

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF MATERIAL FACTS 2

STANDARD OF REVIEW 6

ARGUMENT 6

 I. MS. KOMSKY DID NOT VIOLATE THE REHABILITATION ACT BECAUSE THE ALARMING RISKS OF ZIKA POSED TOO GREAT A THREAT TO APPEASE AN INFECTED PATIENT AT THE EXPENSE OF ENDANGERING HEALTHY INMATES..... 7

 A. Mr. Rios Was a Direct Threat Because His Highly Contagious Disease Posed a Perceptible Risk of Transmitting Zika to His Healthy Peers in a Combative Environment..... 8

 1. Allowing Mr. Rios to participate in the Boot Camp Program would create a high risk of transmitting Zika because the combat training and uncompromising structure breed injury, violence, and heightened inmate contact..... 10

 2. The nature of the risk of Zika is highly threatening because the virus can be transmitted to other members of the Boot Camp Program through a single instance of blood-to-blood contact..... 12

 B. Reasonable Accommodations to the Boot Camp Program Are Unfeasible Because They Would Alter the Intensive Regimented Structure That Is Necessary to the Program’s Function and Purpose..... 13

 II. MS. KOMSKY DID NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE SHE ADHERED TO ETHICAL MEDICAL STANDARDS AND ACTED PRUDENTLY TO TREAT MR. RIOS’S CONDITION UNDER THE KNOWN CIRCUMSTANCES..... 15

 A. Mr. Rios Did Not Have a Serious Medical Need Because His Complaints to Ms. Komsky and Outward Symptoms Never Demonstrated a Worsening Condition..... 16

 B. Ms. Komsky Did Not Act with Deliberate Indifference in Treating Mr. Rios Because She Was Responsive to His Condition and Elevated Her Level of Care When the Circumstances Were Justified..... 17

CONCLUSION..... 20

TABLE OF AUTHORITIES

Rules

Fed. R. Civ. P. 56(a) 6

Cases

Adams v. Poag, 61 F.3d 1537 (11th Cir. 1995) 19

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 6

Bradley v. Univ. of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922 (5th Cir. 1993)..... 14

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 6

Estelle v. Gamble, 239 U.S. 97 (1976) 1, 15, 18

Farrow v. West, 320 F.3d 1235 (11th Cir. 2003)..... 16, 19

Goebert v. Lee Cty., 510 F.3d 1312 (11th Cir. 2007). 15, 16

Gregg v. Virginia, 438 U.S. 153 (1976) 15

Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991)..... 7, 9, 13

Henderson v. Thomas, 913 F. Supp. 2d 1267 (M.D. Ala. 2012) 9, 10

Hill v. Dekalb Reg'l Youth Det. Ctr., 40 F.3d 1176 (11th Cir. 1994)..... 16, 18

Howell v. Evans, 922 F.2d 712 (11th Cir. 1991) 18

Kohl v. Woodhaven Learning Ctr., 865 F.2d 930 (8th Cir. 1989) 9, 12

McElligott v. Foley, 182 F.3d 1248 (11th Cir. 1999) 16, 18

Montalvo v. Radcliffe, 167 F.3d 873 (4th Cir. 1999)..... 10, 11

Onishea v. Hopper, 171 F.3d 1289 (11th Cir. 1999) 7, 8, 14

Sch. Bd. of Nassau Cty., Fla. v. Arline, 480 U.S. 273 (1987)..... 7, 10, 12, 13

Se. Cmty. College v. Davis, 442 U.S. 397, 406 (1979) 7

Chalk v. C.D. Cal., 840 F.2d 701 (9th Cir. 1988)..... 12

Taylor v. Adams, 221 F.3d 1254 (11th Cir. 2000) 18

Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275 (11th Cir. 2001) 10

Statutes

29 C.F.R. § 32.3 (2003) 13

29 U.S.C. § 794(a) (2015)..... 1

INTRODUCTION

A hero saves one life, but a nurse saves many. As Chief Health Officer at Turner Guilford Knight Correctional Center (“TGKCC”), Jane Komsky protects her inmates with high-level health care in a concentrated cell block where threats of illness and injury loom large. Criminal offender Alexander Rios entered TGKCC infected with the highly contagious Zika virus (“Zika”). Ms. Komsky took swift measures not only to examine, diagnose, and treat Mr. Rios’s unpredictable illness, but to guard against the likely risk that Zika would spread to other inmates. When these goals conflicted, Ms. Komsky used her best medical judgment to triage competing interests of combating the rapid spread of an unpredictable illness and staying responsive to the evident needs of an infected inmate.

A plaintiff can prevail on a claim for violations of the Rehabilitation Act only if he can prove that (1) the program in which he seeks entry receives federal financial assistance; (2) he has a disability; (3) he has been excluded from the program solely by reason of his disability; and (4) he is “otherwise qualified” to enter the program. 29 U.S.C. § 794(a) (2015). An incarcerated prisoner can state a claim for violations under the Eighth Amendment only if he can show that prison personnel were deliberately indifferent to his serious medical need. *Estelle v. Gamble*, 239 U.S. 97, 104 (1976). First, Ms. Komsky did not violate the Rehabilitation Act because she acted to protect healthy inmates from being exposed to a contagious illness in a high-risk environment. Second, Ms. Komsky did not violate the Eighth Amendment because she made sound medical decisions to provide Mr. Rios with the greatest level of care that she believed his condition warranted. Summary judgment must be granted for Ms. Komsky because, as a matter of law, the record proves that Ms. Komsky never intentionally acted at the expense of Mr. Rios’s rights, but rather in support of the health and safety of her entire medical unit.

