No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

In Re MARION L SHERROD - Petitioner

V.

SID HARKLEROAD et al. - Respondents

ON PETITION FOR WRIT OF CERTORARI TO

UNITED STATES SUPREME COURT

APPENDIX OF PETITIONER

Agent for Petitioner
Marion Lamont Sherrod Jr.
without prejudice UCC 1-207/308
Power of Attorney In Fact
Non-Domestic
Doc#0553222
C/O
Tabor Correctional Institution
4600 Swamp Fox Road
Tabor City, North Carolina
[28463

INDEX TO APPENDICES

-end.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6289

MARION L. SHERROD,

Plaintiff - Appellant,

v.

SID HARKLEROAD, Superintendent at North Carolina Department of Correction; JOHN MORGAN, Medical Provider at North Carolina Department of Correction; EDWARDS; STEPHEN SHOOK, Sgt. Officer at North Carolina Department of Correction; PATRICIA MCENTIRE, E-Unit Manager at North Carolina Department of Correction; MARGARET JOHNSON, Nurse at North Carolina Department of Correction; LARRY BASS, Nurse at North Carolina Department of Correction,

Defendants - Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Robert J. Conrad, Jr., District Judge. (1:12-cv-00048-RJC)

Argued: September 18, 2019 Decided: November 5, 2019

Before MOTZ, HARRIS, and QUATTLEBAUM, Circuit Judges.

Affirmed by unpublished opinion. Judge Quattlebaum wrote the opinion, in which Judge Motz and Judge Harris joined.

ARGUED: Anthony John Dick, JONES DAY, Washington, D.C., for Appellant. Elizabeth Pharr McCullough, YOUNG MOORE AND HENDERSON, P.A., Raleigh, North Carolina; Corrine Lenore Lusic, NORTH CAROLINA DEPARTMENT OF

APPENDIX A

JUSTICE, Raleigh, North Carolina, for Appellees. **ON BRIEF:** C. Kevin Marshall, Caleb P. Redmond, JONES DAY, Washington, D.C., for Appellant. Madeleine Pfefferle, YOUNG MOORE AND HENDERSON, P.A., Raleigh, North Carolina, for Appellee John Morgan, N.P. Joseph Finarelli, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees Patricia McEntire, Sid Harkleroad, Gregory Edwards, Stephen Shook, and Margaret Johnson. Martha Thompson, STOTT, HOLLOWELL, PALMER & WINDHAM, L.L.P., Gastonia, North Carolina, for Appellee Larry Bass.

Unpublished opinions are not binding precedent in this circuit.

QUATTLEBAUM, Circuit Judge:

On September 2, 2009, Marion Sherrod, previously convicted of robbery with a dangerous weapon, was transferred to Marion Correctional Institution ("MCI") from another prison. At the time of the transfer, he suffered from a chronic seizure disorder. On November 9, 2009, Sherrod experienced seizures in his cell requiring him to be taken to an outside hospital for treatment. Five days later, Sherrod was transferred from his ground-floor cell to an upstairs cell. Because of his disorder, Sherrod asked that he not be moved to the upstairs cell. John Morgan, a medical provider in the unit where Sherrod's cell was located, did not stop the transfer.

On November 15, 2009, Sherrod was placed in restraints and transported down the steps from his cell towards the prison's recreation area. As Sherrod neared the bottom of the staircase, he suffered a seizure, causing him to fall down the remaining steps. After receiving an alert about Sherrod's fall, nurses Larry Bass and Margaret Johnson came to Sherrod's assistance. Bass and Johnson worked with other prison personnel at the scene to get Sherrod into a wheelchair. He was then transported to a nearby hospital, where his seizure disorder was treated.

Bass and Johnson executed witness statements about their interaction with Sherrod. They reported that they found Sherrod face down on the floor near the bottom of the stairs. They wrote that after he sat up, Sherrod "lunged back at [another officer] with force." J.A. 307–08. The statements do not mention Sherrod's seizure disorder.

Later, Sherrod filed a *pro se* complaint against prison officials at MCI alleging they were deliberately indifferent towards his chronic seizure disorder violating his Eighth

Amendment rights against cruel and unusual punishment. In addition to Morgan, Bass and Johnson, Sherrod asserted claims against Superintendent Sid Harkleroad and prison employees Patricia McEntire, Edwards[1] and Stephen Shook (collectively "Defendants"). On appeal, we consider whether the district court properly dismissed the claims against Morgan, Johnson and Bass. Finding no error, we affirm.

I.

We begin with a review of the procedural history of this case. In Sherrod's Complaint, he alleges that Morgan knew of his seizure disorder. Despite this, Sherrod alleges he ignored his "physical disability" and assigned him to a cell located in an upper-tier of the prison. This, according to Sherrod, required him to traverse stairs while handcuffed. He claims this "deliberate indifference" caused "substantial harm," including the fall on November 15, 2009, which resulted in serious physical injuries. J.A. 28–32.

Sherrod also alleged that Johnson and Bass conspired with the custody staff by making false witness statements. He claims the statements contained no information about his seizure disorder despite the fact that his disability was documented in prison records. Sherrod claims the statements falsely "depict him as being intentionally 'aggressive.'" J.A. 30–31. He also claims because of the statements, he did not receive proper medical care.[2]

[1] Edwards' first name is not contained in the record.

[2] Sherrod further alleged that, as a result of his complaints about this incident and his medical care, Defendants engaged in a course of retaliatory conduct. J.A. 33–38. Sherrod also claimed that Defendants violated his right of access to the courts by interfering (Continued)

The district court dismissed Sherrod's claims in three orders across three years. In February 2013, it dismissed the claims against Morgan, finding Sherrod failed to state a claim against him. Although the court acknowledged that Sherrod's allegations "tend to show that Defendant Morgan knew of Plaintiff's seizure disorder[,]" it reasoned that Sherrod "is presently receiving treatment to address his seizure disorder . . . was treated at Marion Correctional and the hospital following the occurrence of his seizures," and "continued to receive treatment following his release from the hospital." J.A. 337. Thus, the district court concluded that Sherrod's allegations were essentially a disagreement about the treatment Sherrod received, which is, at best, a claim for medical malpractice falling short of the allegations needed for an Eighth Amendment deliberate indifference claim.

On March 30, 2015, the district court granted Bass' Motion for Judgment on the Pleadings. J.A. 379–84. In dismissing the claims against Bass, the court held the Complaint was "conclusory in its contention that Defendant Bass may have provided inadequate medical treatment." J.A. 382.

