FILED: May 18, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7791
(9:18-cv-03028-RMG-BM)

WILLIE JOHNSON

Plaintiff - Appellant

v.

BRYAN P. STIRLING, SCDC Director of South Carolina Department of Corrections; WEST PRICE; EMILY A. FARR; ELIZABETH SIMMONS; DR. STACY SMITH; DR. RICK TOOMEY, Director of DHEC

Defendants - Appellees

ORDER

WILLIE JOHNSON (127069), has applied to proceed without prepayment of fees and given written consent to the collection in installments of the filing fee from appellant's trust account in accordance with the terms of the Prison Litigation Reform Act, 28 U.S.C. § 1915(b)(PLRA). The court grants appellant leave to proceed without full prepayment of fees and directs that:

> an initial partial fee of 20 percent of the greater of the average monthly deposits or average monthly balance for the six-month period immediately preceding the filing of

A copy of this order shall be sent to appellant's custodian, to the Clerk, U. S. District Court, and to all parties.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

Appendix A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6657

WILLIE JOHNSON,

Plaintiff - Appellant,

v.

BRYAN P. STIRLING, SCDC Director of South Carolina Department of Corrections; WEST PRICE; SERGEANT A. HUDSON; SERGEANT STORY; SERGEANT WRIGHT,

Defendants - Appellees.

No. 19-7791

WILLIE JOHNSON,

Plaintiff - Appellant,

v.

BRYAN P. STIRLING, SCDC Director of South Carolina Department of Corrections; WEST PRICE; EMILY A. FARR; ELIZABETH SIMMONS; DR. STACY SMITH; DR. RICK TOOMEY, Director of DHEC,

Defendants - Appellees.

Appeals from the United States District Court for the District of South Carolina, at Beaufort. Richard Mark Gergel, District Judge. (9:18-cv-03028-RMG-BM)

Appendix A

PER CURIAM:

Willie Johnson appeals the district court's orders accepting the recommendations of the magistrate judge and denying relief on Johnson's 42 U.S.C. § 1983 complaint. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Johnson v. Stirling*, No. 9:18-cv-03028-RMG-BM (D.S.C. Oct. 21, 2019 & Apr. 2, 2021). 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.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Willie Johnson, Plaintiff, v. Bryan P. Stirling, West Price; Emily A. Farr, Dr. Rick Toomey, Elizabeth Simmons; Dr. Stacy Smith, Defendants.	Civil Action No. 9:18-3028-RMG **ORDER**

I. Background

Plaintiff, Willie Johnson is proceeding *pro se*. He brings an action against Defendants Bryan Stirling, West Price, Emily A. Farr, Elizabeth Simmons, Dr. Stacey Smith, and Dr. Rick Toomey. Plaintiff's Second Amended Complaint alleges several claims against Defendants, but on October 21, 2019, the Court dismissed all of Plaintiff's claims except for deliberate indifference to a serious medical need pursuant to 42 U.S.C. § 1983. (Dkt. Nos. 47; 64). As to Plaintiff's deliberate indifference claim, Plaintiff alleges he was diagnosed with myeloma bone cancer in December 2016 and was transferred to Kirkland Correctional Institute ("KCI") for transfer to an outside medical facility. (Dkt. No. 47 at 9). Plaintiff alleges that in August 2017, Defendant Price improperly cancelled his stem cell transplant that was prescribed by the Medical University of South Carolina ("MUSC"). (*Id.* at 10). Plaintiff alleges he did not receive proper medical care because Defendants Price and Simmons were EMTs and not licensed nurses. (*Id.* at 10-13). In addition, Plaintiff contends that Defendants Stirling, Farr, Dr. Toomey, and Dr. Smith were aware

Appendix B

in the record to support a § 1983 action against Defendants regarding the subjective component of his medical indifference claim.[2]

1. Defendants Stirling, Farr, Dr. Toomey, Dr. Smith

Plaintiff appears to assert that Defendants Stirling, Farr, Dr. Toomey, and Dr. Smith are vicariously liable for the medical care provided to plaintiff by Defendants Price and Simmons, as EMTs. The doctrine of *respondent superior* has no application under § 1983. *Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985). There are three elements necessary to establish supervisory liability under § 1983: (1) the supervisor had actual or constructive knowledge that a subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to people like the plaintiff; (2) the supervisor's response was so inadequate as to constitute deliberate indifference or tacit authorization of the subordinate's conduct; and (3) there is an "affirmative causal link" between the supervisor's inaction and the plaintiff's constitutional injury. *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994).

Plaintiff does not set forth evidence to establish supervisor liability under § 1983 as to Defendants Stirling, Farr, Dr. Toomey, and Dr. Smith. The evidence reflects that Defendant Farr is the Director of SCLLR and Dr. Toomey, is the Director of DHEC. (Dkt. No. 161-3). Neither of these Defendants were direct supervisors of Defendants Price and Simmons as SCDC employees. SCDC controls all hiring, training, and firing decisions of its employees. (Dkt. Nos. 161-2; 161-3). Defendants Stirling and Smith are employed by SCDC and Plaintiff appears to allege supervisory liability based on the use of EMTs to provide medical care. (Dkt. Nos. 161-5; 161-6).

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[2] Plaintiff objects to the Magistrate Judge's findings on pages 6-7 of the R & R that Plaintiff has failed to identify evidence in the record to support a § 1983 action against Defendants with regard to the subjective component of his Eighth Amendment claim. (Dkt. No. 172 at 8-9). Yet, Plaintiff has not come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

Yet, Plaintiff failed to identify a specific injury as a result of this practice and fails to identify any conduct of these Defendants that amounts to deliberate indifference.

Plaintiff does not set forth evidence to establish that Defendants Stirling, Farr, Dr. Toomey, and Dr. Smith were directly deliberately indifferent to Plaintiff's serious medical need. Plaintiff must show that the officials were aware of facts from which the inference could be drawn that a substantial risk of harm existed and drew that inference. *Heyer*, 849 F.3d at 211. In her Affidavit, Dr. Smith states that "while the doctors at MUSC believed the stem cell transplant would help, the care Plaintiff received, including aggressive chemotherapy, is a [p]roper course of treatment for myeloma bone cancer." (Dkt. No. 161-6 at 2). Plaintiff seeks to find Defendants liable for the alleged cancellation of his stem cell transplant. (Dkt. No. 47 at 10-13). Dr. Smith states that although MUSC recommended the stem cell transplant, SCDC needed to approve it and the decision to approve was not made by her nor any of the other Defendants. (Dkt. No. 161-6 at 2). Dr. Smith states the stem cell treatment was not officially scheduled and therefore was not ever cancelled. (*Id.*). Disagreements between an inmate and a physician over the inmate's proper medical care fail to state a § 1983 claim unless exceptional circumstances are alleged. *Wright v. Collins*, 766 F.2d 841, 849 (4th Cir. 1985).

The Court finds the Magistrate Judge correctly determined that at most, Plaintiff asserts a medical malpractice claim against Defendants, which does not amount to a violation of Plaintiff's Eighth Amendment rights. *Estelle*, 429 U.S. at 106 (explaining that a complaint a physician has been negligent in diagnosing a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment and medical malpractice does not become a constitutional violation merely because the victim is a prisoner.) There is no genuine issue of material fact Defendants Stirling, Farr, Dr. Toomey, and Dr. Smith directly or in a supervisory

capacity, knew of and disregarded an excessive risk of harm to Plaintiff's health or safety. Therefore, summary judgment is granted as to these Defendants.

2. Defendants Price and Simmons

Plaintiff alleges that Defendants Price and Simmons were deliberately indifferent to his serious medical needs. Plaintiff alleges he received insufficient medical care because these Defendants provided medical care as EMTs and not licensed nurses. The record contains the Affidavits of Defendants Stirling and Dr. Smith who aver that the use of licensed, supervised EMTs is acceptable under SCDC policies. (Dkt. Nos. 161-5 at 1; 161-6 at 1). In her Affidavit, Defendant Dr. Smith states that the use of licensed, supervised EMTs is comparable to the role of a Licensed Practical Nurse, and that all EMTs used in the infirmaries within SCDC are supervised by an attending, licensed physician, as well as licensed registered nurses. (Dkt. No. 161-6 at 1). Dr. Smith states that EMTs do not make decisions on treatment methods, do not direct the course of an inmate's care, and do not make medical diagnoses; rather, these decisions are delegated to the attending physician and health directors at SCDC. (Dkt. No. 161-6 at 1-2). Defendant Simmons echoes Dr. Smith's statement that as an EMT she does not make decisions to direct treatment and the course of an inmate's care, nor did she make any medial or treatment diagnosis regarding Plaintiff. (Dkt. No. 161-4 at 1-2). Last, Dr. Smith states that Defendants Price and Simmons were properly trained and observed, and that they provided Plaintiff adequate care. (Dkt. No. 161-6 at 1).

As to Plaintiff's allegation that Defendant Price cancelled Plaintiff's stem cell transplant that MUSC prescribed, Plaintiff fails to establish a deliberate indifference claim. The record reflects that EMTs do not determine treatment methods and are not responsible for directing an inmate's care. (Dkt. Nos. 161-4 at 1-2; 161-6 at 2). Defendant Dr. Smith states that MUSC recommended

a stem cell transplant, but the transplant was never approved by SCDC and was cancelled because it was never officially scheduled. (Dkt. No. 161-6 at 2). Plaintiff has not provided any evidence to demonstrate that Defendants Price and Simmons knew of and disregarded an excessive risk to Plaintiff's health or safety.[3] Therefore, summary judgment is appropriate as to Defendants Price and Simmons.

