APPENDIX A

FILED: June 28, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7884
(0:19-cv-01793-MGL)

SHAHID L. A. MAJID, a/k/a Arthur Moseley

Plaintiff - Appellant

v.

RN RICHARDS, in individual capacity; RN BELSER, in individual capacity; MS. BARBARA, Kitchen Supervisor, in individual capacity; CPT. CARTER, in individual capacity; KAROL BERRY, Health Services Headquarters, in individual capacity; MR. WOODHAM, Kitchen Supervisor, in individual capacity; SGT. SUMMERS, in individual capacity; SCDC; RN MS. HEATHER VARNADORE; LT. C. PARKER, in individual capacity

Defendants - Appellees

J U D G M E N T

In accordance with the decision of this court, this appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
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No. 20-7884

SHAHID L. A. MAJID, a/k/a Arthur Moseley,

Plaintiff - Appellant,

v.

RN RICHARDS, in individual capacity; RN BELSER, in individual capacity; MS. BARBARA, Kitchen Supervisor, in individual capacity; CPT. CARTER, in individual capacity; KAROL BERRY, Health Services Headquarters, in individual capacity; MR. WOODHAM, Kitchen Supervisor, in individual capacity; SGT. SUMMERS, in individual capacity; SCDC; RN MS. HEATHER VARNADORE; LT. C. PARKER, in individual capacity,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Mary G. Lewis, District Judge. (0:19-cv-01793-MGL)

Submitted: June 24, 2021 Decided: June 28, 2021

Before KING and THACKER, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Shahid L. A. Majid, Appellant Pro Se. Andrew Lindemann, LINDEMANN & DAVIS, P.A., Columbia, South Carolina; Amy Lynn Neuschafer, COLLINS & LACY, P.C., Murrells Inlet, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Shahid L.A. Majid seeks to appeal the district court's amended order adopting the magistrate judge's recommendation and dismissing Majid's civil action, as well as denying his requests for injunctive relief. We dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed.

In civil cases, parties have 30 days after the entry of the district court's final judgment or order to note an appeal, Fed. R. App. P. 4(a)(1)(A), unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5) or reopens the appeal period under Fed. R. App. P. 4(a)(6). "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

The district court entered judgment on October 20, 2020. Shahid filed the notice of appeal on November 25, 2020.* Because Shahid failed to file a timely notice of appeal or to obtain an extension or reopening of the appeal period, we grant Defendants' motions to dismiss this appeal for lack of jurisdiction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

* For the purpose of this appeal, we assume that the date designated by Majid in his certificate of service is the earliest date Majid could have delivered the notice to prison officials for mailing to the court. Fed. R. App. P. 4(c)(1); *Houston v. Lack*, 487 U.S. 266, 276 (1988).

APPENDIX B,

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

SHAHID L.A. MAJID, *aka Arthur Moseley*, Plaintiff,

vs.

RN Richards; RN Belser; Ms. Barbara, *Kitchen Supervisor*; Cpt. Carter; Karol Berry, *Health Service HeadQuarters*; Mr. Woodham, *Kitchen Supervisor*; Sgt. Summers; RN Ms. Heather Varnadore; Lt. C. Parker, *all in their individual capacities*; SCDC;

Defendants.

CIVIL ACTION 0:19-1793-MGL-PJG

ORDER ADOPTING THE REPORT AND RECOMMENDATION, GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFFS' MOTIONS FOR A PRELIMINARY INJUNCTION

Plaintiff Shahid L.A. Majid (Majid) filed this 42 U.S.C. lawsuit pro se. The matter is before the Court for review of the Report and Recommendation (Report) of the United States Magistrate Judge suggesting Defendants' motions for summary judgment be granted and Majid's motions for a preliminary injunction be denied. The Report was made in accordance with 28 U.S.C. § 636 and Local Civil Rule 73.02 for the District of South Carolina.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the Court may

accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Magistrate Judge filed the Report on September 25, 2020, but Majid failed to file any objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note). Moreover, a failure to object waives appellate review. *Wright v. Collins*, 766 F.2d 841, 845-46 (4th Cir. 1985).