On March 30, 2016, the district court granted the Motion for Judgment on the Pleadings by Johnson, Harkleroad, Edwards, Shook and McEntire. The court held that Sherrod's allegations were "speculative" and failed to offer "sufficient factual support" as to knowledge of Sherrod's seizure disorder and deliberate indifference related to it. J.A. 394. The district court concluded that the allegations, "[a]t best," amounted only to a

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with his legal mail. J.A. 35–37. On appeal, however, Sherrod does not challenge the dismissal of these claims.

dissatisfaction "with the scope and course of his treatment[,]" which failed to satisfy the requirements for a deliberate indifference claim. J.A. 394.

Sherrod moved to alter or amend the judgment. Importantly, in that motion, while pursuing his claims against the other Defendants, Sherrod specifically indicated that he did not seek relief for the dismissal or judgment entered as to Morgan. He stated "Defendant John Morgan . . . was no longer an issue or Defendant in my claim. Since he was dismissed earlier as a defendant. In which I did not argue." J.A. 403–04. The district court denied this motion.

Sherrod then filed a timely Notice of Appeal. In it, he sought appeal "from the final judgment, dismissal with prejudice entered in this action on the 30th day of March 2016." J.A. 409.

In his Informal Opening Brief, Sherrod raised the following issues: (1) "District courts error in not allowing new evidence into arbitration[;] . . . (2) District Court failed to arbitrate over clear discrimination of prisoners mental and physical disabilities[;] . . . (3) District Court made an error in not arbitrating on clear evidence of First Amendment-Access to Courts violations[;] . . . (4) Error in not reviewing and arbitrating on a 'institutional' policy of racial profiling through classification." Informal Brief of Plaintiff-Appellant at i–ii, *Sherrod v. Harkleroad*, 674 Fed. App'x 265 (4th Cir. Jan. 3, 2017) (No. 16-7045). He identified no issues concerning his deliberate indifference claims related to Morgan, Bass or Johnson. Likewise, he argued no such issues in that brief.

After Sherrod, Edwards, Harkleroad, Johnson, McEntire and Shook submitted their briefs, we issued a per curiam opinion. We considered the district court's order that

"granted the Defendants' motion for judgment on the pleadings under Fed. R.Civ. P. 12(c), finding that Sherrod's complaint failed because he simply assumed in his complaint, without sufficient factual support, that all of the Defendants had intimate knowledge about his seizure disorder." J.A. 435. We then explained the allegations in Sherrod's complaint and accompanying declaration "that medical provider John Morgan and manager Patricia McEntire,[3] both named Defendants, had knowledge of his seizure disorder but failed to accommodate his disability, leading to his serious injuries due to a fall . . . [were] enough to survive the Defendants' motion for judgment on the pleadings." J.A. 436. We then, without specifying whether the remand applied to all or some of the defendants, vacated and remanded for proceedings consistent with the opinion.

In response, Morgan sought clarification of the opinion. Morgan alleged that Sherrod did not appeal the February 2013 order dismissing him and Sherrod's Initial Informal Brief did not raise any issues related to that order or to Morgan. He asked that our opinion vacating and remanding be clarified as not applicable to Morgan.

Sherrod responded and agreed with Morgan, repeating what he said in his Motion to Alter or Amend the Judgment before the district court. While he claimed his appeal should continue as to the other defendants, Sherrod stated: "I do not wish to attempt to hold Defendant Morgan responsible for correctional staff, or making them follow orders. Especially when not under doctors care. So I ask the Honorable Court of Appeals to remove

[3] McEntire was a manager in the unit where Sherrod's cell was located.

Defendant Morgan from the claim." Declaration of Plaintiff-Appellant at 1, *Sherrod v. Harkleroad*, 674 Fed. App'x 265 (4th Cir. Jan 3, 2017) (No. 16-7045).

We granted Morgan's Motion for Clarification. We issued an order explaining that, because Sherrod had not appealed the February 2013 order dismissing Morgan, Morgan was not a party to the appeal. Thus, we concluded that our opinion vacating the district court's March 30, 2016, order "does not affect the dismissal of Morgan as a party to this action." J.A. 455-56.

On remand, the district court—aware of our per curiam opinion but not our clarification order—interpreted our per curiam opinion to mean that Sherrod's claim against Morgan should be revived and that his claim against McEntire should proceed. The district court further determined that our per curiam opinion "did not . . . disturb the grant of summary judgment in favor of Defendants Harkleroad, Edwards, Shook, and Johnson, or the earlier dismissal in favor of Defendant Bass." J.A. 444.

In response, relying on our clarification order, Morgan moved before the district court to be dismissed. On August 8, 2017, the district court, now aware of the clarification order, agreed and directed the Clerk of Court to again terminate Morgan as a defendant. The district court case proceeded only as to McEntire, concluding in a trial with judgment entered in her favor on March 6, 2018. Sherrod timely appealed.

II.

On appeal, Sherrod challenges the district court's dismissal of the claims as to Morgan, Bass and Johnson. This Court reviews de novo a grant of a motion to dismiss or judgment on the pleadings under Rule 12(b)(6) or 12(c). *Burbach Broad. Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 405–06 (4th Cir. 2002).

But before we can consider the merits of Sherrod's arguments, we first must determine whether we have appellate jurisdiction. In their brief, and in a Motion to Dismiss for Lack of Jurisdiction, Morgan and Bass argue that Sherrod only noticed the order entered on March 30, 2016, as the basis for his appeal, and not the earlier orders related to Morgan and Bass. Thus, they argue, this Court lacks jurisdiction to review those earlier dismissals.

We disagree. Morgan and Bass conflate the discretionary doctrine of waiver with mandatory jurisdictional rules. Sherrod timely appealed "from the final judgment, dismissal with prejudice entered in this action on the 30th day of March 2016." J.A. 409. Until that time, Sherrod was unable to appeal the earlier dismissals of Morgan and Bass. Under the "merger rule," Sherrod's appeal from the final judgment gave this Court jurisdiction to review the dismissal of claims against all defendants. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996). Accordingly, we have jurisdiction to consider Sherrod's appeal as to Morgan and Bass and hereby deny their motion to dismiss.

III.

But the fact that we have jurisdiction does not mean we proceed to the merits of Sherrod's appeal. Morgan, Bass and Johnson contend Sherrod waived his rights to appeal their dismissals.[4]

A.

