasoned that the plaintiff's psychological injuries were not documented outside of the plaintiff's testimony and that the taser burns caused him no subsequent pain, were not permanent, and healed "possibly even the same day." Id. The Court cannot agree that Plaintiff's injuries are analogous to the injuries suffered by the plaintiff in Stanley. Here, it is undisputed that Tyson applied the Taser to Plaintiff at least five or six times, and there is a fact question as to whether Tyson applied the Taser more than five or six times. Further, the plaintiff in Stanley was an adult, described as a large man, and the taser was only applied one time. Id. Here, Plaintiff was sixteen years old at the time of the incident, weighed approximately 170 pounds, and the Taser was applied at least five or six times and maybe more. Plaintiff has established that his injuries were more than de minimis and resulted directly from Tyson's use of the Taser.

Second, Defendants argue that Tyson's conduct was reasonable and he did not employ excessive force against Plaintiff. "The relevant question is whether, taking [Plaintiff's] version of the facts as true, the force used by [Tyson] was both excessive to the need and objectively unreasonable." Autin v. City of Baytown, 174 F.App'x 183, 185 (5th Cir. 2005). Plaintiff does not dispute that he was resisting the paramedics and Tyson while attempting to get off the gurney. Plaintiff also does not appear to dispute that he struck one of the paramedics in the face. The parties do dispute whether striking the paramedic was an intentional punch or an accident due to Plaintiff flailing his arms in an attempt to not be restrained. As previously discussed, the parties disagree as to whether Plaintiff was tased five or six times, as Tyson described, or up to fifteen times, as argued by the Plaintiff. The parties do not dispute that Plaintiff was not being placed under arrest.

However, the parties dispute whether or not Tyson was made aware that Plaintiff was experiencing a seizure or was recovering from a seizure.

Based upon the facts and circumstances of this case, the Court concludes that a jury could conclude that Tyson used excessive force in applying the Taser to Plaintiff multiple times. The Defendants rely upon Stanley, arguing Stanley "is strikingly similar to the facts of this case and should be dispositive of the claims here." The Court disagrees. While the plaintiff in Stanley and the Plaintiff here both suffered seizures, resisted medical care, and were subsequently tased, there are important differences that lead the Court to believe there is a fact question as to whether the use of the Taser against the Plaintiff was unreasonable. First, in Stanley, the "only use of force consisted of a one to two second tase that inflicted no serious injury" and "successfully defused the situation." Stanley, 2005 WL 2757370 at *7. Here, the Taser was applied to Plaintiff at least five or six times and was fired fifteen times. The Court is also unable to conclude from the evidence before it if the use of the Taser by Tyson "successfully defused the situation" or if Plaintiff was restrained by the paramedics.

Second, the Stanley plaintiff was described as "a volatile and very muscular man who was on a cycle of steroids...was dressed only in boxer shorts and was sweating profusely, making it difficult to grasp or hold him." Id. Here, Plaintiff has been described as a sixteen-year-old boy, weighing approximately 170 pounds, which, in the opinion of the Court, weighs against Tyson's actions as being objectively reasonable. See Autin, 174 F. App'x at 185 ("In judging the objective reasonableness of [Defendant's] use of force, it should not be forgotten that [Plaintiff] was fifty-nine years old and five feet two inches tall"). While Plaintiff was described by the paramedics as being "massively strong" and struck one of the paramedics in the face, the Court cannot agree with the Defendants that Tyson's use of the Taser was clearly reasonable and not excessive.

Having reviewed the evidence before it, the Court finds that this case is rife with fact issues preventing summary judgment on the excessive force claim. While the parties appear to agree that the Taser was fired fifteen times, they do not agree how many times the Taser was actually applied to Plaintiff. Tyson states that he was not aware that Plaintiff had just suffered a seizure, but Plaintiff presents evidence that two of Plaintiff's friends were repeatedly telling Tyson and the other officers that Plaintiff had suffered a seizure and could not understand their orders. Based upon the foregoing, the Court finds that Plaintiff has created a fact question as to whether Tyson acted with excessive force.

Defendants argue that even if Tyson's use of the Taser is considered excessive force, Tyson is entitled to qualified immunity from Plaintiff's claims. "The doctrine of qualified immunity shields government officials from liability when they are acting within their discretionary authority, so long as their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known." Wallace v. County of Comal, 400 F.3d 284, 289 (5th Cir. 2005). The Supreme Court has established a two-part test to be applied in determining whether the presumption of qualified immunity is to be overcome. "First, a court must decide whether a plaintiff's allegation, if true, establishes a violation of a clearly established right." Hernandez ex rel. Hernandez v. Texas Dep't of Protective and Regulatory Services, 380 F.3d 872, 879 (5th Cir. 2004) "Second, if the plaintiff has alleged a violation, the

court must decide whether the conduct was objectively reasonable in light of clearly established law at the time of the incident." Id. "Even if the government official's conduct violates a clearly established right, the official is nonetheless entitled to qualified immunity if his conduct was objectively reasonable." Id.

As discussed above, the Court concludes that Plaintiff has presented sufficient evidence to create a fact question as to whether Tyson violated Plaintiff's right to be free from the use of excessive force. Therefore, the Court turns to whether or not Tyson's conduct was objectively reasonable. The relevant question is whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). In the opinion of the Court, facts in question materially bear on the qualified immunity analysis and must be deliberated by a jury. Tyson states that he tased Plaintiff five or six times, but Plaintiff argues that the usage report for Tyson's Taser showed it being fired fifteen times, and points to sets of burn marks on his body showing more than five or six pairs of Taser burns. Further, the parties dispute whether or not Tyson knew that Plaintiff had suffered a seizure or was told that Plaintiff could not understand his commands. As Tyson urges, it may be reasonable for an officer to use a Taser five or six times on a person that is violently resisting medical treatment. However, considering the facts in the light most favorable to the Plaintiff, it may not be reasonable for an officer to apply a Taser up to fifteen times to a person that cannot comprehend commands after suffering a seizure. Simply put, Plaintiff has created a fact question as to whether it would be clear to a reasonable officer that Tyson's actions were unlawful.