STATEMENT OF MATERIAL FACTS

For over thirty years, Jane Komsky has worked diligently as a licensed nurse. (Deposition of Jane Komsky, dated Dec. 13, 2016 (“Komsky Dep.”), at 3:16-4:16, attached as Ex. A). Armed with ambition from a young age, Ms. Komsky pursued her dreams of working in medicine by earning a nursing degree at Queens College. (Komsky Dep. 3:10-15). Upon graduation, Ms. Komsky received her nursing license in Florida and quickly secured positions in emergency rooms. (Komsky Dep. 3:16-4:1). With two decades of fast-paced nursing under her belt, Ms. Komsky transferred to TGKCC in Miami, a federally-funded prison where she has worked for the past ten years. (Order, dated Jan. 12, 2017, at 1, attached as Ex. B; Komsky Dep. 4:15-16). At TGKCC, Ms. Komsky takes new opportunities to “learn and grow” while she consistently protects the health of her inmates. (Komsky Dep. 4:5-14).

As Chief Health Officer at TGKCC, Ms. Komsky is not supervised by a physician and is responsible for triaging the medical needs of inmates in her unit. (Komsky Dep. 4:19-5:6). Ms. Komsky also has discretion to send inmates to a local hospital when she believes they need more extensive care. (Komsky Dep. 5:4-6). To stay “up to date” on medical developments, Ms. Komsky has completed more than the required hours of continuing education (“CE”) and continues to find ways to expand her knowledge of the medical field. (Komsky Dep. 5:22-6:7).

Alexander Rios is a twenty-two-year-old convicted criminal with a history of acting out when he is “just angry.” (Deposition of Alexander Rios, dated Dec. 12, 2016 (“Rios Dep.”), at 3:19-4:4), attached as Ex. C). A repeat offender during his juvenile years, Mr. Rios entered TGKCC to serve a seventeen-month sentence for his most recent arrest for the sale of cocaine. (Rios Dep. 4:5-15). After meeting Ms. Komsky for his requisite medical intake, Mr. Rios informed her that he was experiencing soreness, a headache, and a rash on his arms. (Rios Dep.

5:2-7). In keeping with facility protocol, Ms. Komsky questioned Mr. Rios about his travel history. (Rios Dep. 5-8:15). She learned that he had just returned from a trip to Puerto Rico and she promptly issued a blood test after confirming that Puerto Rico had reported cases of Zika. (Komsky Dep. 10:21-11:3).

A highly contagious disease, Zika is a sweeping news topic as countries have seen a rise in epidemics over the past decade. (World Health Org., Zika Virus Fact Sheet, dated July 6, 2016 (“WHO Fact Sheet”), at 1, attached as Ex. D). Mindful that Zika had been reported in Florida, Ms. Komsky attended a CE on infectious diseases before her encounter with Mr. Rios. (Komsky Dep. 6:9-12). Ms. Komsky learned that Zika is commonly transmitted through mosquito bites, though there has been one confirmed case of transmission through blood-to-blood contact. (WHO Fact Sheet at 1; Komsky Dep. 8:17-22). An infected carrier will exhibit mild, flu-like symptoms, such as rashes, fevers, and muscle pain. (WHO Fact Sheet at 1). Infections are confirmed with blood tests, and the recommended treatments are simple, over-the-counter pain medications, rest, and fluids. (WHO Fact Sheet at 2; Komsky Dep. 7:21-23).

Though Zika’s existence is widely known, its nuances are extremely uncertain and the subject of rigorous research. (WHO Fact Sheet at 1). There is a lack of consensus as to the incubation period and the length of time that Zika can survive in a carrier. (WHO Fact Sheet at 1). Zika does have links to autoimmune and neurological disorders such as GBS and microcephaly. (WHO Fact Sheet at 1). Indeed, extensive research shows that microcephaly is caused by Zika and leads to serious brain defects, underdeveloped heads, and early death in infants. (WHO Fact Sheet at 1; Komsky Dep. 8:1-11). The link between Zika and GBS is less developed and has been confirmed only recently in February 2016. (New Eng. J. Med. Correspondence, Feb. 3, 2016 (“Case Series Report”), at 1, attached as Ex. E). Despite the causal

link between GBS and Zika, the signs of GBS are inconsistent, difficult to diagnose in its early stages, and its complications are still being investigated. (Guillain-Barré Syndrome Pamphlet, July 2011 (“GBS Pamphlet”), at 9, attached as Ex. F; WHO Fact Sheet at 1).

