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Minn. R. Civ. App. P. 136.01, subd.1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0571**

Charles Richard Stone,
Respondent,

vs.

Kevin Moser, et al.,
Appellants.

**Filed February 1, 2021
Affirmed in part, reversed in part, and remanded
Bratvold, Judge**

Ramsey County District Court
File No. 62-CV-18-2581

Paul Applebaum, Scott W. Swanson, Andrew Irlbeck, Amanda Montgomery, St. Paul,
Minnesota (for respondent)

Keith Ellison, Attorney General, R.J. Detrick, Assistant Attorney General, St. Paul,
Minnesota (for appellants)

Considered and decided by Reilly, Presiding Judge; Worke, Judge; and Bratvold,
Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellants Kevin Moser, Aaron Preston, and Benjamin Wallace, employees of the
Minnesota Sex Offender Program (MSOP), appeal the denial of their motion for summary
judgment based on qualified immunity. They argue that respondent Charles Richard Stone,
an MSOP resident, voluntarily endangered himself before another resident assaulted him,

and that Stone's complaint for damages does not rest on the violation of a "clearly established constitutional right." Because Stone has produced sufficient evidence, when viewed in a light favorable to him, to show that appellants Preston and Wallace violated his clearly established constitutional right to be protected from the MSOP resident, who had repeatedly threatened Stone, we affirm in part and remand for further proceedings. But because Stone has failed to establish a disputed factual issue in support of his supervisor-liability claim against appellant Moser, we reverse in part.

FACTS

These facts summarize the evidence received on summary judgment, including Stone's deposition and video recordings of the assault.

Stone is civilly committed and resides at the MSOP facility in Moose Lake, where he worked in a paid vocational program. His duties included cleaning the Omega 3 housing unit at MSOP. On June 24, 2016, Stone was cleaning the shower room on the second tier when M.B., an Omega 3 resident, exited his room next to the shower room, disrobed, and told Stone, "I hear you like little boys. Do you want to play with a real man?"

Stone reported what happened to MSOP staff, who reviewed security videos and confirmed that the incident occurred. MSOP staff recorded the incident on MSOP's internal electronic communication system, which circulates incident reports to all MSOP staff. Stone also told Moser, the MSOP facility director, about the incident. Stone testified that between the June 24 incident and July 25, 2016, M.B. threatened him daily, saying, "I'm going to get you, you snitch, snitches get stiches." Stone testified that Preston and Wallace,

MSOP security counselors on the Omega 3 unit, were within earshot as M.B. made these threats.¹

On July 25, 2016, Stone's therapist organized a mediation session with M.B. and Stone. M.B. again threatened Stone saying, "I ain't done with him yet, I'm gonna kill him." M.B. told Stone that he hates child molesters, and that if Stone came back to the Omega 3 unit, M.B. would "take [Stone] out." Stone's therapist recorded M.B.'s threats through incident reports. One day later, M.B. threatened Stone while he was working at the Omega 3 unit saying, "Snitches get stitches, come get your beating." Stone later testified that he told Preston and Moser about M.B.'s threats, and that Wallace was present when M.B. threatened him.

Following the mediation session, Stone testified that MSOP staff established a new protocol or practice of locking M.B. in his room on the second tier while Stone attended to his cleaning duties in the Omega 3 unit. Stone stated that two security counselors accompanied him while he cleaned M.B.'s tier.²

Stone continued to work on the Omega 3 unit almost daily until September 7, 2016. Stone testified that MSOP staff members told him that if he ever felt unsafe working on Omega 3, he should leave the unit. Stone also testified that his therapist said he could be

¹ In their depositions, Preston and Wallace denied any knowledge of M.B.'s threats against Stone.

² Preston, Wallace, and Moser have denied MSOP adopted or followed this protocol. In the district court and on appeal, they argue that MSOP lacked adequate resources to provide one-on-one supervision of Stone, and that MSOP policy prohibited locking a resident in his room, citing Wallace's deposition testimony.

taken off the Omega 3 schedule, but she would not support him for any other vocational placement. Stone testified that he told his therapist he felt safe and protected from M.B. under the new protocol.

On September 7, 2016, Stone was cleaning the Omega 3 unit. Stone testified that he saw Preston or Wallace look in M.B.'s room on the second tier, and noticed M.B.'s door remained open. According to Stone, he asked why they had not secured M.B.'s door, and Preston said that M.B. was not in his room.