We first consider this issue as to Morgan. Sherrod raised four issues in his Informal Brief—all unrelated to his deliberate indifference claim against Morgan. Morgan contends that Federal Rule of Appellate Procedure 28(a)(9)(A) requires that the argument section of appellant's opening brief contain his contentions and reasons for them. Morgan's argument is compelling. We have long held that "[f]ailure to comply with the specific dictates of this rule with respect to a particular claim triggers abandonment of that claim on appeal." *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999). Further, this Court's Local Rules make clear that "[t]he Court will limit its review to the issues raised in the informal brief." 4th Cir. R. 34(b); *Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief.").

[4] The parties at times use the terms waiver and forfeiture interchangeably in their briefs. During oral argument, Morgan's attorney specified that they were pursuing a forfeiture theory. While the distinction between waiver and forfeiture is significant in determining the standard of review of an issue not raised before the district court, the distinction is less important in this context. When a party fails to raise an issue in its opening brief, it is considered waived or abandoned. *Grayson O Company v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017); *Brown v. Nucor Corp.*, 785 F.3d 895, 923 (4th Cir. 2015).

In an attempt to defeat Morgan's waiver contention, Sherrod makes several arguments. He first argues that, despite his failure to specify any issue related to Morgan, he adequately pressed his deliberate indifference claim by stating in his Initial Informal Brief that he "filed a § 1983 action claiming deliberate indifference to a serious medical need . . . ." Informal Brief of Plaintiff-Appellant at 1, *Sherrod v. Harkleroad*, 674 Fed. App'x 265 (4th Cir. Jan. 3, 2017) (No. 16-7045). But that statement, which is the only place in his Initial Informal Brief where Sherrod mentions "deliberate indifference," is in the procedural history section. *Id.* at 1. The issue is not addressed in his identification of issues or in his arguments. As such, we agree with Morgan that Sherrod waived his rights to appeal Morgan's dismissal by failing to raise the issue in his brief.

Sherrod next argues that while his deficiencies might normally constitute waiver, we should find otherwise because of his status as a *pro se* litigant during that portion of this litigation. He is correct that *pro se* filings are to be liberally construed. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But we have done that. And to the extent there was any question on the issue of waiver from his Informal Initial Brief, Sherrod cleared the matter up by stating that he did not intend to pursue Morgan on appeal in response to Morgan's Motion for Clarification. To repeat, Sherrod stated "I ask the Honorable Court of Appeals to remove Defendant Morgan from the claim." Declaration of Plaintiff-Appellant at 1, *Sherrod v. Harkleroad*, 674 Fed. App'x 265 (4th Cir. Jan 3, 2017) (No. 16-7045). Even a liberal construction of his filings leads to the conclusion that Sherrod did not intend to pursue Morgan in his earlier appeal. After all, *pro se* appellants are subject to the basic requirements of Local Rule 34(b).

Next, Sherrod claims that if he did waive his appellate rights regarding Morgan, Sherrod was induced into doing so by an error of this Court. More specifically, he claims we erred in listing Harkleroad, Edwards, Shook, McEntire and Johnson as "appellees" and Johnson and Bass as "defendants" in the caption for Sherrod's appeal. He claims omitting Morgan's name in the case caption caused Sherrod to think he was not able to pursue his appeal as to Morgan. Therefore, he argues, we should excuse his waiver of those claims.

While we agree that Morgan and Bass should have been formally listed as appellees in the caption, we see no indication that Sherrod was confused or misled in any way by the caption of the appeal. After carefully reviewing Sherrod's own words not only in his Initial Informal Brief but also in his response to Morgan's Motion for Clarification, and in his Motion to Alter or Amend the Judgment below, it is clear Sherrod did not intend to appeal as to Morgan.

Sherrod then argues that even if he waived his rights to appeal the district court's dismissal of Morgan, we already exercised jurisdiction over his appeal as to Morgan and accordingly, implicitly excused any waiver. In support of this position, Sherrod points out that we stated in our per curiam opinion that Sherrod "alleged that medical provider John Morgan and manager Patricia McEntire . . . had knowledge of his seizure disorder but failed to accommodate his disability" which was "enough to survive the Defendants' motion for judgment on the pleadings." J.A. 436. While Sherrod accurately quotes our per curiam opinion, he overlooks our order granting Morgan's Motion for Clarification. In it, we clarified that the per curiam opinion "does not affect the dismissal of Morgan as a party to this action." J.A. 456. Had we not done so, Sherrod's argument would be more persuasive.

But we of course have the right to clarify our opinions and Sherrod does not suggest otherwise. Read together, our per curiam opinion and our clarification order make clear that we did not excuse the waiver.

To be sure, under appropriate circumstances, we can exercise our discretion and excuse a party's waiver. *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 271 (4th Cir. 2019). For example, we have excused waiver when the "record provides an adequate basis to consider an alternative legal theory and when neither party is prejudiced by such consideration." *Id.* We find neither of these factors present in this case. As such, we follow the normal rule that failure to raise an issue for review constitutes a waiver.

Finally, Sherrod argues that even if we decline to look past the fact that he waived his appeal of the district court's February 2013 order dismissing Morgan, we have jurisdiction to review the district court's August 8, 2017, order terminating Morgan as a defendant. But all the waiver problems that exist with respect to the February 2013 order also apply to the district court's order of August 8, 2017. As set forth above, Sherrod made it clear that he did not intend to appeal the district court's dismissal of Morgan. Therefore, for the same reasons as set forth above, Morgan has waived any rights he had to appeal the August 8, 2017, order.

In conclusion, while we have jurisdiction over Sherrod's appeal of the district court's order dismissing Morgan, Sherrod waived his rights to appeal that order. Accordingly, we affirm the district court's dismissal of Morgan.

B.

We now turn to the issue of waiver as it relates to Sherrod's appeal of the orders dismissing Johnson and Bass. Sherrod argues he did not waive those rights, and emphasizes that he pressed his deliberate indifference claims against Johnson and Bass by arguing in his Initial Informal Brief that Bass wrote fraudulent witness statements. But this assertion is contained in Sherrod's argument that the district court erred in denying his Motion for Summary Judgment. Sherrod does not link the alleged fraudulent statements to his deliberate indifference claims or to the orders dismissing Bass or Johnson. Therefore, like his appeal of the order dismissing Morgan, Sherrod waived his right to appeal the dismissals of Johnson and Bass when he failed to raise them in his Initial Informal Brief.