After blood tests confirmed Mr. Rios’s Zika diagnosis one week later, Ms. Komsky took diligent care of Mr. Rios in the medical unit until it was evident that his symptoms had subsided. (Komsky Dep. 11:17-20). Even when Mr. Rios’s symptoms had visibly improved, Ms. Komsky remained cautious about his infectiousness. (Rios Dep. 8:1-13). When Mr. Rios asked Ms. Komsky for medical clearance to participate in TGKCC’s Boot Camp Program, she kindly asked him not to participate. (Rios Dep. 8:1-13). Mr. Rios could return to his regular cell, but Ms. Komsky was afraid to place him in a program that involved closer inmate contact, increased chances of violence, and training with heavy machinery that could lead to “cuts and lacerations.” (Rios Dep. 8:1-13; Komsky Dep. 14:3-18). In fact, the Boot Camp Program has even “higher chances” of violence than normal prison facilities where over 50,000 assaults occur annually. (Komsky Dep. 14:3-18).

Despite its potential for violence, the Boot Camp Program has a ninety percent success rate and offers “re-entry avenues” for young criminal offenders who willing to follow a strict and regimented alternative to incarceration. (Boot Camp Program Report, 2013-14 (“Boot Camp Program Report”), at 25-6, attached as Ex. G). The Boot Camp Program offers vocational training through combat-style instruction and “inmate discipline.” (Boot Camp Program Report at 25). Its structured nature is purposely designed with limited flexibility and intends to discipline inmates in a military-like environment. (Boot Camp Program Report at 25; Komsky Dep. 14:19-15:11). Mr. Rios appealed Ms. Komsky’s decision but exhausted his administrative

remedies after TGKCC's warden strongly deferred to Ms. Komsky's judgment. (Rios Dep. 8:14-17; Order at 1).

In July 2016, Mr. Rios sought further treatment when he began to experience what appeared to Ms. Komsky as a continuation of his Zika symptoms. (Komsky 14:23-5:6). Mr. Rios's generalized complaints sounded like the flu-like symptoms he described at his initial medical intake. (Komsky 14:23-5:6). Consequently, Ms. Komsky prescribed Mr. Rios with over-the-counter pain medication. (Komsky Dep. 15:12-22; Rios Dep. 8:18-9:4). Consistent with her tendency to adhere to medical standards, Ms. Komsky's treatment plan reflected the common medical practice for alleviating symptoms in Zika patients. (WHO Fact Sheet at 1).

As Ms. Komsky made her regular rounds through her unit, she consistently observed Mr. Rios acting normally and without signs of distress. (Komsky Dep. 15:23-16:14). Nevertheless, she quickly responded to Mr. Rios as soon as he wrote a letter specifying that he felt a different type of pain in his arms. (Rios Dep. 9:15-10:4). Upon hearing this new symptom, Ms. Komsky immediately brought Mr. Rios in for another medical examination. (Komsky Dep. 16:7-14). But despite his contentions of pain, the examination revealed healthy vital signs, a stable temperature, and a normal blood pressure level. (Komsky Dep. 16:7-14).

Mr. Rios's positive prognosis changed quickly but without Ms. Komsky's knowledge. (Komsky Dep. 16:7-22). By the time Mr. Rios was diagnosed with GBS on July 25, 2016, his medical state was drastically different than what Ms. Komsky observed six days prior. (Komsky Dep. 16:11-14; Emergency Physician Record, dated July 25, 2016 ("Physician Record"), at 1, attached as Ex. H). Mr. Rios was found in pain in his cell but brought to a local hospital and treated for his condition. (Rios Dep. 11:1-5; Emergency Room Nursing Note Record, dated July 24, 2016 ("ER Record"), at 1, attached as Ex. I). Today, Rios is disabled because of his GBS,

which is the cause of his injuries. (Order at 1). But even though Rios cannot reproduce and his mobility is limited, he currently reports “obvious[]” physical improvement. (Rios Dep. 11:6-16). Medical literature also indicates that only three percent of individuals with GBS suffer a relapse in pain years after their initial attack. (GBS Pamphlet 8).

STANDARD OF REVIEW

A court must grant summary judgment if the movant can show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts affect the outcome of the suit and are determined in a light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). No genuine disputes of material fact exist unless the evidence makes certain that reasonable jury could find for the nonmoving party. *Anderson*, 477 U.S. at 248. Thus, summary judgment is necessary when the nonmoving party fails to make a sufficient showing on any one element of its case. *Celotex*, 477 U.S. at 323.

ARGUMENT

Summary judgment must be granted because Ms. Komsky did not violate Mr. Rios’s rights under the Rehabilitation Act of 1973 or the Eighth Amendment. A plaintiff can succeed in a claim for violating the Rehabilitation Act only if he can establish that (1) the program in which he seeks entry receives federal financial assistance; (2) he has a disability; (3) he has been excluded from the program solely by reason of his disability; and (4) he is “otherwise qualified” to enter the program. 29 U.S.C. § 794(a) (2015). In the context of medical care in prison facilities, violations of the Eighth Amendment are not established unless an incarcerated prisoner can show that a prison official was deliberately indifferent to his serious medical need. *Estelle*, 429 U.S. at 104. Here, Ms. Komsky did not violate the Rehabilitation Act because Mr. Rios

posed a direct and significant threat of transmitting Zika that could not be ameliorated due to the contact-intensive and regimented nature of the Boot Camp Program. Additionally, Ms. Komsky did not violate the Eighth Amendment because she made diligent efforts to respond to each of his complaints and attended to the circumstances of Mr. Rios's condition as he made them apparent.