3. Qualified Immunity

Upon a review of the record, the parties' arguments, and the R & R, the Court finds the Magistrate Judge correctly determined that Defendants are protected by qualified immunity. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A court must first make a threshold inquiry of whether a plaintiff's allegations, if true, establish a clear constitutional violation. *Hope v. Pelzer*, 536 U.S. 730, 736 (2002). If a violation of a constitutional right exists, qualified immunity shields a prison official from liability unless the violation was of a "clearly established right of which a reasonable person would have known." *Wilson v. Kittoe*, 337 F.3d 392, 397 (4th Cir. 2003) (citing *Saucier*, 533 U.S. at 201). In *Pearson v. Callahan*, the United States Supreme Court held that the district court has discretion to determine which of the two prongs of the qualified immunity analysis should be

[3] In response to Defendants' motion for summary judgment, Plaintiff includes the Affidavit of Barry L. Singer, M.D. (Dkt. No. 166-3 at 2-5). Mr. Singer's Affidavit is in support of a medical malpractice claim Plaintiff brought in the Court of Common Pleas for Richland County. *Willie Johnson v. South Carolina Dep't of Corr.*, C/A No. 2019CP4001890. Plaintiff may pursue a medical malpractice case in state court, but the alleged medical malpractice in this situation does not give rise to a constitutional claim asserted under § 1983. *Estelle*, 429 U.S. at 106.

addressed first in light of the circumstances presented in the case at hand. 555 U.S. 223, 226-7, 237 (2009).

In this case, the evidentiary record establishes that Plaintiff failed to establish a genuine issue of material fact as to his allegations his constitutional rights were violated. The Magistrate Judge found that because Defendants did not violate Plaintiff's constitutional rights, they are also shielded from liability by qualified immunity. Plaintiff generally objects to the Magistrate Judge's finding on qualified immunity. (Dkt. No. 172 at 13-14). Plaintiff's objection is without merit as the record establishes Defendants did not violate his constitutional rights, and under *Pearson,* it is not necessary to proceed to the second step of the qualified immunity test. 555 U.S. at 236-43.

IV. Conclusion

For the reasons stated above, the Court **ADOPTS** the R & R as the Order of the Court. (Dkt. No. 170). Defendant's motion for summary judgment (Dkt. No. 161) is **GRANTED**.

AND IT IS SO ORDERED.

s/ Richard Mark Gergel
Richard Mark Gergel
United States District Court Judge

April 2, 2021
Charleston, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Willie Johnson, Plaintiff, v. Bryan Stirling, West Price, Emily A. Farr, Elizabeth Simmons, Dr. Stacey Smith, and Dr. Rick Toomey, Defendants.	)	C/A No. 9:18-cv-03028-RMG-MHC **REPORT AND RECOMMENDATION**

Before the Court is a Motion for Summary Judgment (Motion) filed by Defendants Bryan Stirling, West Price, Emily A. Farr, Elizabeth Simmons, Dr. Stacey Smith, and Dr. Rick Toomey. ECF No. 161. All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Civil Rule 73.02(B)(2)(d)(D.S.C.). Because the Motion is dispositive, this Report and Recommendation is entered for review by the District Judge.

I. BACKGROUND

Plaintiff Willie Johnson (Plaintiff) brought this pro se action pursuant to 42 U.S.C. §§ 1983 and 1985, alleging various violations of his civil rights while incarcerated within the South Carolina Department of Corrections (SCDC). Specifically, in the operative Second Amended Complaint, Plaintiff alleged claims of civil rights conspiracy pursuant to 42 U.S.C. §§ 1983 and 1985, denial of due process and equal protection, deliberate indifference to a serious medical need, violation of procedural due process as to the filing of grievances, and placement in unsafe conditions of confinement. ECF No. 47. On October 21, 2019, the Court dismissed all of Plaintiff's claims, except the claim for deliberate indifference to a serious medical need under 42 U.S.C.

Appendix e-1

motion for summary judgment, must demonstrate that specific, material facts exist which give rise to a genuine issue. *Id.* at 324.

Under this standard, 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, although the Court views all the underlying facts and inferences in the record in the light most favorable to the non-moving party, the non-moving "party nonetheless must offer some 'concrete evidence from which a reasonable juror could return a verdict in his [or her] favor.'" *Williams v. Genex Servs., LLC*, 809 F.3d 103, 109 (4th Cir. 2015) (quoting *Anderson*, 477 U.S. at 256). That is to say, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory or speculative allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002). "Only 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." *Anderson*, 477 U.S. at 248. To survive summary judgment, the non-movant must provide evidence of every element essential to his action on which he will bear the burden of proving at a trial on the merits. *Celotex Corp.*, 477 U.S. at 322.

Additionally, pro se filings are to be "liberally construed" and a pro se complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers[.]" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks and citations omitted). This "[l]iberal construction of the pleadings is particularly appropriate where, as here, there is a pro se complaint raising civil rights issues." *Smith v. Smith*, 589 F.3d 736, 738 (4th Cir.

2009) (citation omitted); *Williamson v. Stirling*, 912 F.3d 154, 173 (4th Cir. 2018) (noting "we are obliged to construe [a complaint's] allegations liberally and with the intent of doing justice"). However, the requirement of liberal construction does not mean that the court can assume the existence of a genuine issue of material fact when none exists. *See United States v. Wilson*, 699 F.3d 789, 797 (4th Cir. 2012); *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990) ("The 'special judicial solicitude' with which a district court should view such pro se complaints does not transform the court into an advocate.").

Defendants assert that they are entitled to summary judgment because (1) they are entitled to Eleventh Amendment immunity; (2) Plaintiff has failed to show essential elements of his § 1983 claim for deliberate indifference to a serious medical need under the Eighth Amendment; and (3) they are entitled to qualified immunity. For the following reasons, the Court recommends granting Defendants' Motion.

A. Eleventh Amendment Immunity

Defendants argue, and the Court agrees, that it is unclear whether Plaintiff has brought this action against Defendants in their official capacities. To the extent Plaintiff's § 1983 claim is brought against Defendants in their official capacities, it is barred by the Eleventh Amendment. Under the Eleventh Amendment, federal courts are barred from hearing claims against a state or its agents, instrumentalities, and employees, unless the state has consented to the suit. *Fauconier v. Clarke*, 966 F.3d 265, 279 (4th Cir. 2020); *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) ("It has long been settled that [the Eleventh Amendment's] reference to 'actions against one of the United States encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities."). Unless a state has consented to suit or Congress has waived a state's immunity pursuant to the Fourteenth

Amendment, a state (and its agencies) may not be sued in federal or state court. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989). Congress has not abrogated the states' sovereign immunity under § 1983, *Quern v. Jordan*, 440 U.S. 332, 343 (1979), and South Carolina has not consented to suit in federal district court. S.C. Code Ann. § 15-78-20(e).

Here, at all times relevant to Plaintiff's Second Amended Complaint, Defendants Stirling, Price, Simmons, and Dr. Smith were employed by SCDC, a state agency.[1] Additionally, Defendant Farr was employed as Director of the South Carolina Department of Labor, Licensing, and Regulation (SCLLR), and Defendant Dr. Toomey was employed as the Director of the South Carolina Department of Health and Environmental Control (DHEC). Both SCLLR and DHEC are state agencies.[2] Therefore, to the extent Plaintiff is attempting suit against Defendants in their official capacities, Defendants are entitled to Eleventh Amendment immunity.[3] *See Will*, 491 U.S. at 71 (reasoning "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office," and, "[a]s such, it is no different from a suit against the State itself").

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[1] *See Simpson v. S.C. Dep't of Corr.*, No. 2:19-CV-2245-RMG, 2020 WL 582321, at *2 n.1 (D.S.C. Feb. 6, 2020) (noting SCDC employees are entitled to Eleventh Amendment immunity in suits brought against them in their official capacities).

[2] *See Magwood v. Streetman*, No. CV 2:15-1600-RMG-BM, 2016 WL 5334678, at *4 (D.S.C. Aug. 15, 2016) (noting SCLLR is a state agency entitled to Eleventh Amendment immunity), *report and recommendation adopted,* No. 2:15-CV-1600-RMG, 2016 WL 5339579 (D.S.C. Sept. 22, 2016); *Stepheney v. Publix's Food Store Pharmacys CEO*, No. CA 1:11-3402-MBS-SVH, 2012 WL 2502722, at *3 (D.S.C. Jan. 20, 2012) (noting DHEC is a state agency entitled to Eleventh Amendment immunity from § 1983 claims), *report and recommendation adopted sub nom. Stepheney v. Publix's Food Store Pharmacy(s)*, No. CA 1:11-3402-MBS, 2012 WL 2500368 (D.S.C. June 27, 2012).

[3] Moreover, for purposes of § 1983, Defendants are not considered "persons" amenable to suit. *See Will*, 491 U.S. at 71 ("Neither a State nor its officials acting in their official capacities are 'persons' under § 1983."); *see also Hafer v. Melo*, 502 U.S. 21, 26–27 (1991).

MMC

B. Section 1983 Claim for Deliberate Indifference to a Serious Medical Need

To state a § 1983 claim, Plaintiff must demonstrate that Defendants, acting under color of state law, deprived him of a right secured by the Constitution or the laws of the United States. 42 U.S.C. § 1983; *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001).