After a thorough review of the Report and the record in this case pursuant to the standard set forth above, the Court adopts the Report and incorporates it herein. Therefore, it is the judgment of the Court Defendants' motions for summary judgment are **GRANTED** and Majid's motions for a preliminary injunction are **DENIED**.

IT IS SO ORDERED.

Signed this 19th day of October, 2020, in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE

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NOTICE OF RIGHT TO APPEAL

The parties are hereby notified of the right to appeal this Order within thirty days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Shahid L.A. Majid, *aka Arthur Moseley*, Plaintiff, v. RN Richards; RN Belser; Ms. Barbara, *Kitchen Supervisor*; Cpt. Carter; Karol Berry, *Health Service HeadQuarters*; Mr. Woodham, *Kitchen Supervisor*; Sgt. Summers; RN Ms. Heather Varnadore; Lt. C. Parker, *all in their individual capacities*; SCDC; Defendants.	)	C/A No. 0:19-1793-MGL-PJG **REPORT AND RECOMMENDATION**

The plaintiff, Shahid L.A. Majid, a self-represented state prisoner, filed this action alleging a violation of his constitutional rights. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.) for a Report and Recommendation on the defendants' motions for summary judgment. (ECF Nos. 117 & 121.) Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), the court advised Majid of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to the defendants' motion. (ECF Nos. 118 & 122.) Majid filed responses in opposition to the motions (ECF Nos. 148 & 149), as well as motions seeking a preliminary injunction (ECF Nos. 141 & 160), and the defendants replied (ECF Nos. 158 & 159).[1] Having reviewed the record presented and the applicable law, the court finds that the defendants' motions should be granted, and Majid's motions should be denied.

[1] Majid also filed a sur-reply. (ECF No. 165.) The Local Civil Rules make no provision for sur-replies. However, consideration of Majid's sur-reply would not change the court's recommendation on the defendants' motion.

BACKGROUND

The following facts are either undisputed or are taken in the light most favorable to Majid, to the extent they find support in the record. Majid generally alleges that in or around October 2018, while housed at Broad River Correctional Institution ("BRCI"), he was distributed food consisting of a 2400-calorie diet. Majid complains that sometimes food items were missing from his tray. He also appears to allege that—perhaps due to his diabetes—he should have received a 3000-calorie diet tray, but that South Carolina Department of Corrections ("SCDC") staff ignored his complaints. Majid also alleges that on November 24, 2018, he suffered from vomiting and a fever and passed out in his cell, hitting his head. He alleges that Defendants Richards and Varnadore, both nurses, did not properly treat his medical needs when they visited his cell. (See generally Am. Compl., ECF No. 15.)

The court construed Majid's Amended Complaint as alleging only claims pursuant to 42 U.S.C. § 1983 for deliberate indifference to serious medical needs and a nutritionally adequate diet in violation of the Eighth Amendment; the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq; and a state law claim of gross negligence. (Order, ECF No. 40 at 1.) No party challenged this construction of the claims. Majid seeks monetary relief. (Am. Compl., ECF No. 15 at 7.)

DISCUSSION

A. Summary Judgment Standard

Under Rule 56, summary judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish

the existence of an element essential to that party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(c), (e); Celotex Corp., 477 U.S. at 322. Further, while the federal court is charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case, see, e.g., Cruz v. Beto, 405 U.S. 319 (1972), the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990).

B. Defendants' Motions for Summary Judgment

1. Eighth Amendment—Deliberate Indifference

The Eighth Amendment to the United States Constitution expressly prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. To proceed with his claim under the Eighth Amendment, Majid must demonstrate: (1) objectively, the deprivation suffered or

injury inflicted was "sufficiently serious," and (2) subjectively, the prison officials acted with a "sufficiently culpable state of mind." Farmer v. Brennan, 511 U.S. 825, 834 (1994); Williams v. Benjamin, 77 F.3d 756, 761 (4th Cir. 1996). "These requirements spring from the text of the amendment itself; absent intentionality, a condition imposed on an inmate cannot properly be called 'punishment,' and absent severity, such punishment cannot be called 'cruel and unusual.' " Iko v. Shreve, 535 F.3d 225, 238 (4th Cir. 2008) (citing Wilson v. Seiter, 501 U.S. 294, 298-300 (1991)). "What must be established with regard to each component 'varies according to the nature of the alleged constitutional violation.' " Williams, 77 F.3d at 761 (quoting Hudson v. McMillian, 503 U.S. 1, 5 (1992)).