I. MS. KOMSKY DID NOT VIOLATE THE REHABILITATION ACT BECAUSE THE ALARMING RISKS OF ZIKA POSED TOO GREAT A THREAT TO APPEASE AN INFECTED PATIENT AT THE EXPENSE OF ENDANGERING HEALTHY INMATES.

Ms. Komsky complied with the provisions of the Rehabilitation Act because she protected vulnerable inmates from being exposed to a contagious disease in a high-risk environment. A plaintiff can succeed in a claim for violating the Rehabilitation Act only if he can establish that: (1) the program in which he seeks entry receives federal financial assistance; (2) he has a disability; (3) he has been excluded from the program solely by reason of his disability; and (4) he is "otherwise qualified" to enter the program. 29 U.S.C. § 794(a) (2015).

Rights under the Rehabilitation Act extend only to "otherwise qualified" individuals. *Id.*; *Onishea v. Hopper*, 171 F.3d 1289, 1297 (11th Cir. 1999). An individual is not otherwise qualified when he cannot meet a program's requirements despite his disability. *Id.* at 1300 (citing *Se. Cmty. College v. Davis*, 442 U.S. 397, 406 (1979)). Contagious diseases are considered "disabilities" under Rehabilitation Act. *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 281 (1987). An individual who has a contagious disease cannot meet a program's requirements first, when the disease constitutes a direct threat to the health and safety of others, and second, when reasonable accommodations cannot minimize the threat to an acceptable level. *Onishea*, 171 F.3d at 1297; *Harris v. Thigpen*, 941 F.2d 1495, 1527 (11th Cir. 1991).

Here, TGKCC is a federally-funded program covered by the Rehabilitation Act. (Order at 1). Additionally, Mr. Rios has a disability because he has a physical impairment that limits his

mobility. (Order at 1). The parties also concede that Mr. Rios was encouraged not to participate in the Boot Camp Program after becoming infected with Zika. (Rios Dep. 8:1-13). But Mr. Rios is not “otherwise qualified” because his exposure to Zika created a serious hazard that could not be ameliorated. First, Mr. Rios posed a direct threat because the regimented structure and combat-intensive training of the Boot Camp Program created toxic conditions where Zika would thrive. Second, the Boot Camp Program cannot reasonably accommodate Mr. Rios because changes to mitigate the threat of Zika would undermine the program’s purpose to provide simulation military training.

A. Mr. Rios Was a Direct Threat Because His Highly Contagious Disease Posed a Perceptible Risk of Transmitting Zika to His Healthy Peers in a Combative Environment.

Mr. Rios was a direct threat to members of the Boot Camp Program because the militant nature of the program all but guaranteed that his contagious disease would rapidly spread. An individual who is disabled with a contagious disease is not “otherwise qualified” under the Rehabilitation Act when he poses a direct threat to the health and safety of others. *Onishea*, 171 F.3d at 1297. A direct threat to the health and safety of others exists where there is a significant risk of communicating a contagious disease. *Id.* Courts in the Eleventh Circuit determine the significance of a risk by conducting an individualized inquiry and making appropriate findings of fact. *Arline*, 480 U.S. at 287. The factual inquiry includes findings, based on the “reasoned and sound” medical judgments of public health officials, concerning: (a) the duration of the risk (how long the carrier is infectious); (b) the severity of the risk (the potential harm to third parties); (c) the probabilities the disease will be transmitted and will cause varying degrees of harm; and (d) the nature of the risk (how the disease is transmitted). *Id.* at 288. By showing deference to reasonable medical judgments, courts balance statutory goals of eliminating disability-based

discrimination and addressing “legitimate concerns of exposing others to significant health risks.” *Harris*, 941 F.2d at 1527; *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1289 (M.D. Ala. 2012) (internal citation omitted).

Here, the duration of Zika is unknown because the infection has the potential to survive in a carrier for an indeterminate amount of time. (WHO Fact Sheet, at 1). Even after visible symptoms subside, Zika can linger in a carrier long afterward and remain contagious. (WHO Fact Sheet, at 1); *see, e.g., Kohl v. Woodhaven Learning Ctr.*, 865 F.2d 930, 937 (8th Cir. 1989) (finding that an individual infected with hepatitis B carried a risk of transmission even though the incubation period was inconclusive). Second, Zika poses severe harm to others because of its scientific links to autoimmune and neurological disorders. (WHO Fact Sheet at 1). The conclusive medical consensus that Zika causes microcephaly in unborn infants is particularly threatening because it leads to serious brain defects and often results in underdeveloped heads and early death. (WHO Fact Sheet at 1; Komsky Dep. 8:1-11).

Third, there is a high probability that Mr. Rios will transmit Zika through blood-to-blood contact because the combat training and regimented structure of the Boot Camp Program make inmates susceptible to bloody injuries and violent behavior. (Boot Camp Program Report at 25; Komsky Dep. 14:3-18). Finally, the nature of the risk creates a direct threat because verified findings of transmitting Zika through blood-to-blood contact demonstrate that a single encounter with contaminated blood can result in infection. (WHO Fact Sheet at 1). Therefore, Mr. Rios was a direct threat to the vitality of the Boot Camp Program because he risked exposing healthy inmates to the consequences of a highly contagious disease.