Plaintiff's claim, that prison officials failed to provide him adequate medical care, is an allegation that his Eighth Amendment rights were violated. *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016) ("[T]he Eighth Amendment imposes a duty on prison officials to 'provide humane conditions of confinement . . . [and] ensure that inmates receive adequate food, clothing, shelter, and medical care.'" (quoting *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). To sustain his constitutional claim under 42 U.S.C. § 1983, Plaintiff must make (1) a subjective showing that Defendants were deliberately indifferent to his medical needs and (2) an objective showing that those needs were serious. *Iko v. Shreve*, 535 F.3d 225, 241 (4th Cir. 2008) (noting a "plaintiff must demonstrate that the officers acted with 'deliberate indifference' (subjective) to the inmate's 'serious medical needs' (objective)"); *see also Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (to state an Eighth Amendment claim, "a prisoner must allege acts or omissions sufficiently harmful to evidence [1] *deliberate* indifference to [2] *serious* medical needs" (emphasis added)).

The subjective prong of deliberate indifference is a "very high standard" and merely negligent behaviors do not meet the subjective mens rea requirement. *Young v. City of Mount Ranier*, 238 F.3d 567, 575–76 (4th Cir. 2001). The Fourth Circuit has recognized two different aspects of an official's state of mind that must be shown to satisfy the subjective prong in this context: "First, *actual knowledge of the risk of harm* to the inmate is required" and, second, "the officer must *also* have recognized that *his actions were insufficient* to mitigate the risk of harm to the inmate arising from his medical needs." *Iko*, 535 F.3d at 241 (emphasis in original) (internal

quotation marks and citations omitted); *see also Farmer*, 511 U.S. at 837 ("[A] prison official cannot be found liable . . . for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the 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.").

As to the objective prong, a "serious medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Heyer v. United States Bureau of Prisons*, 849 F.3d 202, 210 (4th Cir. 2017) (internal quotation marks omitted) (quoting *Iko*, 535 F.3d at 241).

It is undisputed Plaintiff's myeloma bone cancer is an objectively serious medical condition. However, Plaintiff has failed to identify evidence in the record that supports a § 1983 action against any Defendant with regard to the subjective component of his Eighth Amendment claim.

1. Allegations against Stirling, Farr, Dr. Toomey, and Dr. Smith

Defendants Stirling, Farr, Dr. Toomey, and Dr. Smith all serve in a supervisory capacity.[4] Plaintiff's Second Amended Complaint is difficult to decipher, but his allegations against these Defendants appear to be based upon their director-level roles, particularly with regard to their allowance of the use of EMTs (rather than licensed nurses) to provide medical care within SCDC. Plaintiff also appears to allege that these Defendants were indifferent to his medical care as provided by Defendants Price and Simmons. These four Defendants are entitled to summary judgment for the following reasons.

[4] Stirling is the Director of SCDC; Farr is the Director of SCLLR; Dr. Toomey is the Director of DHEC; and Dr. Smith is the supervisory physician in charge of the infirmary at KCI. *See* ECF No. 161-3, 161-5, 161-6.

a. *No Personal Involvement*

As an initial matter, even construing the Second Amended Complaint liberally, as this Court must, Plaintiff does not allege—or cite to any evidence in the record that could lead a reasonable jury to believe—that Defendants Stirling, Farr, Dr. Toomey, or Dr. Smith had any personal involvement in the alleged cancelling of Plaintiff's stem cell transplant, which is fatal to Plaintiff's § 1983 claim against them. *See Williamson*, 912 F.3d at 171 (noting a plaintiff must show that the official acted personally in violating the plaintiff's constitutional rights); *Wilcox v. Brown*, 877 F.3d 161, 170 (4th Cir. 2017) (noting liability will only lie in § 1983 actions where it is "affirmatively shown that the official charged acted personally in the deprivation of the plaintiffs' rights" (internal quotation marks and citation omitted)). Accordingly, because Plaintiff fails to point to evidence in the record that supports a threshold essential element of a § 1983 claim, summary judgment is appropriate as to these four Defendants. *See Celotex Corp.*, 477 U.S. at 322 (noting the non-movant must provide evidence of every element essential to his action to survive summary judgment).

b. *No Supervisory Liability*

Furthermore, to the extent Plaintiff alleges these Defendants are vicariously liable for inadequate medical care by Defendants Price or Simmons because neither were registered nurses, these claims also fail. Pure supervisory liability will not lie in § 1983 actions. *Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985) ("The doctrine of *respondeat superior* has no application under this section." (quoting *Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir.1977)). Rather, to hold a supervisor liable for a constitutional injury inflicted by a subordinate under § 1983, Plaintiff must show facts establishing the following elements: (1) the supervisor had actual or constructive knowledge that a subordinate was engaged in conduct that posed "a pervasive and unreasonable

risk" of constitutional injury to people like the plaintiff; (2) the supervisor's response was so inadequate as to constitute deliberate indifference or tacit authorization of the subordinate's conduct; and (3) there is an "affirmative causal link" between the supervisor's inaction and the plaintiff's constitutional injury. *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994).

Here, with regard to Defendants Farr and Dr. Toomey, neither are direct supervisors of Defendants Price or Simmons. Defendant Farr is the Director of SCLLR, which is an agency tasked with overseeing various professional licensing boards throughout the state. *See* S.C. Code § 41-3-10 *et seq.* Defendant Dr. Toomey is the Director of DHEC.[5] All decisions made in hiring, training, or firing employees at KCI fall squarely with SCDC. *See* ECF Nos. 161-2, 161-3.

Turning to Defendants Stirling and Dr. Smith, who are employed by SCDC, Plaintiff's allegations as to them deal with the use of EMTs in principle. Even if the Court assumes the use of EMTs, rather than registered nurses, posed a pervasive and unreasonable risk of harm, Plaintiff has failed to identify a specific injury, any specific conduct of these Defendants that was so egregious as to amount to deliberate indifference, and/or the affirmative causal link between the constitutional injury and that conduct.

Accordingly, the Court recommends granting summary judgment as to all four of these Defendants. *See Celotex Corp.*, 477 U.S. at 322 (noting the non-movant must provide evidence of every element essential to his action to survive summary judgment).

c. *No Violation of the Eighth Amendment*

Finally, even if the Court were to set aside the baseline requirements for liability to attach to these Defendants under § 1983, Plaintiff's claim still fails because he has not shown evidence

[5] Moreover, Dr. Toomey was not the Director of DHEC when the alleged violations took place, as he did not become Director until February 26, 2019, after the Complaint was filed. *See* ECF No. 161-3.

of a violation of the Eighth Amendment. As noted above, to prove deliberate indifference, Plaintiff must show Defendants knew of and disregarded an excessive risk to inmate health and safety. *See Farmer*, 511 U.S. at 837. Under this standard, "mere disagreements between an inmate and a physician over the inmate's proper medical care are not actionable absent exceptional circumstances." *Scinto*, 841 F.3d at 225 (citation and internal quotation marks omitted).

Here, Plaintiff's Second Amended Complaint does not allege, nor is there any evidence to support, that Defendants failed to provide Plaintiff *any* medical care for his myeloma bone cancer. Indeed, Dr. Smith attested—and Plaintiff does not dispute—that Plaintiff was prescribed aggressive chemotherapy for his condition. *See* ECF No. 161-6 at 2 ("[W]hile the doctors at MUSC believed the stem cell transplant would help, the care Plaintiff received, including aggressive chemotherapy, is a [p]roper prescribed course of treatment for myeloma bone cancer."). Instead, Plaintiff disagreed with this course of treatment and seeks to hold these Defendants liable for the alleged cancellation of his stem cell transplant. *See* ECF No. 47 at 10–13. However, such claims are not a violation of the Eighth Amendment. *See Wright*, 766 F.2d at 849 ("Disagreements between an inmate and a physician over the inmate's proper medical care do not state a § 1983 claim unless exceptional circumstances are alleged.").[6]

At most, Plaintiff's allegations constitute a claim of medical malpractice, which falls short of violating Plaintiff's Eighth Amendment rights. *See Estelle*, 429 U.S. at 106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.").

[6] Plaintiff has not alleged any exceptional circumstances that would make his claim actionable under § 1983.

Accordingly, for all of the foregoing reasons, the Court recommends summary judgment be granted in favor of Defendants Stirling, Farr, Dr. Toomey, and Dr. Smith.

2. Allegations against Price and Simmons

Plaintiff alleges that Defendants Price and Simmons were deliberately indifferent to his serious medical needs. Specifically, Plaintiff alleges he received inadequate medical care because Defendants Price and Simmons are EMTs, rather than licensed nurses. Plaintiff further alleges Defendant Price cancelled the stem cell transplant that was prescribed by doctors at MUSC.

With regard to the allegation that Defendants Price and Simmons did not provide Plaintiff with adequate medical care solely by virtue of being EMTs, there is no evidence in the record that that these Defendants' status as EMTs, instead of nurses, resulted in inadequate medical care. *See Scinto*, 841 F.3d at 227 ("To survive summary judgment, there must be evidence on which the jury could reasonably find for the [nonmovant]." (citation and internal quotation marks omitted)). Indeed, Defendant Stirling and Dr. Smith stated in their affidavits that the use of licensed, supervised EMTs is acceptable under SCDC policies. *See* ECF Nos. 161-5 at 1, 161-6 at 1. There is no evidence otherwise.