Preston and Wallace then accompanied Stone to the second tier, where they unlocked the janitor's closet. Stone gathered his supplies and walked down the hall toward the shower room, which is next to M.B.'s room. At about the same time, Preston and Wallace turned and walked down the stairs to the first floor. Stone testified that he thought Preston and Wallace were behind him; he could not hear because of squeaky wheels on his mop bucket and noise from other units. As Stone approached the end of the hall, he turned to greet another resident. Stone testified that he could not see into M.B.'s room at the very end of the hall because the window which opens to the hall was "blackened" out.

When Stone reached the end of the hall, M.B. stepped out of his room and punched Stone in the face. Stone suffered "a fractured orbital socket, fractured jaw bone, fracture down his deviated septum, and a fracture from his temple area to his jaw, loss of vision in his right eye, cross-eyed and blurred vision, and exacerbated glaucoma."

Security cameras captured the assault from two vantage points. The first video begins after Preston and Wallace unlocked the janitor's closet, and shows Stone turn his head toward Preston and Wallace as they start down the stairs, though it is not clear whether

Stone can see either Preston or Wallace. As Stone walks down the hall, a man, presumably M.B., is visible in his room, though it is not clear whether Stone sees him. M.B.'s room window does not appear to be blacked out because light is visible.

The second video shows Stone walking down the hall, but does not capture Stone above his shoulders, and does not show which way he is facing. Stone appears to be facing M.B.'s room as he keeps walking toward the shower room, but Stone turns slightly just before M.B. steps out of his room and hits him. Neither video has an audio recording.

Stone sued, and his amended complaint alleged two counts: a section 1983 claim against Preston, Wallace, and Moser, and a section 1983 supervisor-liability claim against Moser. Moser, Preston, and Wallace moved to dismiss the amended complaint and for summary judgment. During the hearing, the district court denied the motion to dismiss the complaint on the record and heard arguments on the summary-judgment motion. During arguments, Stone's counsel agreed that the claims against Moser should likely be dismissed. Stone's counsel explained that MSOP adopted a procedure to "escort Mr. Stone onto the unit, make sure M.B. [was] . . . either not on the tier or unit or that he's secure[d] in his room. Given that that was put in place, it would seem that—that Mr. Moser, any supervisory capacity claim, we weren't able to prove out." Because he was unable to consult Stone, counsel declined to voluntarily dismiss the claim and would "leave it to [the district court] to dismiss." At the close of the hearing, the district court took the summary-judgment motion under consideration.

The district court denied summary judgment. The district court noted the undisputed and disputed facts of the case, and determined that Preston, Wallace, and Moser were not

entitled to summary judgment. On Stone's claims against Preston and Wallace, the district court determined that whether Preston and Wallace "were deliberately indifferent to the need to protect Stone from M.B., and if so, if that indifference resulted in Stone's injuries, are questions of fact for a jury." The district court identified Stone's deposition testimony that MSOP staff knew about M.B.'s threats against him, adopted a new protocol to protect him, and, on the day of the assault, Preston and Wallace did not follow the protocol. The district court also noted Preston and Wallace's testimony denying any new protocol. On Stone's claim against Moser, the district court cited disputed facts, for example, whether Moser knew of constitutional violations by his subordinates and failed to take "sufficient remedial action."

After Preston, Wallace, and Moser filed a notice of appeal, this court questioned whether the order denying summary judgment was immediately appealable. After briefing by the parties, we determined that, under the collateral-order doctrine, the district court's order involved an abstract legal issue that is immediately appealable. *See Behrens v. Pelletier*, 516 U.S. 299, 313, 116 S. Ct. 834, 842 (1996) (determining collateral-order doctrine allowed immediate review of "abstract issue of law" related to qualified immunity); *see also Mumm v. Mornson*, 708 N.W.2d 475, 481 (Minn. 2006) ("An order denying summary judgment on immunity grounds is immediately appealable.").

This appeal follows.