1. Allowing Mr. Rios to participate in the Boot Camp Program would create a high risk of transmitting Zika because the combat training and uncompromising structure breed injury, violence, and heightened inmate contact.

There was a high probability that Mr. Rios would transmit Zika to members of the Boot Camp Program through blood-to-blood contact because the regimented combat training lends itself to a high frequency of bodily injuries and inmate violence. A disabled individual with a contagious disease poses a direct threat to others in part when there is a strong probability that the disease will be transmitted and will cause varying degrees of harm. *Arline*, 480 U.S. at 288. To the extent that a disease is contagious, the probability of transmission is “largely a function of behavior.” *Henderson*, 891 F. Supp. 2d at 1293. Engaging in high-risk activities increases the probability of transmitting a disease to others. *Id.* at 1292 (finding that HIV-positive inmates who participated in needle-sharing increased the risk of transmitting the virus). Alternatively, a carrier drastically reduces the probability of transmission if he abstains from conduct that is known to create a risk of infection. *Id.*

A person with a contagious disease transmittable through blood aggravates the likelihood of infecting others by engaging in activities involving risks of injury. *Montalvo v. Radcliffe*, 167 F.3d 873, 874 (4th Cir. 1999); *see also Waddell v. Valley Forge Dental Assocs., Inc.*, 276 F.3d 1275, 1281 (11th Cir. 2001) (finding a “sound” probability of transmission where an HIV-positive dentist performed exposure-prone procedures using sharp instruments that could puncture his fingers and cause his blood to flow into a patient’s mouth). In *Montalvo*, a student infected with HIV sought entry into a combat-oriented martial arts program. 167 F.3d at 874. The “hard-style” karate program simulated fight scenes that often resulted in the spillage of blood on participants’ skin and uniforms. *Id.* at 876. The program instructor discouraged the student from participating in the fast-paced combat exercises because they would expose him to

nosebleeds and bloody abrasions. *Id.* at 877. The court held that there was a high probability of transmission because the rigor of the martial arts program naturally led to bloody injuries that even the most conscientious safety procedures could not prevent. *Id.* at 878.

Here, there is a high probability that Mr. Rios would transmit Zika because the intense militant structure of the Boot Camp Program creates a toxic combination of sustained injuries and heightened inmate contact. Like the HIV-positive student in *Montalvo*, whose virus was extremely likely to be transmitted by blood during the contact-intensive fighting, Mr. Rios's Zika infection would spread rapidly through contact with bloody injuries caused by the militaristic combat training. The very purpose of the Boot Camp Program is to provide vocational training with heavy machinery. (Boot Camp Program Report at 25; Komsky Dep. 14:3-18). Even though the participants are extensively supervised, it would be impossible to detect each instance where the sharp edges of the weapons cause bloody lacerations. Like the exposure-prone dental procedures in *Waddell*, where the use of sharp tools naturally created risks of skin puncturing, the use of military equipment in the Boot Camp Program naturally lends itself to open wounds and abrasions. Additionally, the antagonistic nature of combat training creates a greater possibility that participants will cause injury through aggressive behavior. (Komsky Dep. 14:3-18). If the Boot Camp Program breeds more violence than normal prison conditions, where approximately 50,000 cases of assault have been reported annually, then Mr. Rios is sure to be involved in a bloody battle with inmates. (Komsky Dep. 14:3-18). Combined with Mr. Rios's repeated juvenile history of acting belligerent when he "just [gets] angry," the risk of assault is even more problematic. (Rios Dep. 3:19-4:4). Thus, the intensive combat training in a concentrated setting makes it extremely likely that Mr. Rios's contaminated blood would be spilled and exchanged with other inmates.

2. The nature of the risk of Zika is highly threatening because the virus can be transmitted to other members of the Boot Camp Program through a single instance of blood-to-blood contact.

The nature of the risk of Zika is highly threatening because a single exposure to contaminated blood is enough to spread the virus to anyone. A disabled individual with a contagious disease poses a direct threat to others in part when the nature of the risk is highly contagious. *Arline*, 480 U.S. at 288. Whether the nature of the risk is highly contagious depends on how the disease is transmitted. *Id.* Not every contact with a contagious carrier results in transmission, but often a single exposure drastically increases the likelihood of infection. *Kohl*, 865 F.2d at 933.

A direct threat of infection can arise from just one successful transmission. *Id.* at 933. In *Kohl*, a carrier of hepatitis B was released from a learning facility because he risked transmitting the infection to staff members through his bodily fluids. *Id.* at 937. Even though the level of infectiousness varied in each carrier, a single exposure to contaminated blood resulted in a ten to fifteen percent chance of hepatitis B infection. *Id.* The court reasoned that the nature of the risk posed a significant threat because no chance of transmission, however small, was too small to be discounted. *Id.* at 941. Just one exposure leading to infection was evidence that no staff member was safe from the possibility of contracting hepatitis B. *Id.* Therefore, where there existed any possibility of transmission, the nature of the risk was unacceptable. *Id.*; *but see Chalk v. C.D. Cal.*, 840 F.2d 701, 709 (9th Cir. 1988) (finding the mode of transmitting AIDS in an ordinary school setting presented a low threat because medical evidence indicated only a “theoretical possibility” that infection could occur from everyday socializing).