Deliberate indifference by prison personnel to a prisoner's medical needs is actionable under the Eighth Amendment to the United States Constitution. See Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). To satisfy the subjective prong of an Eighth Amendment claim, an inmate must show that the prison official's state of mind was "deliberate indifference" to the inmate's health and safety. Farmer, 511 U.S. at 834. A prison official is deliberately indifferent if he has actual knowledge of a substantial risk of harm to an inmate and disregards that substantial risk. Id. at 847; Parrish v. Cleveland, 372 F.3d 294, 302 (4th Cir. 2004). To be liable under this standard, the prison 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." Farmer, 511 U.S. at 837. However, because even a subjective standard may be proven through circumstantial evidence, "a prison official cannot hide behind an excuse that he was unaware of a risk, no matter how obvious." Makdessi v. Fields, 789 F.3d 126, 133 (4th Cir. 2015) (quoting Brice v. Va. Beach Corr. Ctr., 58 F.3d 101, 105 (4th Cir. 1995)). Therefore, "a factfinder may conclude that a prison

official knew of a substantial risk from the very fact that a risk was obvious." Makdessi, 789 F.3d at 133 (quoting Farmer, 511 U.S. at 842).

Not "every claim by a prisoner [alleging] that he has not received adequate medical treatment states a violation of the Eighth Amendment." Estelle, 429 U.S. at 105. To establish deliberate indifference, 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). Mere negligence, malpractice, or incorrect diagnosis is not actionable under 42 U.S.C. § 1983. See Estelle, 429 U.S. at 106. While the Constitution requires a prison to provide inmates with medical care, it does not demand that a prisoner receive the treatment of his choice. Jackson v. Fair, 846 F.2d 811, 817 (1st Cir. 1988). "[A] prisoner's mere difference of opinion over matters of expert medical judgment or a course of medical treatment fail[s] to rise to the level of a constitutional violation." Nelson v. Shuffman, 603 F.3d 439, 449 (8th Cir. 2010) (internal quotation marks & citation omitted) (alterations in original); see also Wright v. Collins, 766 F.2d 841, 849 (4th Cir. 1985).

a. Claims Regarding Food Tray

As stated above, Majid generally alleges that the food tray he received was inadequate in that it consisted of only 2400 calories and that food items were sometimes missing from his tray. The crux of Majid's claims appears to be his disagreement with the diet he received while at BRCI and his belief that he should instead be receiving a 3000-calorie diet.

In support of their motion for summary judgment, the defendants present affidavit testimony from Teri Hiott of SCDC's Office of Health and Information Resources, who avers that Majid was prescribed a 2400-calorie diabetic diet during the time period in which he was housed at BRCI. (Hiott Aff. ¶¶ 1-3, ECF No 121-3.) Hiott also refers to medical records that show the history of Majid's prescribed 2400-calorie diet from May 4, 2018 while housed at Lieber

Correctional Institution, to July 20, 2018 when Majid was transferred to BRCI, to February 12, 2019 after Majid had been transferred from BRCI to Lee Correctional Institution. (Id. ¶ 3, ECF No. 121-3 at 1-2; Med. Recs., ECF No. 121-3 at 3-5.) Hiott also provides information that shows that approximately a year after Majid was transferred from BRCI, his diet prescription was changed to a 3000-calorie diabetic diet. (Hiott Aff. ¶ 3, ECF No. at 2, Med. Recs., ECF No. 121-3 at 6.) Importantly, the defendants also point out that Majid's diet was prescribed by a physician, yet none of the named defendants is the physician who either prescribed a 2400-calorie diet to Majid or who may have refused to prescribe a 3000-calorie diet to Majid. (Defs.' Mem. Supp. Summ. J., ECF No. 121-1 at 4.)