DECISION

Preston, Wallace, and Moser argue that the district court erred when it denied summary judgment for two reasons: (1) no constitutional violation occurred because Stone

“put himself in the position he claims [a]ppellants should have prevented,” there was no imminent threat of harm by M.B., and no evidence proves deliberate indifference by Preston and Wallace; and (2) the record evidence and caselaw do not establish that appellants violated a clearly established constitutional right. Stone argues that the district court correctly identified disputed fact issues and this court should affirm the denial of summary judgment as to Preston and Wallace—Stone does not defend his supervisor-liability claim against Moser, as explained below.

Appellate courts “review the grant of summary judgment de novo to determine ‘whether there are genuine issues of material fact and whether the district court erred in its application of the law.’” *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quoting *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005)). The applicability of immunity to a government official’s actions is a legal question subject to de novo review. *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004). When reviewing an order granting or denying summary judgment, appellate courts “must consider the evidence in the light most favorable to the nonmoving party.” *Mumm*, 708 N.W.2d at 481 (affirming denial of qualified immunity on summary judgment).

A government official sued for a civil-rights violation under 42 U.S.C. § 1983 may raise the affirmative defense of qualified or “good faith” immunity. *Elwood v. County of Rice*, 423 N.W.2d 671, 674 (Minn. 1988). Under the doctrine, officials are immune from suit when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S.

800, 818, 102 S. Ct. 2727, 2738 (1982). Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986). “On summary judgment, a defendant is entitled to qualified immunity unless (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation.” *Walton v. Dawson*, 752 F.3d 1109, 1116 (8th Cir. 2014) (citations and quotations omitted). We use an objective lens and ask “whether a reasonable officer could have believed [their actions] to be lawful, in light of clearly established law and the information [they] possessed.” *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040 (1987).

Because the applicability of qualified immunity depends on the two elements identified above, we address appellants’ arguments in the context of these two elements. Because the allegations against Preston and Wallace differ substantially from the supervisor-liability claim against Moser, we discuss the qualified-immunity arguments, first, as to Preston and Wallace, and second, as to Moser.

I. The district court did not err in denying summary judgment on qualified immunity for Preston and Wallace because the facts, viewed favorably to Stone, support a violation of his clearly established constitutional rights.

A. Violation of constitutional rights

“Prison officials have a duty to protect prisoners from violence at the hands of other prisoners.” *Farmer v. Brennan*, 511 U.S. 825, 833, 114 S. Ct. 1970, 1976 (1994) (quotation omitted). “[T]he [E]ighth [A]mendment’s prohibition against cruel and unusual punishment requires prison officials to ‘take reasonable measures to guarantee’ inmate

safety by protecting them from attacks by other prisoners.” *Young v. Selk*, 508 F.3d 868, 871 (8th Cir. 2007) (quoting *Brennan*, 511 U.S. at 832, 114 S. Ct. at 1976). Although the Eighth Amendment applies only to convicted prisoners, *Bell v. Stigers*, 937 F.2d 1340, 1342 n.4 (8th Cir. 1991), the Fourteenth Amendment provides civilly committed persons, such as Stone, “at least as many protections as does the Eighth Amendment.” *Hott v. Hennepin County*, 260 F.3d 901, 905 (8th Cir. 2001).³ Thus, we analyze Stone’s failure-to-protect claim under the same standard applicable to a convicted prisoner. *See Nelson v. Shuffman*, 603 F.3d 439, 446 n.3 (8th Cir. 2010) (detainee in Missouri Sexual Offender Treatment Center); *see also Crow v. Montgomery*, 403 F.3d 598, 601 (8th Cir. 2005) (pretrial detainee held at correctional facility).

To survive summary judgment on his failure-to-protect claim, Stone must offer evidence that the “official was deliberately indifferent to a ‘substantial risk of serious harm.’” *Young*, 508 F.3d at 872 (quoting *Brennan*, 511 U.S. at 828, 114 S. Ct. at 1974). There are two requirements to proving deliberate indifference: “The first requirement tests whether, viewed objectively, the deprivation of rights was sufficiently serious. The second requirement is subjective and requires that the inmate prove that the prison officials had a

³ Appellants note that the Fifth Amendment’s Due Process Clause only applies to the federal government, and is “therefore inapplicable here.” We agree. *See Dusenbery v. United States*, 534 U.S. 161, 167, 122 S. Ct. 694, 699 (2002) (noting Fifth Amendment Due Process “prohibits the United States” from “depriving any person of property” without due process, while the Fourteenth Amendment prohibits the state from committing similar deprivations). We therefore analyze the application of qualified immunity only as to the Fourteenth Amendment.