Defendant Dr. Smith noted that the use of licensed, supervised EMTs is comparable to the role of a Licensed Practical Nurse, and that all EMTs used in the infirmaries within SCDC are supervised by an attending, licensed physician, as well as licensed registered nurses. ECF No. 161-6 at 1. She also attested that EMTs do not make decisions on treatment methods, do not direct the course of an inmate's care, and do not make medical diagnoses; rather, these decisions are delegated to the attending physician and health directors at each institution. ECF No. 161-6 at 1–2. Defendant Dr. Smith further attested that, with regard to Defendants Price and Simmons, both Defendants were properly trained and observed, and they provided Plaintiff adequate care. ECF

No. 161-6 at 1. Defendant Simmons's affidavit echoed Dr. Smith's testimony—specifically, he attested that EMTs are supervised, they do not make decisions as to treatment methods, they do not direct the course of inmates' care, and they do not make medical diagnoses. ECF No. 161-4 at 1–2.

Plaintiff has not provided or identified any evidence or facts that put this testimony into genuine dispute, nor has he shown how Defendants Price and Simmons carrying out their duties as EMTs presented a substantial risk of serious harm. *See Anderson*, 477 U.S. at 248 (noting "a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial" (citation and internal quotation marks omitted)). However, even if the Court were to assume that the use of EMTs was inappropriate, Plaintiff still has failed to show how Price or Simmons were deliberately indifferent to his medical needs. *See Heyer*, 849 F.3d at 211 ("A prison official acts with deliberate indifference if he knows of and disregards an excessive risk to [the inmate's] health or safety. Put differently, the plaintiff must show that the official was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed *and* drew that inference." (internal citation and quotation marks omitted)).

Construing Plaintiff's pleadings liberally, to the extent Defendants Price and Simmons's status as licensed EMTs (instead of licensed nurses) could have caused the care they gave to fall below the standard of adequate medical care, such claims are claims of medical malpractice. *See Estelle*, 429 U.S. at 106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."). Accordingly, these claims fall well below the threshold necessary to show deliberate indifference to a serious medical need in violation of the Eighth Amendment. *See*

Campbell v. Florian, 972 F.3d 385, 395 (4th Cir. 2020) ("[D]eliberate indifference is a form of *mens rea* (or 'guilty mind') equivalent to criminal-law recklessness."), *as amended* (Aug. 28, 2020); *Grayson v. Peed*, 195 F.3d 692, 696 (4th Cir. 1999) (noting deliberate indifference requires "more than ordinary lack of due care for the prisoner's interests or safety"). Under the circumstances, summary judgment is proper as to Defendants Price and Simmons regarding their status as EMTs. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'").

Finally, with regard to the allegation that Defendant Price cancelled Plaintiff's stem cell transplant, Plaintiff cannot establish a deliberate indifference claim. As noted above, the only evidence before the Court is that EMTs do not make decisions as to treatment methods and do not direct the course of inmates' care. ECF Nos. 161-4 at 1–2, 161-6 at 2. Furthermore, Defendant Dr. Smith notes in her affidavit that, although MUSC recommended a stem cell transplant, the transplant was never approved by SCDC and was, therefore, never cancelled because it was never officially scheduled. ECF No. 161-6 at 2. Plaintiff does not present any evidence putting these facts into dispute and, therefore, summary judgment in favor of Defendant Price is appropriate.[7] *See Anderson*, 477 U.S. at 248.

In any event, as already noted above, Plaintiff was prescribed aggressive chemotherapy for his condition, and Plaintiff's disagreement with his course of treatment does not set forth an actionable claim under the Eighth Amendment. *See Wright*, 766 F.2d at 849 ("Disagreements

[7] Interestingly, this fact—that the stem cell transplant was never approved—is corroborated by an exhibit attached to Plaintiff's Response in Opposition to Defendants' Motion. *See* ECF No. 166–3 at 4 (affidavit of Dr. Barry Singer, noting "[t]o date, [Plaintiff] is still waiting on approval for the stem cell transplant").

between an inmate and a physician over the inmate's proper medical care do not state a § 1983 claim unless exceptional circumstances are alleged."); *see also Estelle*, 429 U.S. at 107–08 (reasoning that merely contending that more should have been done by the way of diagnosis and treatment failed to state a cognizable § 1983 claim, and noting a medical decision to not pursue an avenue of treatment does not represent cruel and unusual punishment). Accordingly, the Court recommends summary judgment be granted in favor of Defendants Price and Simmons.[8]

C. Qualified Immunity

All Defendants are also entitled to qualified immunity from Plaintiff's claim. The doctrine of qualified immunity offers some protection to a government employee being sued in his or her individual capacity, as is the case with Defendants here. The Supreme Court has held that "[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Renn by and Through Renn v. Garrison*, 100 F.3d 344, 349 (4th Cir. 1996).

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether a plaintiff's allegations, if true, establish a clear constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736 (2002). If a violation of a constitutional right in fact exists, qualified immunity nonetheless shields a prison official from liability, unless the violation was of a "clearly established right of which a reasonable person would have known." *Wilson v. Kittoe*, 337 F.3d 392, 397 (4th

[8] Plaintiff includes an affidavit from a medical expert opining on potential medical malpractice, which appears to have been filed in a companion state case. *See* ECF No. 166-3 at 2–5. While Plaintiff may pursue a medical malpractice claim in state court, the alleged malpractice in this instance does not give rise to a constitutional claim asserted under § 1983. *See Estelle*, 429 U.S. at 106 ("[M]edical malpractice does not become a constitutional violation merely because the victim is a prisoner."); *see also Paul v. Davis*, 424 U.S. 693, 701 (1976) (not every claim which may set forth a cause of action under a state tort law is sufficient to set forth a claim for a violation of a constitutional right).

Cir. 2003) (citation and internal quotation marks omitted).

As set forth in detail above, Plaintiff has failed to establish a genuine issue of material fact on any of his allegations of constitutional violations. Because none of Defendants violated Plaintiff's constitutional rights, they are also shielded from liability by qualified immunity.

III. CONCLUSION

For the reasons set forth above, it is **RECOMMENDED** that Defendants' Motion, ECF No. 161, be **GRANTED** and this action be **DISMISSED**.

Molly H. Cherry
United States Magistrate Judge

March 3, 2021
Charleston, South Carolina

The parties are directed to the next page for their rights to file objections to this recommendation.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

Willie Johnson, Plaintiff, vs. Bryan P. Stirling; West Price; Sgt. A. Hudson; Sgt. Wright; Emily A. Farr; Dr. Rick Toomey, *Director of DHEC*; Elizabeth Simmons; Dr. Stacy Smith; Lt. Kimberly Story; Defendants.	)	C/A No. 9:18-3028-RMG-BM **REPORT AND RECOMMENDATION** (Partial Summary Dismissal)

The Plaintiff, Willie Johnson, proceeding pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983. At the time he filed this action he was an inmate at the Kirkland Correctional Institution (KCI), part of the South Carolina Department of Corrections (SCDC). He is currently incarcerated at the Broad River Correctional Institution (BRCI) of the SCDC.

Under established local procedure in this judicial district, a careful review has been made of the pro se Second Amended Complaint pursuant to the procedural provisions of 28 U.S.C. § 1915 and § 1915A, the Prison Litigation Reform Act (PLRA), Pub.L. No. 104–134, 110 Stat. 1321 (1996), and in light of the following precedents: Denton v. Hernandez, 504 U.S. 25 (1992), Neitzke v. Williams, 490 U.S. 319 (1989), Haines v. Kerner, 404 U.S. 519 (1972), Nasim v. Warden, Maryland House of Corr., 64 F.3d 951 (4th Cir. 1995), and Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983). Pro se complaints are held to a less stringent standard than those drafted by attorneys,

Appendix C-2

reconsider, vacated the prior dismissal of the First Amended Complaint, and referred the case back to the undersigned for initial review on the proposed Second Amended Complaint. ECF No. 35. Plaintiff also filed an appeal to the Fourth Circuit Court of Appeals, which was denied, and the case was remanded to the district court because the case remained ongoing. ECF Nos. 39, 44. Another order directing Plaintiff to bring his case into proper form was then issued on July 3, 2019 (ECF No. 46), and Plaintiff has now provided the necessary documents to bring this case into substantially proper form.

In his Second Amended Complaint (ECF No. 47), Plaintiff names as Defendants Bryan P. Stirling, the Director of SCDC; Emily A. Farr, Director of the South Carolina Department of Labor, Licensing, and Regulation; SCEC employees West Price, Elizabeth Simmons, Lt. Kimberly Story, Sgt. Wright, Sgt. A Hudson, and Dr. Stacy Smith; and Dr. Rick Toomey, Director of the South Carolina Department of Health and Environmental Control (DHEC).[1] Plaintiff asserts claims for a civil rights conspiracy pursuant to 42 U.S.C. §§ 1983 and 1985, denial of due process and equal protection, deliberate indifference to a serious medical need, violation of procedural due process as to the filing of grievances, and placement in unsafe conditions of confinement. Plaintiff requests that the court issue a declaratory judgment and award compensatory and punitive damages. ECF No. 47 at 19.

[1]Plaintiff listed this Defendant as John Doe (DHEC) in the caption of the Second Amended Complaint, but later submitted proposed service documents in which he identified this Defendant as Rick Toomey.

Civil Rights Conspiracy

In his first cause of action in his Second Amended Complaint, Plaintiff alleges that Defendants Farr, Smith, Toomey, and Simmons violated his rights under 42 U.S.C. § 1985 because they conspired to allow SCDC to use EMT Defendant West as a nurse at SCDC when West was not licensed as a nurse as required by South Carolina law and SCDC policy. In his second cause of action titled denial of due process, Plaintiff also alleges a civil rights conspiracy pursuant to 42 U.S.C. § 1983.