With regard to the actual meals received by Majid, the defendants provide affidavit testimony from Betty Smith, the Food Service Administrator, who avers that the 2400-calorie diabetic diet menu prescribed to Majid was developed by qualified SCDC nutritionists in accordance with state and federal statutes; DHEC regulations; and the "Recommended Dietary Allowances" as defined by the National Academy of Sciences National Research Council. (Smith Aff. ¶¶ 1-6, ECF No. 121-2 at 1-2.) Smith also swears that she reviewed the daily meal logs which she avers show that Majid received meals in compliance with the 2400-calorie diet each day during the period of which Majid complains. (Id. ¶ 15, ECF No. 121-2 at 3.)

In response, Majid references exhibits attached to his Amended Complaint in the form of requests to staff, Step 1 grievances, and sick call requests that he alleges show that he was not receiving the proper diet during the time period at issue. (See generally Exs. A-F, ECF No. 15-1 at 1-6.) Additionally, he attaches to his response in opposition to the defendants' motion a

declaration[2] and what appears to be a partial diet portion sheet. In his declaration, he attests that the exhibits attached to his Complaint show that the daily meal logs are not correct and that he was not receiving meals in compliance with the 2400-calorie diet.[3] (ECF No. 149-2 at 7, 4.) Review of these documents shows that Majid did indeed complain in October and November of 2018 that he believed he was not receiving the correct or sufficient amount of food on his trays; however, these documents also show that Majid's concerns were investigated and found to be misplaced. Responses to Majid's requests to staff and grievance forms point out that every breakfast meal does not contain identical items, and that the food he was receiving was representative of a 2400-calorie diet. (See generally Exs. A-F, ECF No. 15-1 at 1-6.)

Courts have recognized that "lay people are not qualified to determine . . . medical fitness, whether physical or mental; that is what independent medical experts are for." O'Connor v. Pierson, 426 F.3d 187, 202 (2d Cir. 2005); see also Nelson, 603 F.3d at 449 ("A prisoner's disagreement as to the appropriate treatment fails to rise to the level of a constitutional claim and

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[2] Although entitled a "Declaration of Service," this filing does not substantially comply with 28 U.S.C. § 1746 in that Majid fails to declare that the statements made in the declaration are true and correct. However, for the reasons discussed, even consideration of Majid's declaration would not preclude summary judgment being granted in favor of the defendants. This document also appears to consist of two pages, although the pages are not sequential and are out of order. (ECF No. 149-2 at 7, 4.)

[3] Majid also attaches to his response in opposition an additional request to staff, Step 1 grievance, and additional "declarations of service." (ECF Nos. 149-2 at 5-6, 10-12.) However, the allegations referenced in these documents occurred at a much later time period than the time period alleged in the Amended Complaint. Majid did not move to supplement his Amended Complaint to add these claims. Thus, these documents do not support the claims at issue in this action. Additionally, to the extent Majid raises additional claims in his response in opposition that were not raised in his Amended Complaint, such claims are not properly before the court. See, e.g., Bridgeport Music, Inc. v. WM Music Corp., 508 F.3d 394, 400 (6th Cir. 2007) (holding that a party may not expand its claims to assert new theories in response to summary judgment); White v. Roche Biomedical Labs., Inc., 807 F. Supp. 1212, 1216 (D.S.C. 1992) (noting that "a party is generally not permitted to raise a new claim in response to a motion for summary judgment").