But even if Sherrod did not waive his rights to appeal the orders dismissing Bass and Johnson, we find that the district court did not err in concluding that our per curiam opinion did not affect the dismissal of Bass and Johnson. And not only did the district court properly construe our per curiam opinion, the district court correctly concluded in the first place that Sherrod did not sufficiently plead deliberate indifference against Johnson and Bass. Claims under 42 U.S.C. § 1983 based on an alleged lack of or inappropriate medical treatment must fall within the Eighth Amendment's prohibition against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). In order to state a valid claim, Sherrod must allege "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* at 106. "The deliberate indifference standard applies to cases alleging failures to safeguard the inmate's health and safety, including failing to protect inmates from attack, maintaining inhumane conditions of confinement,

or failing to render medical assistance." *Thompson v. Commonwealth of Virginia*, 878 F.3d 89, 97 (4th Cir. 2017). "The deliberate indifference standard is a two-pronged test: (1) the prisoner must be exposed to a substantial risk of serious harm, and (2) the prison official must know of and disregard that substantial risk to the inmate's health or safety." *Id.* at 97–98.

The standard for this claim is high. Disagreement over the quality of care he received is insufficient to state a constitutional claim under § 1983. *See Wright v. Collins*, 766 F.2d 841, 849 (4th Cir. 1985). And allegations that might be sufficient to support negligence and medical malpractice claims do not, without more, rise to the level of a § 1983 claim. *Estelle*, 429 U.S. at 104–06.

Sherrod alleges because Johnson and Bass made false statements, he did not receive proper medical care. Even if Sherrod is correct in stating that Johnson and Bass offered false statements, he does not link the false statement to any of the harms he alleges. In other words, he fails to explain how the false statement affected his treatment. Considering this deficiency, we agree with the district court's dismissal of Johnson and Bass pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:12-cv-00048-RJC

MARION LAMONT SHERROD, Plaintiff, v. SID HARKLEROAD, Superintendent at North Carolina Department of Corr.; JOHN MORGAN, Medical Provider at North Carolina Department of Corr.; FNU EDWARDS; STEPHEN SHOOK, Sgt. Officer at North Carolina Department of Corr.; PATRICIA MCENTIRE, E-Unit Manager at North Carolina Department of Corr.; MARGARET JOHNSON, Nurse at North Carolina Department of Corr.; LARRY BASS, Nurse at North Carolina Department of Corr., Defendants.	)	**ORDER**

THIS MATTER is before the Court on Defendants' Motion for Judgment on the Pleadings, (Doc. No. 121); Plaintiff's Motion for Summary Judgment, (Doc. No. 123); Plaintiff's Motions for Leave to File an Amended Complaint, (Doc. Nos. 111, 124), Plaintiff's Motions for Appointment of Counsel, (Doc. Nos. 112, 114), Plaintiff's Motion for an Order Compelling Discovery, (Doc. No. 117); Plaintiff's Motion for Default Judgment, (Doc. No. 126); and Plaintiff's Motion for Judgment as a Matter of Law, (Doc. No. 130).

For the reasons that follow, Defendants' Motion for Judgment on the Pleadings will be GRANTED, and Plaintiff's complaint will be DISMISSED with prejudice.

I. BACKGROUND

Plaintiff is a prisoner of the State of North Carolina who filed a pro se complaint contending the defendants violated his civil rights by being deliberately indifferent to his serious medical needs, by engaging in acts of negligence, and by violating his right to access the courts through interference with his legal mail.

According to his complaint, Plaintiff was transferred to Marion Correctional Institution on September 2, 2009, "as a known inmate with a chronic seizure disability." (Doc. No. 1: Compl. at 7). Plaintiff contends that despite this "known" seizure disorder, Defendant John Morgan, a medical provider with the North Carolina Department of Public Safety, was deliberately indifferent to this medical condition by "[f]ailing in his duty to provide or renew medical restrictions and supplying documentation of said restrictions [] for the physical accommodation of his seizure disability." (Id.). Plaintiff provides one example where he contends that Defendant Morgan expressed deliberate indifference by allowing Defendant Patricia McEntire to place him in a top tier cell on November 15, 2009, and from which he later fell and suffered serious injury. Plaintiff contends this action, or inaction, led to "substantial harm" due to the "consistent 'deliberate indifference' of the consideration of a known physical disability . . ." (Id.).

After he fell from the top tier, Plaintiff contends that Defendant Morgan continued to provide inadequate medical care by failing to provide the "standard" treatment. Plaintiff reiterates that he suffered long-lasting harm and that he is being treated by ECU Physical Therapy "for his back pain and loss of feeling in lower extremities from his incident on 11-15-09." (Id. at 8).

Plaintiff filed written grievances concerning his injury and treatment, and he alleges a conspiracy arose which led to harassment and retaliation during the investigation into the grievances. For instance, Plaintiff contends that Defendant McEntire subjected him to "discrimination, harassment and retaliation . . . through the submission of fraudulent statements of [witnesses] by her subordinates . . . and the failure to investigate" Plaintiff's grievances. (Id. at 9).

Plaintiff alleges Defendants Margaret Johnson and Larry Bass, whom Plaintiff identifies as nurses within Marion Correctional, "joined in conspiracy with custody staff" to portray Plaintiff as acting aggressively during his seizure episodes that occurred on November 15, 2009. Plaintiff charges that Defendants Johnson and Bass submitted fraudulent statements which were devoid of any actual "observations of Plaintiff's seizure disability" and this action led to continued medical indifference and increased pain. Plaintiff concludes by alleging that actions or omissions of Defendants Johnson and Bass, in suppressing information regarding his "known" seizure disorder, led to retaliation against him and was motivated by "evil" intent such that his right to be free from cruel and unusual punishment was violated. (Id. at 9-11).

Plaintiff contends that Stephen Shook, who worked as a security officer within Marion Correctional, accepted the version of events provided by Defendants Johnson and Bass and as a consequence, Plaintiff was upgraded to a higher security threat level (Security Threat Group "STG").

Plaintiff continues by alleging that after his November 2009 seizure, prison officials began opening his legal mail which was part of unrelated, ongoing litigation. Plaintiff complained to "non-judicial government officials and other resources within the Department of

Corrections, by using his right to 'privileged' mail." Some of this mail appears to have been intercepted, according to Plaintiff, and he was singled out for punishment for "sending out sealed 'privileged mail.'" (Id. at 14). In particular, Plaintiff contends that despite his protests regarding his legal mail, no action was taken to address the situation. Plaintiff further alleges that prison officials, specifically Defendants Shook and Edwards, who is the mailroom supervisor, restricted his ability to send legal mail by citing Plaintiff's STG classification. Plaintiff maintains these restrictions violated his constitutional right to send and receive confidential legal mail, unduly limited his access to the courts, and are in retaliation for his grievances concerning his November 2009 seizure-related injury. (Id. at 16-17).