‘sufficiently culpable state of mind.’” *Irving v. Dormire*, 519 F.3d 441, 446 (8th Cir. 2008) (quoting *Brennan*, 511 U.S. at 834, 114 S. Ct. at 1977).

Appellants make three arguments why Stone’s claims against Preston and Wallace cannot survive summary judgment: (1) Stone voluntarily approached M.B. on the day of the assault; (2) no evidence establishes an imminent threat against Stone at the time of the assault; and (3) no evidence allows a jury to find deliberate indifference by Preston and Wallace. We discuss each argument in turn.

1. Stone’s “voluntary conduct”

As to Preston and Wallace’s liability, appellants argue that “[b]ecause video evidence indisputably shows that [Stone] himself created the situation he now claims [a]ppellants failed to protect him from, he cannot show that [a]ppellants violated his constitutional rights.”⁴

Looking at the evidence appellants rely on to argue that Stone voluntarily placed himself in a position to be attacked, we conclude that summary judgment is not appropriate. Appellants rely on the two security-camera videos, contend that Stone’s testimony should

⁴ Appellants cite cases in which federal appellate courts affirmed a grant of summary judgment for the defendant on a section 1983 claim based, at least, in part on the plaintiff’s voluntary act. *See, e.g., Haas v. Weiner*, 765 F.2d 123, 124 (8th Cir. 1985) (affirming summary judgment on section 1983 claim because plaintiff’s use of marijuana and alcohol while in jail was voluntary). The caselaw is, at best, persuasive. But most, if not all of these cases, address whether the plaintiff offered sufficient evidence of causation to survive summary judgment. *See id.* In Minnesota, causation is typically a question of fact for the jury that precludes summary judgment. *See, e.g., Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 193 (Minn. 2019) (“[W]hether proximate cause exists in a particular case is a question of fact for the jury to decide.”). Thus, we do not find it helpful to closely analyze this line of cases.

be disregarded, and cite Supreme Court precedent to support their position: “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007). According to appellants, the video evidence “blatantly contradicts” Stone’s testimony that he did not know Preston and Wallace were on the first tier and that he could not see M.B. in his room.

We disagree with appellants’ characterization of the video evidence. The security videos do not indisputably show that Stone “knew that he was walking toward M.B. and knew that staff [were] not following him.” Rather, when we view the evidence in a light favorable to Stone, as we must do on summary judgment, the videos show that Stone briefly turned his head and likely saw Preston and Wallace lock the janitor’s closet door; it is not clear what Stone saw of Preston and Wallace after this point. The videos also show Stone walking toward M.B.’s room, but they do not show in which direction Stone was looking as he approached the room.

Finally, because the videos lack audio and begin as Preston and Wallace are opening the janitor’s closet, the videos do not provide evidence of any communications between Preston, Wallace, and Stone about whether M.B. was in his room or why his door was not locked. At best, the videos only contradict Stone’s testimony that M.B.’s room window was “blackened out.” But the video evidence does not indisputably show that Stone could or did see M.B. in his room as he walked down the second-tier hallway. Thus, whether

Stone voluntarily encountered M.B. on the day of the assault is a question of fact for the jury.

2. Imminent threat of harm

To lose qualified immunity, an “official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Brennan*, 511 U.S. at 837, 114 S. Ct. at 1979. Appellants contend that the evidence does not establish a constitutional violation because M.B.’s July 25 threat against Stone was six weeks before the assault. Appellants also argue that “the district court’s findings . . . fail to show that they were aware that M.B. posed any imminent threat of serious harm to [Stone] on September 7, 2016.”

Appellants point to *Prater v. Dahm*, 89 F.3d 538 (8th Cir. 1996), where the Eighth Circuit reversed an order denying qualified immunity on a motion for judgment on the pleadings. There, Prater, a prisoner, admitted in his pleadings that “prison officials had assurances from both inmates that there would be no trouble,” and Prater and his assailant “were incarcerated together for a substantial period of time without incident.” *Id.* at 542. The Eighth Circuit held that “[u]nder the circumstances, the two-week period between Prater’s return to [the correctional facility] and the altercation was in itself a sufficient time for prison officials to believe that Prater was not, in fact, in danger.” *Id.* Given *Prater*, Preston and Wallace argue that “there is no authority that would have put [them] on notice that they were required to protect [Stone] from M.B. because of a threat that occurred as many as six weeks earlier.”