fails to create a genuine issue of material fact."); Dulany v. Carnahan, 132 F.3d 1234, 1240 (8th Cir. 1997) ("In the face of medical records indicating that treatment was provided and physician affidavits indicating that the care provided was adequate, an inmate cannot create a question of fact by merely stating that she did not feel she received adequate treatment."); Fleming v. Lefevere, 423 F. Supp. 2d 1064, 1070 (C.D. Cal. 2006) ("Plaintiff's own opinion as to the appropriate course of care does not create a triable issue of fact because he has not shown that he has any medical training or expertise upon which to base such an opinion."). Here, Majid does not refute the defendants' evidence that he was prescribed a 2400-calorie diabetic diet by the SCDC medical staff during the time period at issue. Rather, he claims that this diet was insufficient and that he wished to be prescribed a 3000-calorie diet. Additionally, the record shows that Majid had access to medical care while housed within SCDC facilities prior to, during, and after the relevant time period. Moreover, Majid has provided no admissible evidence supporting a finding that he faced "a substantial risk of serious harm" from the prescribed 2400-calorie diet as required to establish the objective component of a deliberate indifference claim under the Eighth Amendment. Farmer, 511 U.S. at 837. Majid does not have a constitutional claim against the defendants merely because he disagrees with the prescribed diet he received. See Jackson, 846 F.2d at 817; Nelson, 603 F.3d at 449; see also O'Connor, 426 F.3d at 202; Dulany, 132 F.3d at 1240; Fleming, 423 F. Supp. 2d at 1070. At most, Majid's claims allege negligence or medical malpractice, which are not actionable under § 1983. See Daniels v. Williams, 474 U.S. 327, 328-36 & n.3 (1986); Pink v. Lester, 52 F.3d 73, 78 (4th Cir. 1995) ("The district court properly held that Daniels bars an action under § 1983 for negligent conduct."); Ruefly v. Landon, 825 F.2d 792, 793-94 (4th Cir. 1987); see also Estelle, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."). Accordingly, based on the record presented in this

case—which, notably, shows that SCDC officials investigated Majid's complaints and found them to be unwarranted, no reasonable jury could find that the defendants were deliberately indifferent to Majid's dietary needs. See Farmer, 511 U.S. at 837.

b. Claims regarding November 24, 2018 Medical Incident

Majid alleges that on November 24, 2018, he suffered from vomiting and a fever and passed out in his cell, hitting his head, He raises claims against Defendants Richards and Varnadore—both nurses—whom he alleges did not properly treat his medical needs when they visited his cell.

i. Defendant Richards

Majid filed his Amended Complaint on July 17, 2019. (ECF No. 15.) On September 24, 2019, the court authorized the issuance and service of process and directed the United States Marshals Service to effect service because Majid is proceeding *in forma pauperis*. (ECF No. 40.) Majid was warned that Federal Rule of Civil Procedure 4(m) provides a ninety-day time limit for service and that Majid's case may be dismissed if service was not properly effected within that time. The summons for Defendant Richards was returned unexecuted. (ECF No. 59.)

The United States Marshals's service form (Form USM-285) indicated that Defendant Richards could not be identified or located. (Id.) On December 20, 2019, the court issued an order explaining that the summons for Defendant Richards was returned unexecuted. (ECF No. 86.) The court attached the returned Form USM-285 that explained why service could not be effected and directed Majid to complete a new Form USM-285 for Defendant Richards with information sufficient to identify the defendant. (ECF No. 86.) Majid was specifically advised that if he needed more time to effect service on this defendant, he must file a motion to extend the time for service and show good cause for his failure to do so pursuant to Rule 4(m). (Id.) Although Majid returned an almost identical Form USM-285 to the court, he did not move to extend the service deadline. Accordingly, on February 10, 2020, the court issued a docket text order directing that Majid's

USM-285 form as to Defendant Richards not be served, as the service deadline had expired and Majid had not shown good cause to extend the deadline. (ECF No. 107); see Mendez v. Elliott, 45 F.3d 75, 79 (4th Cir. 1995) (holding that the court may not extend the time for service absent a showing of good cause).

Pursuant to Federal Rule of Civil Procedure 4(m), service of process generally must be effected on a defendant within ninety days of filing the Complaint. In this case, over ninety days has passed since the filing of the Amended Complaint and the issuance of the order directing service of process. See Robinson v. Clipse, 602 F.3d 605, 608-09 (4th Cir. 2010) (tolling the time period for service during initial review). After review of the unexecuted summons, the court concludes that the investigative efforts of the United States Marshals Service were reasonable. See Greene v. Holloway, No. 99-7380, 2000 WL 296314, at *1 (4th Cir. 2000) (citing with approval Graham v. Satkoski, 51 F.3d 710 (7th Cir. 1995)). Importantly, Majid has not moved to extend the time for service, which lapsed in December, even after the court suggested Majid do so. Accordingly, the court recommends that Defendant Richards be dismissed without prejudice pursuant to Federal Rule of Civil Procedure 4(m).