In his claims for relief, Plaintiff requests a declaration that his rights have been violated, both through the treatment of his seizure disorder, and the limitation on his right to access the courts; that the defendants be held criminally liable for violation of his First Amendment rights; that he be awarded compensatory damages in the amount of $1,000,000 against each defendant, and an award of punitive damages in the amount of $500,000 against each defendant; and for appointment of counsel. (Id. at 5-6).[1]

II. STANDARD OF REVIEW

Rule 12(c) motions are governed by the same standard as motions brought under Rule 12(b)(6). Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999). In its review of a Rule 12(b)(6) motion, "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." Mylan Labs Inc. v. Matakari, 7 F.3d 1130, 1134 (4th Cir. 1993) (internal citation omitted). But the court need not accept

[1] Defendants Morgan and Bass were previously dismissed from this action after the Court found that Plaintiff had failed to state an actionable claim. (1:12-cv-00048, Doc. Nos. 58, 107).

allegations that "contradict matters properly subject to judicial notice or by exhibit." Blankenship v. Manchin, 471 F.3d 523, 529 (4th Cir. 2006) (quoting Veney v. Wyche, 293 F3d 726, 730 (4th Cir. 2002)). The court may consider the complaint, answer, and any materials attached to those pleadings or motions for judgment on the pleadings "so long as they are integral to the complaint and authentic." Philips v. Pitt Cnty. Mem. Hosp., 572 F.3d 176, 180 (4th Cir. 2009); see also Fed R. Civ. P. 10(c) (stating that "an exhibit to a pleading is part of the pleading for all purposes."). In contrast to a Rule 12(b)(6) motion, the court may consider the answer as well on a motion brought pursuant to Rule 12(c). Alexander v. City of Greensboro, 801 F. Supp. 2d 429, 433 (M.D.N.C. 2011).

The plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 563. A complaint attacked by a Rule 12(b)(6) motion to dismiss will survive if it contains sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678. Thus, the applicable test on a motion for judgment on the pleadings is whether, when viewed in the light most favorable to the party against whom the motion is made, genuine issues of material fact remain or whether the case can be decided as a matter of law. Alexander, 801 F. Supp. 2d at 433.

Finally, a pro se complaint must be construed liberally. Haines v. Kerner, 404 U.S. 519,

520 (1972). However, the liberal construction requirement will not permit a district court to ignore a clear failure to allege facts in his Complaint which set forth a claim that is cognizable under federal law. Weller v. Dep't of Soc. Servs., 901 F.2d 387, 391 (4th Cir. 1990). In assessing whether the complaint states a claim for relief, this Court must determine whether the complaint raises an indisputably meritless legal theory or is founded upon clearly baseless factual contentions, such as fantastic or delusional scenarios. Neitzke v. Williams, 490 U.S. 319, 327–28 (1989).

III. DISCUSSION

A case filed under 42 U.S.C. § 1983 requires a deprivation of a right secured by federal law by a person acting under color of state law. See Maine v. Thiboutot, 448 U.S. 1 (1980); Gomez v. Toledo, 446 U.S. 635, 640 (1980). There is no dispute that each of the defendants were acting under color of state law.

A. November 15, 2009 fall

Plaintiff contends that one or more defendants knew about his serious seizure disorder and deliberately violated his Eighth Amendment rights by placing him in a top tier cell and failing to properly supervise and treat him after he fell.

A claim pled under 42 U.S.C. § 1983 based on an alleged lack of or inappropriate medical treatment falls within the Eighth Amendment's prohibition against cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). To state a claim under the Eighth Amendment, a plaintiff must show a "deliberate indifference to serious medical needs." Id. "Deliberate indifference requires a showing that the defendants actually knew of and disregarded a substantial risk of serious injury to the detainee or that they actually knew of and ignored a

detainee's serious need for medical care." Young v. City of Mt. Ranier, 238 F.3d 567, 575–76 (4th Cir. 2001) (citations omitted). "To establish that a health care provider's actions constitute deliberate indifference to a serious medical need, the treatment must be so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." Miltier v. Beorn, 896 F.2d 848, 851 (4th Cir. 1990), overruled on other grounds by, Farmer v. Brennan, 511 U.S. 825, 837 (1994).

To be found liable under the Eighth Amendment, a prison official must know of and consciously or intentionally disregard "an excessive risk to inmate health or safety." Farmer, 511 at 837; Johnson v. Quinones, 145 F.3d 164, 167 (4th Cir. 1998). "[E]ven if a prison doctor is mistaken or negligent in his diagnosis or treatment, no constitutional issue is raised absent evidence of abuse, intentional mistreatment, or denial of medical attention." Stokes v. Hurdle, 393 F. Supp. 757, 762 (D. Md.1975), aff'd, 535 F.2d 1250 (4th Cir. 1976).

The constitutional right is to medical care. A claim based solely on a difference of opinion as to the quality of such care is not sufficient to raise a constitutional claim. Id. Therefore, a disagreement "between an inmate and a physician over the inmate's proper medical care [does] not state a § 1983 claim unless exceptional circumstances are alleged." Wright v. Collins, 766 F.2d 841, 849 (4th Cir. 1985) (dismissing the plaintiff's § 1983 claim against a defendant physician for allegedly discharging the plaintiff too early from a medical clinic, as such claim did not rise to the level of deliberate indifference but would, "at most, constitute a claim of medical malpractice").

Finally, as noted allegations that might be sufficient to support negligence and medical malpractice claims do not, without more, rise to the level of a cognizable § 1983 claim. Estelle,

429 U.S. at 106; Grayson v. Peed, 195 F.3d 692, 695 (4th Cir. 1999) ("Deliberate indifference is a very high standard—a showing of mere negligence will not meet it.").

After reviewing the record in this matter, the Court finds that Plaintiff's allegations are speculative and fail to state a claim for relief. For instance, Plaintiff was transferred to Marion Correctional on November 2, and his accident occurred on November 15, and he simply assumes in his complaint – without sufficient factual support – that all of the defendants had intimate knowledge about his seizure disorder, and after being armed with this knowledge the defendants (1) deliberately tried to cause his injury by placing him in a top tier cell, (2) deliberately endangered him as he was conducted down the steps after the fall, and they deliberately failed to provide proper medical treatment.[2]

Plaintiff has also failed to carry his burden of demonstrating that any of the defendants were deliberately indifferent to his serious medical needs. At best, he contends that he is dissatisfied with the scope and course of his treatment, and to the extent he alleges negligence in his medical treatment or in placing him in a top tier cell and in transporting him down the stairs after his fall, these claims must fail.