Here, the nature of the risk presents a dangerous threat because one confirmed blood transmission leaves open the possibility that Zika can spread wherever blood-to-blood contact is

likely to occur. As in *Kohl*, where even a ten percent chance of transmitting hepatitis B through bodily fluids placed staff members at a great risk of infection, a single instance of transmitting Zika through blood places inmates at a great risk of infection. Current medical findings have confirmed one case where an infected carrier transmitted Zika through blood-to-blood contact. (WHO Fact Sheet at 1). Unlike in *Chalk*, where a lack of medical consensus failed to establish that everyday social contact could lead to AIDS, there is clear medical consensus to establish that blood-to-blood contact can lead to Zika. There is simply no “theoretical possibility” that blood-to-blood contact *can* transmit Zika from an infected carrier to a healthy victim. Rather, there is scientific proof that blood-to-blood contact *does* transmit Zika. (WHO Fact Sheet at 1). And given that the first large Zika outbreak occurred only ten years ago, scientific findings of the nature of the disease are still in development. (WHO Fact Sheet at 1). Therefore, the available medical judgments prove that the nature of the risk of Zika is highly threatening because it would make anyone susceptible to Mr. Rios’s infection through exposure to his blood.

B. Reasonable Accommodations to the Boot Camp Program Are Unfeasible Because They Would Alter the Intensive Regimented Structure That Is Necessary to the Program’s Function and Purpose.

The Boot Camp Program cannot reasonably accommodate Mr. Rios because any changes to the program would undermine its regimented philosophy and simulated military training. An individual who is disabled with a contagious disease is not “otherwise qualified” within the meaning of the Rehabilitation Act if reasonable accommodations cannot minimize the threat of the disease to an acceptable level. *Harris*, 941 F.2d at 1527. Reasonable accommodations include changes and modifications to the structure or manner in which a program is conducted. 29 C.F.R. § 32.3 (2003). Changes to the structure of a program are unreasonable when they impose financial and administrative burdens or “undue hardship.” *Arline*, 480 U.S. at 288;

Onishea, 171 F.3d at 1301. Reasonable accommodations impose undue hardship when they require a fundamental alternation to the nature of the program. *Arline*, 480 U.S. at 287 n.17.

Accommodations are unreasonable when they undermine a program's function or purpose. *Bradley v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 925 (5th Cir. 1993). In *Bradley*, an HIV-positive surgical assistant regularly touched open wounds and used sharp medical tools inside body cavities. *Id.* at 924. The employer hospital could only minimize the threat of transmitting HIV by removing the assistant from all invasive procedures. *Id.* at 925. Eliminating duties inherent in the surgical assistant's role redefined his responsibilities altogether and compromised the surgical team's dynamic. *Id.* The court agreed that changes to the surgical assistant's job were unreasonable because they compelled the hospital to make critical changes that altered the essential functions of the surgical assistant's job. *Id.*

Here, the accommodations which Mr. Rios proposes are unreasonable because they require modifications that would compromise the success of the Boot Camp Program's regimen. Like in *Bradley*, where the hospital could not mitigate the risk of HIV without eliminating essential functions of a surgical assistant's job, the Boot Camp Program cannot mitigate the risk of Zika without eliminating its combat-intensive structure. The Boot Camp Program is committed to using combat-style instruction as a means of providing "structured re-entry avenues" for criminal offenders. (Boot Camp Program Report at 25). As in the military, the disciplined program demands that participants strictly adhere to inflexible rules governing conduct. (Boot Camp Program Report at 25; Komsky Dep. 14:19-15:11). Even though there would be no financial burden by letting Mr. Rios sit out of high-risk activities, a single alteration to the program would frustrate its systematized nature, which has proven to be ninety percent effective in disciplining inmates. Therefore, modifications to the Boot Camp Program are

unreasonable because loosening the reins on the program's strict rules would undercut its success and demonstrate the very type of rule-breaking that the program seeks to deter.

II. MS. KOMSKY DID NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE SHE ADHERED TO ETHICAL MEDICAL STANDARDS AND ACTED PRUDENTLY TO TREAT MR. RIOS'S CONDITION UNDER THE KNOWN CIRCUMSTANCES.

Summary judgment should be granted because Ms. Komsky acted diligently to ensure that Mr. Rios was always receiving the degree of care that his condition warranted. The Eighth Amendment prohibits the infliction of cruel and unusual punishment. U.S. Const. amend. VIII. The prohibition against cruel and unusual punishment ensures that those who are incarcerated criminals are not subject to treatment involving the "unnecessary and wanton infliction of pain." *Gregg v. Virginia*, 438 U.S. 153, 154 (1976). Deliberate indifference to a serious medical need constitutes an unnecessary and wanton infliction of pain under the Eighth Amendment. *Estelle*, 429 U.S. at 104. An incarcerated individual can state a claim for an Eighth Amendment violation only if he can prove: (1) the existence of a serious medical need; (2) a prison official acted with deliberate indifference to the serious medical need; and (3) the injury was caused by the prison official's wrongful conduct. *Goebert v. Lee Cty.*, 510 F.3d 1312, 1326 (11th Cir. 2007).