To establish a civil conspiracy under § 1983, a Plaintiff must present evidence that the Defendants acted jointly in concert and that some overt act was done in furtherance of the conspiracy, which resulted in the deprivation of a constitutional right. Glassman v. Arlington Cnty., 628 F.3d 140 (2010)(citing Hinkle v. City of Clarksburg, 81 F.3d 416 (4th Cir.1996)). A plaintiff must set forth specific evidence that each member of the alleged conspiracy shared the same conspiratorial objective. Hinkle, 81 F.3d at 421. As such, the factual allegations must reasonably lead to the inference that the defendants came to a mutual understanding to try to "accomplish a common and unlawful plan". Plaintiff's allegations must amount to more than "rank speculation and conjecture," especially when the actions are capable of innocent interpretation. Id. at 421-422. Here, Plaintiff sets forth only conclusory allegations of an agreement or meeting of the minds between these Defendants, such that these claims are subject to summary dismissal. See generally Ashcroft v. Iqbal, 556 U.S. at 677-679; Bell Atlantic Corp. v. Twombly, 550 U.S. at 555; see also Simmons v. Sacramento County Superior Court, 318 F.3d 1156, 1161 (9th Cir. 2003)[conclusory allegations of a conspiracy between private attorney and state officer insufficient to support § 1983 claim].

Stirling, Farr, Simmons, and Smith violated his constitutional rights because they knew that Price and Simmons were unqualified and they hired them, refused to fire them, and/or improperly allowed them to provide and direct Plaintiff's medical care.[2]

Plaintiff also claims that in January 2019, Defendants Price, Story, and Wright conspired to falsely state that Plaintiff refused medical treatment and had Plaintiff transferred to BRCI because of this alleged refusal of treatment. However, these claims are subject to summary dismissal because these alleged actions occurred after the filing of this action in November 2018. Before a prisoner can proceed with a lawsuit in federal court, he must first exhaust his administrative remedies as required by the PLRA, which provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002). Moreover, exhaustion is required even when a prisoner seeks remedies, such as money damages, that are not available in the administrative proceedings. See Booth v. Churner, 532 U.S. 731, 740–41 (2001). To satisfy this requirement, a plaintiff must avail himself of every level of available administrative review, which means "'using all steps that the agency holds out, and doing so properly.'" Woodford v. Ngo, 548

[2]Although it may be that Plaintiff's allegations are just a disagreement as to the treatment provided, see Smart v. Villar, 547 F.2d 112 (10th Cir. 1976); Lamb v. Maschner, 633 F. Supp. 351, 353 (D.Kan. 1986), further information is needed from Defendants as it appears Plaintiff has alleged sufficient facts to state a claim for medical deliberate indifference to a serious medical need. See Estelle v. Gamble, 429 U.S. 97 (1976).

U.S. 81 (2006) (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002)). Thus, "it is the prison's requirements, and not the [Prison Litigation Reform Act], that define the boundaries of proper exhaustion." Jones v. Bock, 549 U.S. 199, 218 (2007).

While a plaintiff's failure to exhaust administrative remedies is considered an affirmative defense, and not a jurisdictional infirmity; Jones v. Bock, 549 U.S. at 216; if the lack of exhaustion is apparent on the face of the prisoner's complaint, sua sponte dismissal prior to service of the complaint is appropriate. Anderson v. XYZ Corr. Health Servs., Inc., 407 F.3d 674, 683 (4th Cir. 2005).[3] The Fourth Circuit recently stated that exceptions to the rule (that an inmate need not demonstrate exhaustion of administrative remedies in his complaint and that failure-to-exhaust is an affirmative defense that the defendant must raise) which allow a court to sua sponte dismiss a complaint for failure to exhaust administrative remedies are rare. Custis v. Davis, 851 F.3d 358, 361-362 (4th Cir. 2017).

Therefore, Plaintiff's allegations concerning his medical care at KCI from May 26, 2017 until the filing of this lawsuit on November 8, 2018 (this includes Plaintiff's allegations that Defendant Price improperly denied him a stem cell transplant; Price and Simmons provided him with inadequate medical care; and Defendants Stirling, Farr, Toomey, and Smith knew about this and failed to take proper action) should be allowed to proceed. However, Plaintiff's allegations

[3]As Plaintiff has not asserted that he exhausted his administrative remedies as to his claims that occurred after the filing of this action, he cannot amend his Second Amended Complaint to address this defect. However, if Plaintiff later exhausts his administrative remedies with respect to these claims, he can address this defect, if he can, in the filing of a new action. See, e.g., Brockington v. South Carolina Dep't of Soc. Servs., No. 17-1028, 2017 WL 1531633 (4th Cir. 2017)[Noting that pro se Plaintiff should be provided an opportunity to amend his complaint to cure defects prior to a dismissal]; Evans v. Richardson, No. 17-1144, 2017 WL 2294447 (4th Cir. May 25, 2017)[same]; Breyan v. All Medical Staff, No. 17-6186, 2017 WL 2365232 (4th Cir. May 31, 2017)[same].

P10

concerning his medical care after the filing of this action (including his claims that in January 2019 Defendants Price, Story, and Wright allegedly said he refused medical treatment and caused his subsequent transfer to BRCI) should be dismissed.

4. Procedural Due Process of the Law/Grievances/Legal Documents

Plaintiff alleges that the SCDC grievance coordinator denied him procedural due process by failing to process two separate SCDC grievances. ECF No. 47 at 14-16. However, this allegation fails to state a claim, as it is well-settled that prison inmates have no federal constitutional right to have any inmate grievance system in operation at the place where they are incarcerated. See Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994); see also Smith v. Ray, 36 F. App'x 99 (4th Cir. 2002) ("[A]ccess to the grievance procedure is not a constitutionally protected right[.]"); Oliver v. Myers, No. 7:08–CV–558, 2008 WL 5212409, at *4 (W.D.Va. Dec. 12, 2008) [stating that "because state grievance procedures are separate and distinct from state and federal legal procedures, an institution's failure to comply with state grievance procedures does not compromise its inmates' right of access to the courts"], appeal dismissed, 335 F. App'x 317 (4th Cir. 2009); but see Booker v. South Carolina Department of Corrections, 855 F.3d 533, 545(4th Cir. 2017)[prisoners have a clearly established First Amendment right "to file a prison grievance free from retaliation."]. Further, the grievances in question appear to have been submitted in 2019 at BRCI (grievance numbers 0026-19 BRCI and 00215-19 BRCI), indicating they were filed after this lawsuit was filed. Therefore, Plaintiff's claims concerning the processing of these two grievances should be summarily dismissed.

Plaintiff also alleges that after he re-filed these grievances, Defendant Sgt. A. Hudson authorized an inmate to shred Plaintiff's legal documents. This claim should also be summarily

p11

dismissed as this alleged incident again occurred after the date this action was filed, such that it is clear from the face of the Second Amended Complaint that Plaintiff has not exhausted his administrative remedies as to this claim.

5. Conditions of Confinement

Plaintiff alleges that Defendants Price, Story, and Wright placed him in unsafe conditions of confinement in January 2019 (because he was transferred from KCI to BRCI). Specifically, he claims that he is currently being exposed to environmental tobacco smoke or second-hand smoke from inmates smoking outside "on the rock", which then comes through the ventilation system. He also claims that he is disabled, but his cell is not accessible to a wheelchair and the unit does not have proper showers and toilets for disabled inmates (which he also claims violates the Americans with Disabilities Act). Additionally, Plaintiff claims that his safety at BRCI is threatened because his unit is "overrun with gang members" who are allowed to roam the unit while he is locked down in his cell. Plaintiff also appears to allege that his unit at BRCI does not provide proper medical personnel to provide treatment for cancer patients. ECF No. 47 at 16-19.

These claims are subject to summary dismissal because they allegedly occurred after the filing of this action, such that Plaintiff could not have exhausted his administrative remedies as to these claims. Further, there is no indication that Defendants Price, Story, or Wright (employed at KCI) work at BRCI, and thus there is no indication how or why they would be responsible for Plaintiff's alleged deficient conditions of confinement at BRCI.

These claims are further subject to summary dismissal because they fail to state a claim. To state a claim that conditions of confinement violate constitutional requirements, "a

plaintiff must show 'both (1) a serious deprivation of a basic human need; and (2) deliberate indifference to prison conditions on the part of prison officials.'" Strickler v. Waters, 989 F.2d 1375, 1379 (4th Cir.1993) (quoting Williams v. Griffin, 952 F.2d 820, 824 (4th Cir. 1991)). A plaintiff asserting unconstitutional conditions of confinement must demonstrate that he suffered a serious or significant physical or mental injury as a result of the challenged condition. See Strickler, 989 F.2d at 1380–81. Here, Plaintiff has not alleged that he has suffered a serious or significant physical or mental injury as a result of the challenged conditions. Thus, Plaintiff's claims concerning his conditions of confinement at BRCI should be summarily dismissed.

6. Defendants Hudson, Wright, and Story

Defendants Kimberly Story and Sgt. Wright are subject to summary dismissal as Defendants to this action because the only claims Plaintiff has asserted against these Defendants is their alleged conspiracy with Price to accuse Plaintiff of refusing medical treatment on or about January 2, 2019.[4] ECF No. 47 at 9. As noted above, such claims occurred after the filing of this lawsuit such that Plaintiff has not alleged that he exhausted his administrative remedies as to such claims.

Defendant Hudson should be dismissed as a Defendant because the only allegations against Hudson concern grievances filed in 2019 and a claim that in 2019 Hudson allegedly directed an inmate to shred Plaintiff's legal documents. These alleged actions also occurred after the filing of this lawsuit such that Plaintiff could not have exhausted his administrative remedies as to the

[4]Plaintiff denies that he refused medical treatment.