Finally, Plaintiff complains he was placed in the STG after he began to file grievances after his fall, however this claims fails – on the facts presented here – because prison officials are given broad discretion when classifying conditions of confinement. See, e.g., Sandin v. Connor, 515 U.S. 472, 485-86 (1995); O'Bar v. Pinion, 953 F.2d 74, 83 (4th Cir. 1991) (noting that

[2] Plaintiff raised the substance of these claims he presents herein in a complaint filed with the North Carolina Industrial Commission. His case was dismissed because the Commission found his contentions regarding his "known" seizure disorder and that he had medical restriction on his housing was without foundation. (Id., Doc. No. 22-2).

"changes in conditions of confinement (including administrative segregation), and the denial of privileges are matters contemplated within the scope of the original sentence") (citing Montayne v. Haynes, 427 U.S. 236, 242 (1976)). Plaintiff has failed to present allegations sufficient to sustain an actionable claim here and it will be dismissed.

A. Legal mail

In asserting a claim that his First Amendment right to access the courts, Plaintiff contends that Defendant Harkleroad, "acting in concert" with Defendant Shook, whom he identifies as an officer with Security Threat Group, and Defendant Edwards, the mailroom supervisor, "joined in [a] conspiracy to 'punish' Plaintiff for his protected rights and deny his access to courts." (1:12-cv-00048, Doc. No. 1: Compl. at 14).

Plaintiff describes an incident on November 20, 2009, in which he contends that incoming legal mail was opened when it was processed in the mailroom, and another instance on February 4, 2010, when his legal mail was held for ten days. (Id. at 14-15). Plaintiff also vaguely contends there was a general trend of opening his legal mail, but he fails to provide any specific detail regarding other instances or what individuals may have participated in such conduct.

There is no question that prisoners must have reasonable access to present claims in court. See Bounds v. Smith, 430 U.S. 817, 824-25 (1977). However, in order to show a denial of access to the courts, a prisoner must demonstrate an actual injury or that a defendant's alleged conduct impeded his right to access the courts. See, e.g., Lewis v. Casey, 518 U.S. 343, 351-52 (1996); Michau v. Charleston County, 434 F.3d 725, 728 (4th Cir. 2006). Plaintiff identifies a couple of isolated incidents where his legal mail was opened, but Plaintiff has failed to demonstrate that these incidents impeded his access to the courts nor has met his burden of

demonstrating any actual injury. See Buie v. Jones, 717 F.2d 925, 926 (4th Cir. 1983) (finding "a few isolated instances" of opened legal mail does not state a valid constitutional claim for denial of access to the courts).

IV. Pending motions

A. Motions for leave to file an amended complaint (Doc. Nos. 111, 124)

In Plaintiff's motions to amend, he seeks to add as defendants employees of the North Carolina Department of Public Safety: Timothy McMahan, Kristine Lemon, and Brianna Suttles. Plaintiff contends these defendants were involved in the conspiracy to violate his civil rights. The Court previously denied as futile a motion to amend his complaint to add these same defendants after noting that Plaintiff's contention that these defendants were negligent in transporting him or in placing him in a upper-tier cell was not actionable in a § 1983 claim. (1:12-cv-00048, Doc. No. 106: Order at 2) (citing Daniels v. Williams, 474 U.S. 327, 330-31 (1986) (finding a "mere lack of due care by a state official" insufficient to state a § 1983 claim); Pink v. Lester, 52 F.3d 73, 77 (4th Cir. 1995).

Plaintiff also seeks to add a claim pursuant 42 U.S.C. § 1985 (civil conspiracy) and § 1986 (neglect to prevent). Plaintiff's motions to amend will be denied as futile as he has failed to demonstrate a conspiracy or a failure to prevent harm.

B. Motions for appointment of counsel (Doc. Nos. 112, 114)

The Court observes there is no absolute right to the appointment of counsel in civil actions such as this one. Therefore the movant must present "exceptional circumstances" in order for the Court to seek the assistance of a private attorney if the plaintiff is unable to afford counsel. See Miller v. Simmons, 814 F.2d 962, 966 (4th Cir. 1987); 28 U.S.C. § 1915(e)(1) (no

absolute right to attorney). After liberally reviewing the allegations in this case, the Court finds that Plaintiff has failed to make the requisite showing and his motions for appointment of counsel will be denied.

B. Motion to compel discovery (Doc. No. 117)

The Court finds that this motion should be denied as Plaintiff's requests are overly broad and the documents filed by the parties in this action sufficiently address the issues regarding Plaintiff's claims for relief.

V. CONCLUSION

Based on the foregoing, the Court finds that Plaintiff has failed to present a claim upon which relief may be granted and Defendants' motion for judgment on the pleadings will therefore be granted. 28 U.S.C. § 1915A(e)(2)(B)(ii).

IT IS, THEREFORE, ORDERED that:

1. Defendants' Motion for Judgment on the Pleadings is **GRANTED**, (Doc. No. 121), and Plaintiff's complaint is **DISMISSED with prejudice**.
2. Plaintiff's Motions for Leave to File Amended Complaints are **DENIED**. (Doc. No. 111, 124).
3. Plaintiff's Motion to Compel Discovery is **DENIED**. (Doc. No. 117).
4. Plaintiff's Motions for Appointment of Counsel are **DENIED**. (Doc. Nos. 112, 114).
5. Plaintiff's Motions for Summary Judgment, (Doc. No. 123); for Default Judgment, (Doc. No. 126); and for Judgment as a Matter of Law, (Doc. No. 130) are **DENIED**.

The Clerk of Court is respectfully directed to close this case.

SO ORDERED.

Signed: March 30, 2016

Robert J. Conrad, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:12-cv-00048-RJC

MARION LAMONT SHERROD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
SID HARKLEROAD, et al.,	)	
	)	
Defendants.	)	
	)	

THIS MATTER is before the Court on consideration of Defendant Larry Bass's motion to dismiss or in the alternative, for judgment on the pleadings to which Plaintiff has responded. (Doc. No. 97).

I. BACKGROUND

Plaintiff is a prisoner of the State of North Carolina who filed a pro se complaint pursuant to 42 U.S.C. § 1983. Plaintiff alleges that he was injured while a prisoner in the Marion Correctional Institution on November 15, 2009. Specifically, Plaintiff alleges that he has a known seizure disorder and he was injured after one or more defendant officers placed him in a top tier bunk despite his protests, and that he suffered an injury while being transported down the stairs because one or more defendant officers did not properly monitor him. Plaintiff was subsequently treated for injuries but he contends that he has had long-term complications.