Prater is not analogous or persuasive authority. Appellants' argument ignores that Stone testified that M.B.'s threats were ongoing after the initial threat on June 24 and after the mediation session on July 25. Stone testified that M.B. told him he "hate[d]" him after Stone reported M.B.'s threat on June 24, and that, later, M.B. told Stone "I'm going to . . . take you out." Stone also testified that he communicated his fears about M.B. to MSOP officials, who created incident reports circulated by the internal communication system. According to Stone, Preston and Wallace were within earshot and likely heard some of M.B.'s threats. Unlike in *Prater*, no evidence establishes that either Stone or M.B. told officials "there would be no trouble." *Prater*, 89 F.3d at 542. And, according to Stone, M.B. did not assault him earlier because of the new protocol to protect him after the mediation session. Although several weeks had passed after M.B.'s July 25 threat without incident, there is no evidence that M.B.'s hostility toward Stone had ceased. Thus, there is sufficient evidence that M.B. posed an imminent harm to Stone to create a fact issue for the jury.

3. Evidence of deliberate indifference by Preston and Wallace

"[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Brennan*, 511 U.S. at 844, 114 S. Ct. at 1982-83. Under the circumstances, we take as true Stone's testimony that M.B.'s threats were ongoing, MSOP adopted a new protocol to protect Stone after the mediation session, and the new protocol was a reasonable response to M.B.'s threats. Viewing the evidence in a light favorable to Stone, Preston and Wallace failed to follow the new protocol on the day M.B. attacked

Stone. We recognize that Preston and Wallace dispute Stone's testimony about the new protocol. Thus, like the district court, we conclude that disputed facts make summary judgment inappropriate.

Alternatively, Preston and Wallace argue that "according to [Stone]'s own account of the events leading up to the assault on September 7, 2016, Preston and Wallace could not have been deliberately indifferent." They "believed M.B. was not on the Omega 3 Unit [therefore, M.B.] could not have posed a 'known risk' to [Stone] and there was no reason to follow the purported protocol to protect [Stone] from M.B." Viewing the evidence in a light favorable to Stone, as required on summary judgment, Stone relied on assurances from Preston and Wallace that M.B. was not present and the new protocol required Preston and Wallace to determine whether M.B. was present. Thus, Stone offers sufficient evidence of deliberate indifference to defeat summary judgment.

B. Clearly established constitutional right

Even assuming Stone has offered evidence sufficient to pass summary judgment on a violation of his rights, appellants argue that "no [legal] authority put them on notice that they were required to stop [Stone] from continuing his work on M.B.'s unit." Under the second prong of the qualified-immunity analysis, Stone's constitutional right must be "clearly established" at the time of the alleged violation. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 816 (2009). This argument, therefore, is an independent basis for granting summary judgment on qualified immunity.

The "clearly established law" must not be "at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 2084 (2011). "Mere statements of

constitutional principles are too vague to offer guidance to [] officers in the field; the plaintiff must show that the contours of the right were sufficiently clear that a reasonable official would understand that his actions violated that right.” *Baker v. Chaplin*, 517 N.W.2d 911, 914 (Minn. 1994) (citing *Anderson*, 483 U.S. at 639-40, 107 S. Ct. at 3038-39). “While [the Supreme Court’s] case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.” *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (quotations omitted). “The very action in question need not have previously been held unlawful, but its unlawfulness must have been ‘apparent’ in light of pre-existing law.” *Baker*, 517 N.W.2d at 914 (quoting *Anderson*, 483 U.S. at 639-40, 107 S. Ct. at 3038-39).