Here, the parties have stipulated that GBS caused Mr. Rios's injuries. (Order at 1). Additionally, Mr. Rios did not have a serious medical need because his complaints of pain were consistent with the mild, flu-like symptoms he exhibited when Ms. Komsky first diagnosed him with Zika. Finally, Ms. Komsky did not act with deliberate indifference in treating Mr. Rios because she responded to his complaints and elevated her level of care when his condition justified greater attention. Therefore, Ms. Komsky did not violate the Eighth Amendment because she promptly cared for Mr. Rios under the circumstances that were known to her.

A. Mr. Rios Did Not Have a Serious Medical Need Because His Complaints to Ms. Komsky and Outward Symptoms Never Demonstrated a Worsening Condition.

Mr. Rios did not have a serious medical need because he only demonstrated pain that was consistent with his initial Zika diagnosis. An incarcerated prisoner can state a claim under the Eighth Amendment only if he can prove the existence of a serious medical need. *Goebert*, 510 F.3d at 1326. A serious medical need is one that has been diagnosed by a doctor as mandating treatment or is so obvious that a lay person would easily recognize it as requiring medical attention. *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir. 1994). In either scenario, the need for medical attention must pose a substantial risk of serious harm if left unattended. *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003) (internal citation omitted).

A serious medical need does not exist when there are no discernable signs of harm or where the prisoner fails to disclose symptoms that are otherwise inconspicuous. *Hill*, 40 F.3d at 1191. In *Hill*, an attentive nurse who cared for a juvenile inmate was off duty when members of the prison staff sexually assaulted him. *Id.* at 1180. Even though the inmate bled in his underwear from the incident, he did not inform the nurse of his assault, and his behavior did not reveal any changes in his health. *Id.* at 1191. He merely complained of stomach pains that seemed directly related to his physician's recent diagnosis of a gastrointestinal condition. *Id.* at 1189. The court found that the inmate did not have a serious medical need because he gave the nurse no reason to believe that he was reacting to issues other than his preexisting illness. *Id.* at 1191. The nurse was not liable for new medical complications that were unknowable to her and were not detectable. *Id.*; *contra McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999) (treating stomach pains as a serious medical need where the inmate made specific complaints of the full extent of his pain and exhibited symptoms of vomiting and nausea that made the severity of his condition obvious).

Here, Mr. Rios did not have a serious medical need because his general complaints and outward behavior were consistent with the symptoms from his initial Zika diagnosis. In *Hill*, the juvenile inmate complained of stomach pains that seemed like a continuation of his recurring gastrointestinal issues. Similarly, Mr. Rios complained of generalized pain that seemed like a continuation of the discomfort he described at his medical intake. Immediately prior to his Zika diagnosis, Mr. Rios experienced a headache, fever, and rash on his arms. (Rios Dep. 5:2-7). After Ms. Komsky initially treated Mr. Rios for Zika, he issued subsequent complaints that echoed the same flu-like symptoms. (Rios Dep. 8:18-9:4). But just as the juvenile inmate in *Hill* withheld from his nurse that he was bleeding in his underwear, Mr. Rios withheld from Ms. Komsky the specifics of his severe arm pain during her routine rounds through the cell. Coupled with these general complaints is the fact that, at the time of Mr. Rios's complaints, no doctor had diagnosed him as having any other condition that mandated treatment. (Rios Dep. 4:23-5:1). Without evidence in Mr. Rios's medical record of another issue, Ms. Komsky only had reason to suspect that what she observed in Mr. Rios pointed to the stereotypical malaise associated with Zika. Thus, Mr. Rios did not have a serious medical need because he mostly expressed general, flu-like Zika symptoms to Ms. Komsky. Mr. Rios's failure to come forward sooner about the severity of his pain led Ms. Komsky to treat his symptoms as nothing more than they appeared.

B. Ms. Komsky Did Not Act with Deliberate Indifference in Treating Mr. Rios Because She Was Responsive to His Condition and Elevated Her Level of Care When the Circumstances Were Justified.

Ms. Komsky was not deliberately indifferent in treating Mr. Rios because she was attentive to his complaints and used her medical judgment to respond appropriately to the way Mr. Rios presented his condition. An incarcerated prisoner can state a claim for violations of the Eighth Amendment only if he can prove that a prison official acted with deliberate indifference

to a serious medical need. *Estelle*, 429 U.S. at 104. A prison official does not act with deliberate indifference when he is aware that an inmate is in serious need of medical care and does not fail or refuse to obtain treatment for the inmate. *McElligott*, 182 F.3d at 1255. Not every claim by a prisoner that he has not received medical treatment will amount to an Eighth Amendment violation. *Estelle*, 429 U.S. at 106. A failure or refusal to obtain medical treatment constitutes an Eighth Amendment violation only if there is subjective knowledge of a risk of serious harm and disregard for that risk by conduct that is more than mere negligence. *Id.* Negligent conduct does not amount to an Eighth Amendment violation when it is accidentally inadequate or even medical malpractice. *Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Cir. 2000) (citing *Estelle*, 429 U.S. at 105-06); *see also Howell v. Evans*, 922 F.2d 712, 722 n.8 (11th Cir. 1991) (“[E]rrors medical judgment will rarely constitute deliberate indifference”).