In the complaint, Plaintiff identifies Defendant Bass as a nurse who "joined in conspiracy with custody staff, to depict him as being intentionally 'aggressive'" after the "seizure incident" which resulted in Plaintiff suffering physical injuries and "excruciating long term harm, both to

Plaintiff's safety and mental health." Plaintiff further complains that Defendant Bass submitted a fraudulent statement regarding the November 15th seizure incident which was "void of any observations of Plaintiff's seizure disability despite institutional records." (Doc. No. 1: Complaint at 9-10). The end result, as Plaintiff contends, is that he received improper medical care following his fall after having the seizure and the false statements were made with "evil" intent. (Id. at 10). Finally, Plaintiff alleges that the false statements resulted in him being placed in the Security Threat Group which exposed him to "increasing animosity and individual discrimination." (Id. at 12-13).

II. STANDARD OF REVIEW

A. Motion to Dismiss

When a defendant files a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, the court must examine the pleadings and consider the facts in a light that is most favorable to the non-moving plaintiff. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In so doing, the court is bound to accept well-pleaded factual allegations as true. See Erickson v. Pardus, 551 U.S. 89, 91 (2007). The granting of a motion to dismiss may be proper if, when accepting a plaintiff's – nondelusional – factual allegations as true, the complaint fails to state a claim as a matter of law. Ashcroft, 556 U.S. at 678. In other words, a plaintiff maintains the burden of pleading facts which support each of his claims for relief. See Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003) (citing Dickson v. Mircrosoft Corp., 309 F.3d 193, 213 (4th Cir. 2002)).

B. Motion for Judgment on the Pleadings

Federal Rule of Civil Procedure 12(c) provides that, "[a]fter the pleadings are

closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." In examining a motion for judgment on the pleadings, the court must accept all of the nonmovant's factual averments as true and draw all reasonable inferences in its favor. Bradley v. Ramsey, 329 F. Supp. 2d 617, 622 (W.D.N.C. 2004); Atwater v. Nortel Networks, Inc., 394 F. Supp. 2d 730, 731 (M.D.N.C. 2005). Judgment on the pleadings may be properly granted where the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Bradley, 329 F. Supp. 2d at 622. The standard is similar to that used in ruling on a Rule 12(b)(6) motion "with the key difference being that on a 12(c) motion, 'the court is to consider the answer as well as the complaint.'" Continental Cleaning Serv. V. United Parcel Serv., Inc., 1999 WL 1939249, at *1 (M.D.N.C. April 13, 1999) (internal citations omitted).

In resolving a motion for judgment on the pleadings, the court may rely on admitted facts in the pleadings, documents attached to the pleadings, and facts contained in materials of which the court may take judicial notice. Bradley, 329 F. Supp. 2d at 622 (noting that the Court should consider documents attached to the pleadings); Hebert Abstract Co. Inc. v. Touchstone Prop., Ltd., 914 F.2d 74, 76 (5th Cir. 1990) (holding that court should consider pleadings and judicially noticed facts).

III. DISCUSSION

A case filed under 42 U.S.C. § 1983 requires a deprivation of a right secured by federal law by a person acting under color of state law. Section 1983 applies to violations of federal constitutional rights, as well as certain limited federal statutory rights. See Maine v. Thiboutot, 448 U.S. 1 (1980); see also Gonzaga University v. Doe, 536 U.S. 273, 283 (2002) (holding that a right must be "unambiguously conferred" by a statute to support a Section 1983 claim).

Plaintiff's principal complaints against Defendant Bass are that he provided inadequate medical treatment by providing false statements following his seizure and that the false statement, along with other co-defendant statements, led to him being placed in the Security Threat Group which curtailed his rights and privileges.

The Eighth Amendment provides that a prisoner is entitled to adequate medical care. In Farmer v. Brennan, the Supreme Court held that the Eighth Amendment "imposes duties on [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" 511 U.S. 825, 832 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)). To establish an Eighth Amendment claim, a prisoner must demonstrate (1) that the deprivation was objectively, sufficiently serious—that is, the deprivation must be a "denial of the minimal civilized measure of life's necessities" and (2) that the defendant was deliberately indifferent to the prisoner's health or safety. Id. at 834 (internal quotations marks and citations omitted). See also Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). Furthermore, "[d]eliberate indifference requires that the defendant actually knew of and disregarded a substantial risk of serious injury to the detainee or that they actually knew of and ignored a detainee's serious need for medical care." Young v. City of Mt. Rainer, 238 F.3d 567, 575 (4th Cir. 2001).

Plaintiff's complaint in this case is notably vague, and frankly, conclusory in its contention that Defendant Bass may have provided inadequate medical treatment. For instance, Plaintiff contends that Defendant Bass, while acting under color of state law, committed acts, or omissions, which "led to continued physical pain and impairment from his injuries." (1:12-cv-

00048, Doc. No. 1 at 10). However, Plaintiff fails to elaborate further except to allege that Defendant Bass's "false" statement contributed to his "individual labeling and classification on November 19, 2009 and serious attempt at suicide on April 13, 2010." (Id.).[1] And the Court notes, that inmates have no constitutionally protected right – and therefore an actionable right under § 1983 – to a particular custody classification, in particular, because as Plaintiff admits, the disciplinary action which he contends was caused, at least in part, by Bass's statement, was dismissed. See, e.g., Sandin v. Connor, 515 U.S. 472, 485-86 (1995); O'Bar v. Pinion, 953 F.2d 74, 83 (4th Cir. 1991) (noting that "changes in conditions of confinement (including administrative segregation), and the denial of privileges are matters contemplated within the scope of the original sentence"). (See Compl. at 14: "Plaintiff Sherrod states that after his 11-15-2009 seizure incident, and subsequent A-3 Infraction dismissal [there was] an escalation of 'deliberate indifference towards his physical injuries,'" and his incoming legal mail began being compromised by prison officials."). Notably, however Plaintiff cannot reasonably contend that Defendant Bass had any impact on his legal mail.

IV. CONCLUSION

For the reasons stated herein, the Court finds that Plaintiff's claim of medical mistreatment –through actual treatment or an allegedly false statement – fails to state a claim under § 1983 and the motion for judgment on the pleadings will be granted.

IT IS, THEREFORE, ORDERED that Plaintiff's motion for extension of time to file a response to the motion to dismiss, or for judgment on the pleadings is **GRANTED**. (Doc. No.

[1] Plaintiff does provide details regarding ongoing medical treatment following his seizure, and that it was Defendant Morgan that provided deliberately indifferent medical treatment that day by failing to provide the "standard" treatment. (Doc. No. 1 at 8).