P13

alleged actions. Further, as noted above, the alleged failure to process grievances does not rise to the level of a constitutional violation.

Recommendation

Based on the foregoing, it is recommended that Defendants Hudson, Wright, and Story be summarily dismissed as Defendants to this action. The Second Amended Complaint should be served on the remaining Defendants (Stirling, Price, Farr, Simmons, Smith, and Toomey). It is further recommended that all of Plaintiff's claims, with the exception of his claims concerning his medical care at KCI from his transfer there on May 26, 2017 until the filing of this action on November 8, 2018, be summarily dismissed. Plaintiff's attention is directed to the important notice on the next page.

Bristow Marchant
United States Magistrate Judge

September 12, 2019
Charleston, South Carolina

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

Willie Johnson, Plaintiff, vs. Bryan P. Stirling, West Price, Sgt. A. Hudson, Sgt. Story, Sgt. Wright, Defendants.	)	C/A No. 9:18-3028-RBH-BM **REPORT AND RECOMMENDATION**

The Plaintiff, Willie Johnson, proceeding pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983. At the time Plaintiff filed this action he was an inmate at the Kirkland Correctional Institution (KCI), part of the South Carolina Department of Corrections (SCDC). It appears, however, that he is currently incarcerated at the Broad River Correctional Institution (BRCI) of the SCDC.[1]

Under established local procedure in this judicial district, a careful review has been made of the pro se Complaint pursuant to the procedural provisions of 28 U.S.C. § 1915 and § 1915A, the Prison Litigation Reform Act (PLRA), Pub.L. No. 104–134, 110 Stat. 1321 (1996), and in light of the following precedents: Denton v. Hernandez, 504 U.S. 25 (1992), Neitzke v. Williams, 490 U.S. 319 (1989), Haines v. Kerner, 404 U.S. 519 (1972), Nasim v. Warden, Maryland House

[1]Plaintiff lists a BRCI address on his latest pleadings. See ECF Nos. 14, 16. However, despite being ordered to keep the Clerk of Court advised in writing if his address changed for any reason, and being warned that his case may be dismissed for failure to do so (see ECF No. 9), Plaintiff has not submitted a written change of address notification.

Appendix C-3

of Corr., 64 F.3d 951 (4th Cir. 1995), and Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983). Pro se complaints are held to a less stringent standard than those drafted by attorneys, Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a pro se complaint to allow for the development of a potentially meritorious case. Erickson v. Pardus, 551 U.S. 89, 93 (2007) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555–56 (2007)); Hughes v. Rowe, 449 U.S. 5, 9 (1980).

However, even when considered pursuant to this liberal standard, for the reasons set forth hereinbelow this case is subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. See Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990); see also Ashcroft v. Iqbal, 556 U.S. 662 (2009) [outlining pleading requirements under the Federal Rules of Civil Procedure].

Discussion

In an order entered February 11, 2019, Plaintiff was given notice of pleading deficiencies and he was given an opportunity to amend his complaint. ECF No. 9. Plaintiff then filed an Amended Complaint in which he generally reiterates his same claims, adds claims concerning incidents that occurred after the filing of this lawsuit, and further adds various other vague complaints which are discussed below.

First, Plaintiff requests that the Court "enforce" the ruling of the Supreme Court of the United States in Frew v. Hawkins, 540 U.S. 431, 440 (2004). Based on this, he appears to be seeking reinstatement of the so-called Nelson consent decree, which concerned prison conditions at SCDC and was entered in Plyler v. Leeke, No. 82–876, 1986 WL 84459 (D.S.C. Mar. 26, 1986),

aff'd in part and dismissed in part, Plyler v. Leeke, 804 F.2d 1251(4th Cir. Nov. 12, 1986) [Table]. The original representative for the class in Civil Action No. 82–876 was Gary Wayne Nelson, but Harry Plyler became the class representative upon Nelson's release from the SCDC. See Plyler v. Evatt, 846 F.2d 208 (4th Cir.1988). However, the Nelson consent decree was terminated on June 4, 1996, pursuant to the defendants' motion under the PLRA, and the termination of the consent decree was thereafter affirmed on November 14, 1996, by the United States Court of Appeals for the Fourth Circuit in Plyler v. Moore, 100 F.3d 365 (4th Cir.1996). This court lacks the authority or jurisdiction to enforce a prison consent decree that has previously been terminated. See Hines v. Anderson, No. 03–2010, 2003 WL 22952185, *1 (8th Cir. 2003) [court recognized that once motion to terminate consent decree was granted, inmates lost right to enforce the terms of consent decree]; Ward v. Ozmint, No. 09–1594, 2010 WL 4638622 (D.S.C. Oct. 10, 2018), adopted by 2010 WL 4637991(D.S.C. Nov. 8, 2010).

Further, contrary to Plaintiff's argument, the decision in Frew does not dictate that this Court must reinstate or enforce the Nelson consent decree. In Frew the Supreme Court found that the Eleventh Amendment did not bar the enforcement of a state's obligations under a valid consent decree that had been entered into in federal court. See Frew, 540 U.S. at 438; Hawkins v. Commissioner, NH Dept. of Health and Human Servs., No. 99–cv–143–JD, 2007 WL 1456214 (D.N.H. May 16, 2007)[noting that the Court in Frew was "presented with the issue of whether the Eleventh Amendment precludes enforcement of a consent decree by a federal court against state officials" and that the "decision did not reach the standard of review applicable to enforcement actions."]. Here, there is not a current, valid consent decree to enforce. See, e.g., Porter v. Graves, No. 77–3045, 2015 WL 6807826 (D.Kan. Nov. 5, 2015)[denying motions to intervene in a closed

case for purposes of ordering or enforcing consent decrees which were issued more than nineteen years previously].

Further, the doctrine of res judicata precludes this Court from reopening or reinstating the Nelson consent decree. Res judicata bars litigation of all claims or defenses that were available to the parties in the previous litigation, regardless of whether they were asserted or determined in the prior proceeding. See Brown v. Felsen, 442 U.S. 127, 131 (1979)["Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes."]; Meekins v. United Transp. Union, 946 F.2d 1054, 1057 (4th Cir.1991)["The preclusive affect of a prior judgment extends beyond claims or defenses actually presented in previous litigation, for '[n]ot only does res judicata bar claims that were raised and fully litigated, it prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.'"].

Plaintiff also alleges claims in his Amended Complaint about prison conditions at SCDC institutions other than the facilities at which he was housed[2] (for example, Plaintiff complains extensively about alleged incidents, including a riot, at the Lee Correctional Institution) and claims pertaining to other inmates. However, such claims must be dismissed, as Plaintiff may not assert claims on behalf of other inmates. See Laird v. Tatum, 408 U.S. 1 (1972); see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 482 (1982);

[2]SCDC records indicate that since November 2016, Plaintiff has only been housed at KCI and BRCI (except for brief periods where he was transported outside SCDC for various reasons, such as medical care, court proceedings, and parole proceedings). See http://public.doc.state.sc.us/scdc-public/ [Search Inmate "Willie Johnson"]. This Court "may properly take judicial notice of matters of public record." See Philips v. Pitt Cnty. Mem. Hosp., 572 F.3d 176, 180 (4th Cir. 2009); see also Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989) ["We note that '[t]he most frequent use of judicial notice is in noticing the content of court records.'"].

Flast v. Cohen, 392 U.S. 83, 99 (1968)[a district court, when determining whether a plaintiff has standing to sue, must focus on the status of the party who has filed the complaint, such that the merits of the case are irrelevant]; Lake Carriers Ass'n v. MacMullan, 406 U.S. 498, 506 (1972); Hummer v. Dalton, 657 F.2d 621, 625-626 (4th Cir. 1981)[a prisoner cannot act as a "knight-errant" for others]. Cf. Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975)[a pro se prisoner cannot be an advocate for others in a class action].

Plaintiff also alleges that Defendant Bryan P. Stirling, the Director of the SCDC, has violated his civil rights and SCDC procedures by accepting him as a inmate without having the proper commitment papers. This is a challenge to the fact or duration of Plaintiff's confinement, which may not be brought in a § 1983 action. See Heck v. Humphrey, 512 U.S. 477, 481(1994)[stating that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983"]; Preiser v. Rodriguez, 411 U.S. 475, 487–88 (1973)[attacking the length of duration of confinement is within the core of habeas corpus]. Additionally, to the extent that Plaintiff is seeking monetary damages that implicitly question the validity of his conviction, such a claim is also barred by Heck, as Plaintiff has not alleged that his conviction has been previously invalidated. Heck, 512 U.S. at 486-487. Moreover, any violation of a policy of the SCDC does not constitute a violation of Plaintiff s constitutional rights, and is therefore not assertable in a § 1983 action. See Keeler v. Pea, 782 F. Supp. 42, 44 (D.S.C. 1992); cf. Johnson v. S.C. Dep't of Corrs., No. 06–2062, 2007 WL 904826, at *12 (D.S.C. Mar. 21, 2007)[The plaintiff's allegation that defendants did not "follow their own policies or procedures, standing alone, does not amount to a constitutional violation."](citing Riccio v. County of Fairfax, Virginia, 907

F.2d 1459, 1469 (4th Cir. 1990)[if state law grants more procedural rights than the Constitution requires, a state's failure to abide by that law is not a federal due process issue]).