Municipal Liability

Plaintiff brings causes of action against the City of Corinth (the "City") under Section 1983 of the Civil Rights Act. In his Second Amended Complaint, Plaintiff argues that the City's "failure to properly train, supervise, test, regulate, discipline or otherwise control its employees and the failure to promulgate and enforce proper guidelines for the use of Tasers constitutes a custom, policy, practice and or procedure in condoning unjustified use of force." Respondent superior does not apply to municipalities for claims under Section 1983. DeVille, 567 F.3d at 170 (citation omitted). In order to hold the City liable under Section 1983, Plaintiff must establish that "execution of [the City's] policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Id. "The plaintiff can prove the existence of a municipal policy through, inter alia, the actions of the municipality's legislative body or an individual with final decision making authority." Id. "The plaintiff can also prove the existence of a municipal custom by pointing to a 'persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.'" Id.

The City can be held liable under Section 1983 for failing to train its police officers. Id. at 171 (citing City of Canton v. Harris, 489 U.S. 378, 387, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)). "However, the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id. "Only where a failure to train reflects 'deliberate' or

'conscious' choice by a municipality...can a city be liable for such a failure under Section 1983." Id. The same deliberate indifference standard also applies to allegations that a municipality failed to properly discipline its police officers. Id. at 171 (citing Piotrowski v. City of Houston, 237 F.3d 567, 581 (5th Cir. 2001)).

Plaintiff has provided no evidence that the City's policies on use of force and the use of a Taser were inadequate or adopted with deliberate indifference to the rights of its citizens. The City has provided evidence of the police department's use of force policy and policy regarding the use of a Taser device. The City requires that all of its officers be certified by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"). All of the officers involved in this case were required by the City to maintain TCLEOSE certification by attending required continuing education and training classes each year. Plaintiff provides no evidence regarding the City's use of force policy or Taser use policy or how the City's policies that were in place were inadequate. Simply, Plaintiff has produced no evidence that would allow a jury to find that the City acted with deliberate indifference towards the training of its officers.

Plaintiff provides the testimony of three individuals regarding his failure-to-discipline claim against the City. According to two of Plaintiff's friends present the day of the incident, they filed a formal complaint with the City, but the City never followed up with them. Also, Plaintiff's mother testified that she spoke with an officer at the police station to complain, but was told they were very busy with other cases and that he was leaving on vacation. She went back to the police station when the officer said he would return, but he was still out of the office. It does not appear that Plaintiff's mother filed a formal complaint. The Defendants offer the City's policy used for disciplinary action including a specific review for uses of force.

There is no evidence that an investigation of the incident occurred or of what became of the complaint filed with the City. However, an unconstitutional policy or custom cannot be inferred even if the City did not discipline any of the officers in this case. The Fifth Circuit has stated that "a city's custom or policy authorizing or encouraging police misconduct 'cannot be inferred from a municipality's isolated decision not to discipline a single officer for a single incident of illegality.'" Fraire v. City of Arlington, 957 F.2d 1268, 1278-79 (5th Cir. 1992) (citation omitted). Liability for failing to supervise or discipline "arises in situations involving a history of widespread abuse, and even then only when there is a causal connection between the failure...and the constitutional violation, and [the] failure... amounts to deliberate indifference." Batiste v. City of Beaumont, 421 F. Supp.2d 1000, 1006 (E.D. Tex. 2006). Here, Plaintiff has failed to provide any evidence that the City has a policy, or its conduct shows a pattern, of failing to discipline, which led to the violation of Plaintiff's rights. Even if the City conducted no investigation after the incident, Plaintiff could not show that the failure to investigate caused the use of excessive force.

Based upon the foregoing, the Court finds that summary judgment should be granted and Plaintiff's claims against the City under Section 1983 should be dismissed.

RECOMMENDATION

The Court RECOMMENDS the following in regard to the causes of action urged by Plaintiff:

1. Defendant City of Corinth's Motion for Summary Judgment (Dkt. #66) should be GRANTED.

2. Defendant Carson Crow's Motion for Summary Judgment (Dkt. #67) should be GRANTED.

3. Defendant Craig Hubbert's Motion for Summary Judgment (Dkt. #68) should be GRANTED.

4. Defendant Kevin Tyson's Motion for Summary Judgment (Dkt. #69) should be GRANTED in part and DENIED in part.

• Plaintiff's cause of action for failure to intervene should be dismissed.

• Plaintiff's cause of action for use of excessive force should not be dismissed.

Within fourteen (14) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen days after service shall bar an aggrieved party from de novo review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. Thomas v. Arn, 474 U.S. 140, 148, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); Rodriguez v. Bowen, 857 F.2d 275, 276-77 (5th Cir. 1988).

Signed this 23rd day of July, 2010.

Amos L. Mazzant
United States Magistrate Judge

Notes:

1 The Court refers to Blake Dwyer as Plaintiff out of convenience and acknowledges the proper plaintiff in this case is Deanna Dwyer as Next Friend for Blake Dwyer.

2 As the Court discusses below, Plaintiff does not address all of the arguments made by the Defendants.