99).

IT IS FURTHER ORDERED Defendant Bass's motion for judgment on the pleadings is **GRANTED.** (Doc. No. 97). Defendant Bass's motion to dismiss will therefore be **DISMISSED** as moot.

IT IS SO ORDERED.

Signed: March 30, 2015

Robert J. Conrad, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:12-cv-48-RJC

MARION LAMONT SHERROD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	**ORDER**
	)	
SID HARKLEROAD, et al.,	)	
	)	
Defendants.	)	
	)	

THIS MATTER comes before the Court on Plaintiff's "Motion for Relief from Order and Motion for Court to Withdraw the Summons and Complaint Directed to John Morgan, F.N.P." (Doc. No. 158); see (Doc. Nos. 156, 157). The motion will be granted.

Pro se Plaintiff Marion Lamont Sherrod filed the Complaint on February 20, 2012, alleging claims related to deliberate indifference to his medical needs, intentional racial discrimination, and violation of his right to send and receive mail. (Doc. No. 1). Following initial review by the Court, the United States Marshals Service was ordered to serve Defendants Larry Bass, FNU Edwards, Sid Harkleroad, Margaret Johnson, Patricia McEntire, John Morgan, and Stephen Shook. (Doc. No. 6).

Defendant Morgan filed a motion to dismiss on June 21, 2012, arguing *inter alia* that the Court lacks jurisdiction due to insufficient service of process and that Plaintiff failed to state a facially sufficient claim for deliberate indifference to a serious medical need. (Doc. No. 24). Plaintiff filed a response opposing dismissal. (Doc. No. 30). The Court granted Defendant Morgan's motion to dismiss on February 20, 2013, for failure to state a claim, and did not reach

the other arguments in favor of dismissal. (Doc. No. 58). Defendant Larry Bass' motion to dismiss or, alternatively, for judgment on the pleadings, (Doc. No. 98), was also granted. (Doc. No. 107).

The remaining Defendants – Harkleroad, Edwards, Shook, McEntire, and Johnson – filed a motion for judgment on the pleadings. (Doc. Nos. 121, 122). Plaintiff filed a motion for summary judgment, (Doc. No. 123), as well as motions for leave to file an amended complaint, (Doc. No. 124), and for judgment as a matter of law, (Doc. No. 130). In an Order entered March 30, 2016, the Court granted Defendants' motion for judgment on the pleadings and denied Plaintiff's motions for summary judgment, leave to amend, and judgment as a matter of law. (Doc. No. 132).

Plaintiff appealed the Court's judgment in favor of Defendants and the Fourth Circuit reversed. Sherrod v. Harkleroad, 674 Fed. Appx. 265 (4th Cir. 2017). It identified as Plaintiff's "primary claim" the allegation that, "despite notice to Defendants that he suffered from seizures, he was housed in an upstairs cell in a top bunk and, as a result, he fell, seriously injuring himself; he alleged this was evidence of an Eighth Amendment violation and deliberate indifference to his serious medical needs." (Id. at 266). It disagreed with the Court's conclusion that the complaint failed because Plaintiff "simply assumed in his complaint, without sufficient factual support, that all of the Defendants had intimate knowledge about his seizure disorder." (Id.). The Fourth Circuit explained:

> In his properly executed declaration, Sherrod alleged that medical provider John Morgan and manager Patricia McEntire, both named Defendants, had knowledge of his seizure disorder but failed to accommodate his disability, leading to his serious injuries due to a fall. We make no finding as to whether Sherrod ultimately may prove an Eighth Amendment violation against the Defendants, see Estelle v. Gamble, 429 U.S. 97, 105-106 (1976); Iko v. Shreve, 535 F.3d 225, 238-39 (4th Cir. 2008), but find that he alleged enough to survive the Defendants' motion for judgment on the pleadings.

(Id. at 266-67). The Fourth Circuit accordingly vacated the judgment in Defendants' favor and

remanded for proceedings consistent with its opinion. (Id.).

On remand, this Court issued an Order on July 20, 2017, that Defendant Morgan be reinstated as a defendant and served with process in accordance with the Fourth Circuit's mandate. (Doc. No. 156). A summons was then issued electronically to the United States Marshals Service. (Doc. No. 157). However, unbeknownst to the Court, Defendant Morgan had received clarification from the Fourth District that "notwithstanding the mention of the claim against Morgan in our opinion, the vacating of the district court's March 30, 2016, order does not affect the dismissal of Morgan as a party to this action." (Doc. No. 159-2 at 2). On July 25, 2017, Defendant Morgan filed a copy of the Fourth Circuit's clarification order and moved the Court to correct its July 20, 2017, Order, (Doc. No. 156), and withdraw the summons, (Doc. No. 157).

In light of the Fourth Circuit's order granting clarification, the Court withdraws the portions of the July 20, 2017, Order directing the United States Marshals Service to serve Defendant Morgan, and instructing the Clerk to reinstate the case against Defendant Morgan. See Fed. R. Civ. P. 60(a). The remainder of the July 20, 2017, Order remains in effect.

IT IS, THEREFORE, ORDERED:

1. Plaintiff's Motion for Relief from the Court's July 20, 2017, Order and Motion for the Court to Withdraw the Summons and Complaint Directed to John Morgan F.N.P., (Doc. No. 158), is **GRANTED**.
2. The portions of the Court's July 20, 2017, Order, (Doc. No. 156), reinstating John Morgan as a defendant in this case and directing the United States Marshals Service to personally serve him, are withdrawn.
3. The summons and complaint directed to John Morgan, (Doc. No. 157), are withdrawn.

4. The Clerk of Court is respectfully instructed to terminate John Morgan as a defendant in this case.

Signed: Augst 8, 2017

Robert J. Conrad, Jr.
United States District Judge

FILED: December 3, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6289
(1:12-cv-00048-RJC)

MARION L. SHERROD

Plaintiff - Appellant

v.

SID HARKLEROAD, Superintendent at North Carolina Department of Correction; JOHN MORGAN, Medical Provider at North Carolina Department of Correction; EDWARDS; STEPHEN SHOOK, Sgt. Officer at North Carolina Department of Correction; PATRICIA MCENTIRE, E-Unit Manager at North Carolina Department of Correction; MARGARET JOHNSON, Nurse at North Carolina Department of Correction; LARRY BASS, Nurse at North Carolina Department of Correction

Defendants - Appellees

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Harris, and Judge Quattlebaum.

For the Court

/s/ Patricia S. Connor, Clerk