ii. Defendant Varnedore

Although Majid initially named a "Jane Doe" nurse defendant, he later identified this defendant as "R.N. Ms. Heather Varnadore." (See Order, ECF No. 40 at 2.) Specifically, Majid alleges as to Defendant Varnadore that she came to his cell to examine him, yet failed to check his vital signs; did not take blood, urine, or stool samples; did not perform an emergency sick call assessment; did not order emergency hospitalization; and did not prescribe any medication. (Am. Compl. ¶ 7, ECF No. 15 at 5.)

In support of her motion for summary judgment, Defendant Varnadore provides affidavit testimony in which she swears that she assessed Majid on November 24, 2018 in the Restrictive

Housing Unit in response to a call from SCDC officers. (Varnadore Aff. ¶ 4, ECF No. 117-2 at 2.) Varnadore avers that when she arrived at Majid's cell, she observed him lying on the floor next to his bed; noted that he was breathing; and noted that he was responsive when she said his name. (Id. ¶ 5.) Majid advised Varnadore that he had thrown up and was feeling light-headed and had passed out. (Id. ¶ 7, ECF No. 117-2 at 3.) Varnadore avers that she performed an assessment on Majid during which she noted he had no open wounds; noted that Majid reported his abdomen was tender to the touch; noted that abdominal sounds were present in all four quadrants, which was normal; took Majid's vital signs, which were normal; and noted no respiratory distress and that his lung sounds were good. (Id. ¶ 8.) Varnadore further avers that Majid reported that he was nauseated, so he was given an injection of Promethazine, a drug used to treat nausea and vomiting. (Id. ¶ 9.) Varnadore swears that after she exited Majid's cell, she observed Majid sit up and drink some water. (Id. ¶ 10.) Varnadore also provides as evidence the medical record and her notes pertaining to her November 24, 2018 assessment of Majid which further support her affidavit testimony. (ECF No. 117-3 at 2-4.)

In response to Defendant Varnadore's motion, Majid raises a plethora of new allegations against Defendant Varnadore and unnamed medical staff including a lack of care in the days following the November 24, 2018 incident, violations of various SCDC policies, and additional claims regarding the alleged lack of care provided by Varnadore on the date of the incident. (See generally Pl.'s Resp. Opp'n Summ. J., ECF No. 148.) However, once again, these claims were not included in Majid's Amended Complaint, and thus are not properly before the court. See, e.g., Bridgeport Music, Inc., 508 F.3d at 400; White, 807 F. Supp. at 1216. With regard to the claims properly before the court, Majid argues that Varnadore's actions met both the objective and subjective components of the test outlined in Farmer, and provides evidence in support of these arguments in the form of "affidavits" and "declarations" attached to his response. However, as

argued by Defendant Varnadore, this evidence is either not admissible or does not support Majid's claims for the following reasons.

As an initial matter, Defendant Varanadore argues that the court should not consider these documents because they are "neither affidavits made under oath nor are they unsworn declarations made in substantial compliance with 28 U.S.C. § 1746." (Def.'s Mem. Supp. Summ. J., ECF No. 158.) Majid attempts to correct some of the many deficiencies outlined by the defendant by resubmitting corrected attachments to his sur-reply, which he filed without leave of the court. (See ECF No. 165-2.) However, even assuming without deciding that Majid's attachments could be considered by the court, the information contained within does not preclude summary judgment for Defendant Varnadore.

Much of Majid's evidence relates either to the time period following the November 24, 2018 incident in which he alleges that he continued to experience pain and requested (from unspecified persons) to receive additional medical care, or relates to the additional claims he attempts to raise against Defendant Varnadore. Accordingly, to the extent this evidence is not relevant to the claims before the court as alleged in Majid's Amended Complaint—specifically, the immediate medical care provided by Defendant Varnadore at Majid's cell on November 24, 2018—it is not admissible and cannot be considered.