Stone’s brief to this court points to *Nelson v. Shuffman*, 603 F.3d 439 (8th Cir. 2010), and argues it is “dispositive on this issue.” We agree. There, Nelson, a resident of Missouri Sexual Offender Treatment Center, brought a section 1983 suit against employees of the center for failing to protect him from another inmate. *Id.* at 442-43. Nelson was assigned to share a room with D.D., who was described as “very violent,” “out of control,” and “explosive.” *Id.* at 443. D.D.’s threatening and inappropriate behavior was well known and documented at the treatment center. *Id.* After Nelson was assigned to room with D.D., one of D.D.’s former roommates, who had filed two complaints against D.D., feared for Nelson’s safety. *Id.* at 444. Shortly after Nelson’s new room assignment, D.D. sexually assaulted him, and Nelson brought a section 1983 failure-to-protect action. *Id.* at 444-45.

Defendants moved for summary judgment based on qualified immunity, which the district court denied for some of the defendants. *Id.* On appeal, the Eighth Circuit affirmed

the denial of summary judgment noting, “[w]hether Nelson is ultimately able to prove the alleged factual bases for his claims is a matter left for the finder of fact—not the appellate court on interlocutory appeal.” *Id.* at 448.

Appellants argue that *Nelson* “bears no resemblance to the key facts here,” noting that Stone “chose to place himself in contact with M.B. for months after M.B.’s initial exposure and alleged subsequent threats by working on the Omega 3 Unit where M.B. lived.” Appellants also point out that Stone admits that he “was told by staff to leave if he felt unsafe.” They argue this contrasts “sharply” with *Nelson*, “where D.D. assaulted Nelson shortly after the defendants placed Nelson in the same room as D.D.”

As seen in our analysis of the record evidence above, we disagree with appellants’ framing of the record on summary judgment. Stone is the nonmoving party, so we view the record evidence in his favor. *See Mumm*, 708 N.W.2d at 481. While appellants are correct that the facts here do not precisely mirror the facts in *Nelson*, they bear enough similarity to put appellants on notice of the “unlawfulness” of their failure to protect Stone from M.B. Thus, appellants’ duty was “apparent in light of pre-existing law.” *See Baker*, 517 N.W.2d at 914 (quotation omitted).

Stone has presented evidence that Preston and Wallace knew about M.B.’s repeated threats against Stone, either by direct observation or by circulation of incident reports through MSOP’s internal communication system. Stone’s work duties required that he clean the shower room directly next to M.B.’s room. We agree with Stone that, at this stage of the case, “it is not this court’s function to resolve factual disputes on interlocutory appeal. Therefore, the defendants’ claim the policies were not in effect cannot be

considered.” *See Nelson*, 603 F.3d at 450. Thus, Stone’s evidence that Preston and Wallace failed to follow the new protocol on the day M.B. assaulted Stone defeats summary judgment based on the “clearly established constitutional right” recognized in *Nelson*.

Longstanding caselaw recognizes the duties of prison officials to protect inmates. “[A]s the lower courts have uniformly held, and as we have assumed, prison officials have a duty to protect prisoners from violence at the hands of other prisoners.” *Brennan*, 511 U.S. at 833, 114 S. Ct. at 1976 (quotations omitted).⁵ Similarly, MSOP officials are duty-bound to protect Stone, a civilly committed person, from a known, substantial risk of assault by M.B.

This does not mean that “every injury suffered by one prisoner at the hands of another translates into constitutional liability for prison officials responsible for the victim’s safety.” *Id.* at 834, 114 S. Ct. at 1977. Rather, as we have discussed above, Stone must prove to a jury that he was committed “under conditions posing a substantial risk of serious harm” and that the defendants acted with “deliberate indifference to inmate health or safety.” *See id.* An official directly supervising a plaintiff’s confinement may be held liable if he “knows that [the plaintiff] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.” *Id.* at 847, 114 S. Ct. at 1984.

⁵ *See also Walton*, 752 F.3d at 1114 (affirming denial of summary judgment in section 1983 claim where jail officials left cell doors unlocked overnight, leading to sexual assault of plaintiff by an inmate who had a history of assaults); *Reece v. Groose*, 60 F.3d 487, 491 (8th Cir. 1995) (affirming denial of summary judgment in section 1983 claim where jail officials failed to take reasonable measures to protect plaintiff, a “snitch,” from prisoner with “a propensity for violence”).