Further, the undersigned is constrained to note that Plaintiff previously unsuccessfully tried to raise an issue relating to his commitment papers in a prior lawsuit. As this Court previously noted in Johnson v. Ozmint, 567 F.Supp.2d 806 (D.S.C. 2008):

> [T]he court concludes Plaintiff's claim cannot proceed because there is simply no evidence, other than Plaintiff's say-so, that he is being improperly detained. The record contains a copy of Plaintiff's commitment order, which indicates Plaintiff was "committed to jail 10–03–84," and it states that Plaintiff is "confined under the jurisdiction and control of the South Carolina Department of Corrections for a period of his life." The order is dated April 18, 1985, and although it does not contain the handwritten signature of the judge, it is signed as "s/ T.L. Hughston, Jr." Plaintiff has not pointed to, and the court has not found, any authority to suggest the commitment order is invalid.

Id. at 813 (internal citations omitted).

In his Amended Complaint, Plaintiff also asserts that Defendant Sterling conspired with state judicial personnel to commit a civil rights conspiracy. To establish a civil conspiracy under § 1983, a Plaintiff must have evidence that the Defendants acted jointly in concert and that some overt act was done in furtherance of the conspiracy, which resulted in the deprivation of a constitutional right. Glassman v. Arlington Cnty., 628 F.3d 140 (2010)(citing Hinkle v. City of Clarksburg, 81 F.3d 416 (4th Cir.1996)). Each member of the alleged conspiracy must have shared the same conspiratorial objective. Hinkle, 81 F.3d at 421. As such, the factual allegations of the Complaint must reasonably lead to the inference that the Defendants came to a mutual understanding to try to "accomplish a common and unlawful plan". Plaintiff's allegations must amount to more than "rank speculation and conjecture," especially when the actions are capable of innocent interpretation. Id. at 421-422. Here, Plaintiff offers only conclusory allegations of an agreement or

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meeting of the minds between Stirling and persons who are not named as Defendants to this action, such that these claims are subject to summary dismissal. See generally Ashcroft v. Iqbal, 556 U.S. at 677-679; Bell Atlantic Corp. v. Twombly, 550 U.S. at 555; see also Simmons v. Sacramento County Superior Court, 318 F.3d 1156, 1161 (9th Cir. 2003)[conclusory allegations of conspiracy between private attorney and state officer insufficient to support § 1983 claim]. Similarly, Plaintiff's conclusory allegations under 42 U.S.C. §§ 1985 and 1986 are also subject to summary dismissal. See Simmons v. Poe, 47 F.3d 1370, 1377 (4th Cir. 1995) [The Fourth Circuit has "specifically rejected section 1985 claims whenever the purported conspiracy is alleged in a merely conclusory manner, in the absence of concrete supporting facts."].[3] To the extent that Plaintiff is now attempting to assert a claim that Stirling and the newly named Defendants conspired to retaliate against him, he also only asserts inadequate conclusory allegations.

As relief, Plaintiff requests monetary damages for emotional distress and mental anguish. However, there is no federal constitutional right to be free from emotional distress, psychological stress, or mental anguish; hence, there is no liability for compensatory or punitive damages under § 1983 regarding such claims. See Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985); Rodriguez v. Comas, 888 F.2d 899, 903 (1st Cir. 1989). The PLRA provides that physical injuries are a prerequisite for an award of damages for emotional distress under § 1983. 42 U.S.C. § 1997e(e)["No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury"].

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[3]Viability of a § 1986 claim is based on the antecedent § 1985 claim. If the § 1985 claim is dismissed, the § 1986 claim also fails. Buschi v. Kirven 775 F.2d 1240, 1243 (4th Cir. 1985); Trerice v. Summons, 755 F.2d 1081, 1085 (4th Cir. 1985).

Plaintiff also attempts to assert claims relating to incidents that occurred after the filing of this action, including that the Defendant Hudson allegedly shredded or directed an inmate to destroy Plaintiff's legal documents, that Stirling allowed Defendant West Price (who allegedly is an EMT technician) to serve as a nurse in violation of SCDC policy, that Defendant Price allegedly cancelled a bone marrow transplant that allegedly was ordered by a nurse, certain retaliatory actions against Plaintiff for filing this action, and that Price allegedly conspired with Defendant Lt. Story and Defendant Sgt. Wright to falsify Plaintiff's medical records. However, in the "Exhaustion of Administrative Remedies Administrative Procedures" portion of the Amended Complaint, Plaintiff concedes that he has only submitted grievances concerning having only two meals on weekends and the Frew ruling. Attached to Plaintiff's original complaint are copies of a grievance filed in 2011 concerning the serving of two meals a days on weekends (Plaintiff also mentions the ruling in Frew in he grievance). ECF No. 16-1. Therefore, it is clear from the face of the Amended Complaint that Plaintiff has not exhausted his administrative remedies as to any of these newly raised issues (and as to his previously asserted claims, has only possibly exhausted his remedies as to his claims concerning the serving of two meals a day on the weekend and his attempt to apply Frew to his case).

Before a prisoner can proceed with a lawsuit in federal court, he must first exhaust his administrative remedies as required by the PLRA, which provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and

p 8

whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002). Moreover, exhaustion is required even when a prisoner seeks remedies, such as money damages, that are not available in the administrative proceedings. See Booth v. Churner, 532 U.S. 731, 740–41 (2001). To satisfy this requirement, a plaintiff must avail himself of every level of available administrative review, which means "'using all steps that the agency holds out, and doing so properly.'" Woodford v. Ngo, 548 U.S. 81 (2006) (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002)). Thus, "it is the prison's requirements, and not the [Prison Litigation Reform Act], that define the boundaries of proper exhaustion." Jones v. Bock, 549 U.S. 199, 218 (2007).

While a plaintiff's failure to exhaust administrative remedies is considered an affirmative defense, and not a jurisdictional infirmity; Jones v. Bock, 549 U.S. at 216; if the lack of exhaustion is apparent on the face of the prisoner's complaint, sua sponte dismissal prior to service of the complaint is appropriate. Anderson v. XYZ Corr. Health Servs., Inc., 407 F.3d 674, 683 (4th Cir. 2005). The Fourth Circuit recently stated that exceptions to the rule (that an inmate need not demonstrate exhaustion of administrative remedies in his complaint and that failure-to-exhaust is an affirmative defense that the defendant must raise) which allow a court to sua sponte dismiss a complaint for failure to exhaust administrative remedies are rare. Custis v. Davis, 851 F.3d 358, 361-362 (4th Cir. 2017). Here, however, while Plaintiff alleges that he exhausted his administrative remedies as to the number of meals he is served on the weekends (and also possibly with respect to his Frew claim), he himself has not alleged that he filed a grievance as to the other matters alleged.[4]

[4]As Plaintiff has not asserted that he exhausted his administrative remedies as to these other matters prior to filing this action, and as some of the incidents allegedly occurred after the filing of this action, he cannot amend his complaint to address this defect. However, if Plaintiff later exhausts his administrative remedies with respect to these claims, he can address this defect, if he can, in the filing of a new action. See, e.g., Brockington v. South Carolina Dep't of Soc. Servs., No. 17-1028,

Even with respect to Plaintiff's assertion that he exhausted his administrative remedies as to his complaint that he was served only two meals a day on weekends, he fails to state a claim because he has not alleged that he suffered any serious or significant injury as a result. To state a claim that conditions of confinement violate constitutional requirements, "a plaintiff must show 'both (1) a serious deprivation of a basic human need; and (2) deliberate indifference to prison conditions on the part of prison officials.'" Strickler v. Waters, 989 F.2d 1375, 1379 (4th Cir.1993) (quoting Williams v. Griffin, 952 F.2d 820, 824 (4th Cir. 1991)). Moreover, a plaintiff asserting unconstitutional conditions of confinement must demonstrate that he suffered a serious or significant physical or mental injury as a result of the challenged condition. See Strickler, 989 F.2d at 1380–81. Courts considering similar claims have found that such allegations as are present here are not sufficiently serious as to constitute violations of the Eighth Amendment. See, e.g., Talib v. Gilley, 138 F.3d 211, 214 n. 3 (5th Cir.1998)[finding it "doubtful" that prisoner missing fifty meals in five months "was denied anything close to a minimal measure of life's necessities," and commenting that "[m]issing a mere one out of every nine meals is hardly more than that missed by many working citizens over the same period."]; White v. Gregory, 1 F.3d 267, 268 (4th Cir.1993)[concluding that plaintiff failed to state a claim because he failed to allege "serious or significant physical or mental injury" from being served only two meals a day on holidays and weekends]; Green v. Ferrell, 801 F.2d 765, 770–71 (5th Cir.1986)[stating that even on a regular, permanent basis, two meals a day may be adequate]; Brzowski v. Ill. Dep't of Corr., No. 15–CV–173–SMY, 2015 WL 1228916, at *4

2017 WL 1531633 (4th Cir. 2017)[Noting that pro se Plaintiff should be provided an opportunity to amend his complaint to cure defects prior to a dismissal]; Evans v. Richardson, No. 17-1144, 2017 WL 2294447 (4th Cir. May 25, 2017)[same]; Breyan v. All Medical Staff, No. 17-6186, 2017 WL 2365232 (4th Cir. May 31, 2017)[same].

p10

(S.D.Ill. Mar.16, 2015)[finding inmate failed to state a claim where he alleged that prison's adoption of two-meal per day system did not meet nutritional guidelines; plaintiff failed to allege that he had lost weight or otherwise suffered adverse health consequences as a result of the new meal plan]; Hernandez v. Santa Rosa Corr. Inst., No. 3:05CV39/MCR/EMT, 2006 WL 1494008, at *4 (N.D.Fla. May 24, 2006) [finding that prisoner who was denied lunch five days per week for four months, but who did not allege that he had suffered physical harm, failed to state a claim for violation of the Eighth Amendment]; Gardner v. Beale, 780 F.Supp. 1073, 1075 (E.D.Va.1991)[holding that providing prisoner with only two meals per day, with an eighteen-hour interval between dinner and brunch, did not satisfy objective component of Eighth Amendment standard], aff'd, 998 F.2d 1008 (4th Cir. 1993).