Many of Majid's remaining "declarations" recount his own conversations with nurses from other SCDC institutions in which he tells a nurse about the November 24, 2018 incident and the nurse opines how Majid's medical care should have been different. As correctly argued by Defendant Varnadore, such hearsay evidence is inadmissible and should not be considered by the court in considering Defendant Varnadore's summary judgment motion. (See Def.'s Mem. Supp. Summ. J., ECF No. 158 at 8-10); see also Fed. R. Evid. 801 & 802; Md. Highways Contractors

Ass'n v. Maryland, 933 F.2d 1246, 1251 (4th Cir. 1991) ("[S]everal circuits, including the Fourth Circuit, have stated that hearsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment."). Accordingly, to the extent Majid's evidence consists of hearsay, such evidence is inadmissible.[4]

Small portions of Majid's evidence do appear to pertain to the claims alleged by Majid against Defendant Varnadore in his Amended Complaint. (See, e.g., ECF No. 148 at 10-12; ECF No. 165-2 at 3-5.) However, this evidence, even if considered, does not avail Majid, as he does not dispute in these "declarations" that Defendant Varnadore provided him with medical treatment, but rather, that the treatment she provided was insufficient. As stated above, Majid does not have a constitutional claim against Defendant Varnadore merely because he disagrees with the treatment he received. See Jackson, 846 F.2d at 817; Nelson, 603 F.3d at 449; see also O'Connor, 426 F.3d at 202; Dulany, 132 F.3d at 1240; Fleming, 423 F. Supp. 2d at 1070. At most, Majid's claims allege negligence or medical malpractice, which are not actionable under § 1983. See Daniels v. Williams, 474 U.S. 327, 328-36 & n.3 (1986); Pink v. Lester, 52 F.3d 73, 78 (4th Cir. 1995) ("The district court properly held that Daniels bars an action under § 1983 for negligent conduct."); Ruefly v. Landon, 825 F.2d 792, 793-94 (4th Cir. 1987); see also Estelle, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."). Accordingly, based on the record presented in this case, no reasonable jury could find that Defendant Varnadore was deliberately indifferent to Majid's medical needs. See Farmer, 511 U.S. at 837.

[4] In his sur-reply, Majid appears to argue that this evidence should be considered as expert witness testimony in support of a claim for medical malpractice against Defendant Varnadore. (See ECF No. 165 at 2.) However, such evidence does not comply with S.C. Code Ann. § 15-36-100(B) which instructs a plaintiff claiming medical malpractice must file an expert affidavit with his *complaint*, which Majid failed to do.

2. ADA Claim

Majid also purports to allege a claim under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., in which he states that he has been diagnosed with type-II diabetes, yet was prescribed a 2400-calorie diabetic diet instead of a 3000-calorie diabetic diet while housed at BRCI. Although the court construed Majid's Amended Complaint as purporting to raise such a claim, Majid's claim fails as a matter of law based on the following authority and for the reasons argued by the defendants in their motion for summary judgment. See 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."); Reyazuddin v. Montgomery Cty., Maryland, 789 F.3d 407, 421 (4th Cir. 2015) (holding that the ADA's "prohibitions on discrimination against individuals with disabilities" is divided "into three parts, each with its own heading: Title I for employment, Title II for public services, and Title III for public accommodations."); Constantine v. George Mason Univ., 411 F.3d 474, 498 (4th Cir. 2005) ("[A] plaintiff seeking recovery for violation [of Title II of the ADA] must allege that (1) [he] has a disability, (2) [he] is otherwise qualified to receive the benefits of a public service, program, or activity, and (3) [he] was excluded from participation in or denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of [his] disability."); Fitzgerald v. Corrections Corp. of America, 403 F.3d 1134, 1144 (10th Cir. 2005) (holding that medical treatment decisions do not ordinarily fall within the scope of the ADA); Wessel v. Glendening, 303 F.3d 203 (4th Cir. 2002) ("Congress did not validly abrogate the sovereign immunity of the states when it enacted . . . Title II of the ADA.") overruled in part by United States v. Georgia, 546 U.S. 151, 159 (2006) ("[I]nsofar as Title II [of the ADA] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth

Amendment, Title II validly abrogates state sovereign immunity."); Jones v. Sternheimer, 387 F. App'x 366 (4th Cir. 2010) (holding that the ADA does not provide for causes of action against individuals); (see also Def.'s Mem. Supp. Summ. J. at 4-7, ECF No. 121-7 at 4-7).