Preston and Wallace misconstrue the issue by asking what legal authority put them on notice that “they were required to stop [Stone] from approaching M.B.” Rather, established caselaw requires Preston and Wallace to protect Stone from M.B. because they knew M.B. posed an ongoing serious danger to Stone’s safety. As discussed above, Stone has offered evidence that Preston and Wallace knew of the significant risk of harm M.B. posed to Stone. Accepting Stone’s evidence that MSOP officials adopted a new protocol after the mediation session, Preston and Wallace’s failure to follow the protocol on the day of M.B.’s assault was evidence that they were deliberately indifferent to a known substantial risk. Thus, Preston and Wallace are not entitled to summary judgment on qualified immunity.

II. The district court erred in denying summary judgment on qualified immunity for Moser, because Stone has not alleged a violation of his constitutional rights by Moser.

Appellants argue that Moser is entitled to qualified immunity, even if Preston and Wallace are not. Stone has not alleged, and the record does not show, that Moser was present during the September 7 assault, thus Moser may only be held liable as Preston and Wallace’s supervisor. A supervisor may be liable for the acts of his subordinates “if he (1) had notice of a pattern of unconstitutional acts committed by subordinates; (2) was deliberately indifferent to or tacitly authorized those acts; and (3) failed to take sufficient remedial action; (4) proximately causing [the injury to the inmate].” *Livers v. Schenck*, 700 F.3d 340, 355 (8th Cir. 2012) (alteration and quotation omitted).

The district court denied summary judgment to Moser because “[w]hether Moser [1] was on notice of unconstitutional acts committed by subordinates, [2] was deliberately

indifferent to or tacitly authorized those acts, [3] failed to take sufficient remedial action, and [4] proximately caused Stone's injuries are all disputed facts for a jury to decide." Moser contends that the district court erred and, on appeal, Stone does not respond to Moser's argument.⁶ We address each of the district court's four reasons for denying summary judgment to Moser.

First, Stone offered no evidence that Moser was on notice of unconstitutional acts by his subordinates, Preston and Wallace, and their adherence to the new protocol. Stone has testified to facts showing that Moser knew about M.B.'s threats, but Stone has also testified that MSOP adopted a new protocol to address those threats. Thus, Stone's failure-to-protect claim against Moser turns on what Moser knew about how his subordinates implemented the new protocol. Stone did not offer any evidence on this point.

Second, Stone offered no evidence that Moser was deliberately indifferent to, or authorized unconstitutional acts by Preston and Wallace. Again, Stone's testimony and legal theory is that Preston and Wallace failed to follow the new protocol on the day of M.B.'s assault. Thus, the new protocol shows Moser and MSOP responded to M.B.'s threats, evidence that contradicts deliberate indifference.

For the same reason, the district court's third and fourth reasons to deny summary judgment also fail: Stone offered no evidence that Moser failed to take sufficient remedial

⁶ During the district court's hearing on summary judgment, Stone's counsel conceded that "we weren't able to prove out" any supervisory claim against Moser, and "[left] it to [the district court] to dismiss" the claim against Moser because he had not yet discussed the matter with Stone. When asked at oral argument before this court about Stone's claim against Moser, his counsel responded that he was "not including [Moser] in my argument. I think we can ignore him."

action, or that Moser was the proximate cause of Stone's injury. Moser does not contend or offer evidence that the new protocol was inadequate. And no record evidence suggests that Moser was on the scene when Preston and Wallace failed to follow the new protocol. There is thus no record evidence, which when viewed favorably to Stone, establishes a constitutional violation as to Moser. *See Pearson*, 555 U.S. at 232, 129 S. Ct. at 816. For this reason, we reverse the district court's order denying summary judgment as to Moser on the ground of qualified immunity.

In conclusion, Stone has offered evidence of facts that, when viewed favorably to him, show Preston and Wallace violated Stone's clearly established constitutional right to protection from a known, substantial risk. Similarly, viewing the record evidence favorably to Stone, Preston and Wallace acted with deliberate indifference to that risk by failing to follow the new protocol adopted to protect Stone from M.B. While the jury may reject Stone's evidence and claims against Preston and Wallace, we cannot dismiss Stone's claims against Preston and Wallace at summary judgment. Thus, we affirm the district court's order denying summary judgment as to Preston and Wallace. Still, the facts alleged, even when viewed favorably to Stone, do not show a constitutional violation by Moser; we therefore reverse the district court's summary judgment as to Moser because he is entitled to qualified immunity. We thus remand the case to the district court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.