A prison official lacks subjective knowledge of a risk of serious harm when he does not know of the risk or the proper form of treatment. *Hill*, 40 F.3d at 1191; *see also Howell*, 922 F.2d at 721 (declining to hold a prison doctor deliberately indifferent for improperly treating an asthmatic inmate because the doctor thought that administering oxygen would properly counter the inmate’s breathing difficulties). In *Hill*, a prison nurse did not recognize when a juvenile inmate was experiencing complications from a sexual assault because the inmate refused to disclose the incident. *Hill*, 40 F.3d at 1181. When the inmate complained of a stomach ache, the nurse treated the symptom as a continuation of the gastrointestinal condition he experienced the previous day. *Id.* at 1189. The court reasoned that the nurse did not have subjective knowledge of the inmate’s medical issues because she “*did not know* that [he] had been sexually assaulted.” *Id.* at 1191. The nurse did not purposely ignore the symptoms and in fact elevated her care after learning that the inmate had blood in his underwear and was vomiting blood. *Id.* at 1180.

Even if a prison official subjectively knows of a risk of serious harm, he is not deliberately indifferent when he promptly attends to that risk. *Adams v. Poag*, 61 F.3d 1537, 1547 (11th Cir. 1995); *contra Farrow v. West*, 320 F.3d at 1246 (recognizing that a prison dentist was deliberately indifferent because he delayed providing dentures to an inmate who he knew to be suffering from severe pain and bleeding gums). In *Adams*, a nurse consistently responded to breathing complaints by a prison inmate who suffered from asthma. *Adams*, 61 F.3d at 1547. The nurse chose to treat the patient with mild oral steroids because her examination of the inmate revealed no signs of acute distress. *Id.* Though the patient later died without stronger medication, the court held that the nurse was not deliberately indifferent because she did not disregard or fail to treat his condition. *Id.* at 1542. Rather, she was responsive and “sound medical judgment to examine, diagnose, and treat” her patient. *Id.* That the nurse was unsuccessful in treating the inmate did not make the treatment inadequate. *Id.*

Here, Ms. Komsky diligently treated Mr. Rios because she rapidly elevated her level of care as soon as she believed his pain had worsened. Like the nurse in *Hill*, who quickly sought treatment for her patient when she discovered he was severely bleeding, Ms. Komsky took prompt action when Mr. Rios indicated that he was experiencing arm pain. After Mr. Rios’s complaints became more specific, Ms. Komsky brought him to her medical unit for a full examination. (Rios Dep. 9:15-10:4). Even before Mr. Rios reported greater levels of pain, Ms. Komsky provided him with a steady supply of pain medication to alleviate his flu-like Zika symptoms. (Rios Dep. 8:18-9:3; WHO Fact Sheet at 1). Like the nurse in *Adams*, who used sound medical judgment to treat her patient’s breathing problems, Ms. Komsky made thorough efforts to provide Mr. Rios with appropriate treatment at each stage of his illness.

Although Mr. Rios began treatment for GBS six days after he complained of severe arm pain, the delay in his diagnosis was occasioned by his own failure to specify his pain. Unlike the dentist in *Farrow*, who intentionally delayed treating an inmate he knew to be suffering from mouth sores, Ms. Komsky did not intentionally delay treating Mr. Rios because she was not made aware of his arm pain. Mr. Rios did not show outward symptoms of acute distress until the day he was transported to the hospital. (Physician Record at 1; Komsky Dep. 15:23-16:6). Additionally, the first study confirming the causal link between GBS and Zika was reported only five months prior to Mr. Rios's diagnosis. (Case Series Report at 1). With research of the link between GBS and Zika still in its infancy, and absent an obvious showing by Mr. Rios of his pain, Ms. Komsky could not have been expected to know that Mr. Rios was suffering from GBS. Therefore, Ms. Komsky did not display deliberate indifference in treating Mr. Rios because she treated him responsively, using her best medical judgment to treat his uncertain condition.

CONCLUSION

For the foregoing reasons, summary judgment must be granted for Ms. Komsky because she has respected Mr. Rios's rights under Rehabilitation Act and under the Eighth Amendment. She has not violated the Rehabilitation Act because she took prudent measures to guard her dependent inmates from catching a highly contagious disease in an environment that breeds a likelihood for transmission. Additionally, Ms. Komsky has not violated the Eighth Amendment because she took prudent measures to diagnose, examine, and treat the symptoms of Mr. Rios's unpredictable illness exactly as he presented them. The matter is rightfully decided as a matter of law because there is no dispute as to any material fact that Ms. Komsky used her best medical judgment to attend to Zika's risks.

DATED: February 18, 2017

Respectfully submitted,

KEHNER, SILVER, & SIMON, LLP

/s/ Alexandra Munson

**Alexandra Munson
2 Biscayne Blvd., Miami, FL 33131
(305) 555-5555**

**ATTORNEYS FOR
DEFENDANT JANE KOMSKY**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Summary Judgment of Defendant Jane Komsky was served this day via email to counsel for Plaintiff at the following address:

Andrew Wolfson, Esq.
Barrett, Bradley, & Lin LLP
1980 Coral Way
Miami, FL 33145
Email: awolfson@bbandl.com
Attorney for Plaintiff

/s/ Alexandra Munson
Dated: February 18, 2017