C. Majid's Motions for a Preliminary Injunction[5]

A plaintiff seeking a preliminary injunction must establish all four of the following elements: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); The Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346-47 (4th Cir. 2009), vacated on other grounds by 559 U.S. 1089 (2010), reissued in part by 607 F.3d 355 (4th Cir. 2010), overruling Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977).[6] A plaintiff must make a clear showing that he is likely to succeed on the merits of his claim. Winter, 555 U.S. at 22; Real Truth, 575 F.3d at 345-46. Similarly, he must make a clear showing that he is likely to be irreparably harmed absent injunctive relief. Winter, 555 U.S. at 20-23; Real Truth, 575 F.3d at 347. Only then may the court consider whether the balance of equities tips in the plaintiff's favor. See Real Truth, 575 F.3d at 346-47.[7] Finally, the court must pay

[5] Although Majid also captions his filings as motions for a temporary restraining order, because the defendants have had notice of Majid's motions, the court is treating the motions as filed under Rule 65(a) of the Federal Rules of Civil Procedure rather than Rule 65(b).

[6] The portions of Real Truth that were reissued by the Fourth Circuit are Parts I and II found at 575 F.3d at 345-47, which are the sections addressing injunctions that are relied upon in the court's Report and Recommendation.

[7] Based on Winter, the Real Truth Court expressly rejected and overruled Blackwelder's sliding scale approach, which allowed a plaintiff to obtain an injunction with a strong showing of a probability of success even if he demonstrated only a possibility of irreparable harm. Real Truth, 575 F.3d at 347; Winter, 555 U.S. at 21-23.

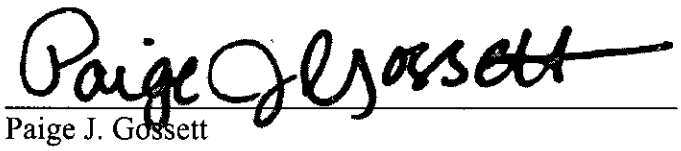
particular regard to the public consequences of employing the extraordinary relief of injunction. Real Truth, 575 F.3d at 347 (quoting Winter, 555 U.S. at 24).

To the extent Majid seeks injunctive relief regarding dental care, access to a computer in the law library, and sanitary conditions in the kitchen, as discussed above, these issues were not raised in Majid's Amended Complaint. Consequently, Majid's is not entitled to relief on these claims. See Devose v. Herrington, 42 F.3d 470, 471 (8th Cir. 1994) ("[A] party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint"); Stewart v. U.S. I.N.S., 762 F.2d 193, 199 (2d Cir. 1985) (finding the district court lacked jurisdiction over the plaintiff's motion for a preliminary injunction because the issues presented in the motion were "entirely different from those which were alleged in his original complaint").

Majid also seeks injunctive relief against kitchen staff because he alleges he is receiving inadequate portions of food or the wrong type of food on his food tray. However, for the reasons discussed in this Report and Recommendation, Majid has failed to show that he is likely to succeed on the merits. See Winter, 555 U.S. at 22. Additionally, he has failed to show that the conduct of which he complains would cause him irreparable harm. Id. at 20-23. Accordingly, for these reasons and because Majid has failed to establish the four elements of Winter, Majid cannot demonstrate that these circumstances warrant the extraordinary remedy he seeks. Thus, Majid's motions for a preliminary injunction should be denied.

RECOMMENDATION

For the foregoing reasons, the court recommends that the defendants' motions for summary judgment be granted (ECF Nos. 117 & 121) and Majid's motions for a preliminary injunction be denied (ECF Nos. 141 & 160).



September 24, 2020
Columbia, South Carolina

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

The parties' attention is directed to the important notice on the next page.

Additional material from this filing is available in the Clerk's Office.