Additionally, as employees of the SCDC, the Defendants are entitled to Eleventh Amendment immunity in their official capacities as to any claims for monetary damages. The Eleventh Amendment to the United States Constitution divests this Court of jurisdiction to entertain a suit for damages brought against the State of South Carolina, its integral parts, or its officials in their official capacities, by a citizen of South Carolina or a citizen of another state. See Alden v. Maine, 527 U.S. 706 (1999); College Savs. Bank v. Florida Prepaid Educ. v. Halderman, 465 U.S. 89 (1984)[although express language of Eleventh Amendment only forbids suits by citizens of other States against a State, Eleventh Amendment bars suits against a State filed by its own citizens]; Alabama v. Pugh, 438 U.S. 781, 782 (1978); Will v. Michigan Dep't of State Police, 491 U.S. 58, 61-71 (1989); Edelman v. Jordan, 415 U.S. 651, 663 (1974)[stating that "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its [Eleventh Amendment] sovereign immunity from suit even though

individual officials are nominal defendants"](quoting Ford Motor Co. v. Dep't. of Treasury, 323 U.S. 459, 464 (1945)); see also Harter v. Vernon, 101 F.3d 334, 338-39 (4th Cir. 1996); Bellamy v. Borders, 727 F. Supp. 247, 248-50 (D.S.C. 1989); Coffin v. South Carolina Dep't of Social Servs., 562 F. Supp. 579, 583-85 (D.S.C. 1983); Belcher v. South Carolina Bd. of Corrs., 460 F. Supp. 805, 808-09 (D.S.C. 1978).

While the United States Congress can override Eleventh Amendment immunity through legislation, Congress has not overridden the states' Eleventh Amendment immunity in § 1983 cases. See Quern v. Jordan, 440 U.S. 332, 343 (1979). Further, although a State may consent to a suit in a federal district court, Pennhurst, 465 U.S. at 99 & n.9, the State of South Carolina has not consented to such actions. To the contrary, the South Carolina Tort Claims Act expressly provides that the State of South Carolina does not waive Eleventh Amendment immunity, consents to suit only in a court of the State of South Carolina, and does not consent to suit in a federal court or in a court of another state. S.C. Code Ann. § 15-78-20(e).

To the extent Plaintiff is attempting to assert claims under South Carolina law, courts are allowed to hear and decide state-law claims only in conjunction with federal-law claims, through the exercise of "supplemental jurisdiction." See 28 U.S.C. §1367; Wisconsin Dep't of Corrs. v. Schacht, 524 U.S. 381, 387 (1998). However, as Plaintiff has asserted no valid federal claim, this Court should not exercise supplemental jurisdiction over any state law claims.[5] See 28 U.S.C.

[5]While a civil action for a state law claim would be cognizable in this Court on its own under the federal diversity statute, that statute requires complete diversity of parties and an amount in controversy in excess of seventy-five thousand dollars ($75,000.00). See 28 U.S.C. § 1332(a). Complete diversity of parties in a case means that no party on one side may be a citizen of the same State as any party on the other side. See Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 372-374 (1978). Here, Plaintiff and the Defendants all are citizens of South Carolina, such that diversity of citizenship does not exist.

p12

§ 1367; see also United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Tigrett v. Rector and Visitors of the Univ. of Va., 290 F.3d 620, 626 (4th Cir. 2002)[affirming district court's dismissal of state law claims when no federal claims remained in the case]. Lovern v. Edwards, 190 F.3d 648, 655 (4th Cir. 1999)["[T]he Constitution does not contemplate the federal judiciary deciding issues of state law among non-diverse litigants"]. Thus, it is also recommended that any state law claims be dismissed.

Finally, it should be noted that Plaintiff has failed to bring his case into proper form. By Order entered February 11, 2019, Plaintiff was given an opportunity to provide the necessary information and paperwork, to include a summons form for Defendant Stirling and a Financial Certificate. Plaintiff was further specifically warned that failure to provide the necessary information within the timetable set forth in the Order would subject the case to dismissal. See ECF No. 9. Plaintiff thereafter failed to provide a completed and signed Financial Certificate and failed to provide a completed summons form for Defendant Stirling.[6] Thus, in the alternative, it is recommended that this action be dismissed in accordance with Rule 41, Fed.R.Civ.P. See Link v. Wabash R.R. Co., 370 U.S. 626 (1962); Ballard v. Carlson, 882 F.2d 93, 95-96 (4th Cir. 1989), cert. denied sub nom, Ballard v. Volunteers of America, 493 U.S. 1084 (1990) [holding that district court's dismissal following an explicit and reasonable warning was not an abuse of discretion].

Motion to Proceed IFP

Plaintiff has submitted an Application to Proceed Without Prepayment of Fees and Affidavit (Form AO 240)] which is construed as a Motion for Leave to Proceed in forma pauperis

[6]Nor has Plaintiff provided any service documents (completed summons forms and completed Forms USM-285) for the Defendants newly named in the Amended Complaint.

p13

Here, Plaintiff has failed to address any of the factors outlined in Winter. As discussed above, it is unlikely Plaintiff will succeed on the merits of his case. Moreover, to the extent Plaintiff is requesting a transfer to another institution, prisoners generally do not have a constitutionally recognized liberty interest in a particular security classification or prison placement. Hewitt v. Helms, 459 U.S. 460, 468 (1983)[no constitutional right under the Due Process Clause to a particular security classification or prison placement]. Plaintiff has failed to show a likelihood of success on his medical claims, as they appear to be a disagreement between Plaintiff and the medical professionals at the prison with respect to the medical care he is receiving, which is not cognizable under § 1983. Lamb v. Maschner, 633 F. Supp. 351, 353 (D.Kan. 1986). He also may be challenging co-payments for medical care, which does not rise to the level of a § 1983 violation. See Ham v. Stirling, No. 13-3178, 2015 WL 1263063 at *9 (D.S.C. Mar. 17, 2015)["Prisons and jails are allowed to impose co-payments for medical services if they actually provide medical care to the prisoner."](quoting Cabbagestalk v. Richstad, No. 09-1834, 2009 WL 4040479 at * 9 (D.S.C. Nov. 9, 2009)(emphasis in original)); Clayton v. Ozmint, No. 10-190, 2011 WL 380149, at * *3-4 (D.S.C. Feb. 2, 2011); see also Sturkey v. Ozmint, No. 07-1502, 2009 WL 649569, at * 2 (D.S.C. Mar. 11, 2009)["[D]ebits such as those made for filing fees, medical services, and expenses are not 'deprivations' because the inmate has been provided with a service or good in exchange for the money debited."].

As to the second factor under Winter, Plaintiff has not made a clear showing that he is likely to be irreparably harmed if preliminary relief is denied. Rather, he merely makes a conclusory statement of harm. See Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 812 (4th Cir. 1991) [holding that a court will not grant a preliminary injunction unless the plaintiff first

MJ P15

makes a "clear showing" that he will suffer irreparable injury without it, and that the harm "must be neither remote nor speculative, but actual and imminent"]. Third, Plaintiff has not shown that the balance of equities tips in his favor, and finally, Plaintiff has not shown that an injunction is in the public interest. See Nicholas v. Ozmint, No. 05-3472, 2006 WL 2711852, * 5 (D.S.C. Sept. 20, 2006); see also Winter, 555 U.S. at 20 ["In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction"]. Thus, it is recommended that Plaintiff's motion for preliminary injunction and transfer (ECF No. 15) be **denied**.

Recommendation

Based on the foregoing, it is recommended that the Court **dismiss** Plaintiff's Complaint with prejudice[8] and without issuance and service of process. It is also recommended that Plaintiff's motions for a preliminary injunction and transfer (ECF No. 15) and to proceed IFP (ECF No. 2) be **denied**.

Plaintiff's attention is directed to the important notice on the next page.

March 19, 2019
Charleston, South Carolina

Bristow Marchant
United States Magistrate Judge

[8]As noted above, Plaintiff was previously given notice (ECF No. 9) that some of the above pleading deficiencies could possibly be corrected by factual amendment, but essentially reasserts the same claims in his amended complaint or has raised unexhausted claims such that further amendment would be futile. See Goode v. Central Va. Legal Aid Soc'y, 807 F.3d 619, 623–24 (4th Cir. 2015).

FILED: January 3, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6657 (L)
(9:18-cv-03028-RMG-BM)

WILLIE JOHNSON

Plaintiff - Appellant

v.

BRYAN P. STIRLING, SCDC Director of South Carolina Department of Corrections; WEST PRICE; SERGEANT A. HUDSON; SERGEANT STORY; SERGEANT WRIGHT

Defendants - Appellees

No. 19-7791
(9:18-cv-03028-RMG-BM)

WILLIE JOHNSON

Plaintiff - Appellant

v.

BRYAN P. STIRLING, SCDC Director of South Carolina Department of Corrections; WEST PRICE; EMILY A. FARR; ELIZABETH SIMMONS; DR. STACY SMITH; DR. RICK TOOMEY, Director of DHEC

Defendants - Appellees

Appendix D

ORDER

The petition for rehearing en banc and motion to appoint counsel was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc and the motion to appoint counsel.

For the Court

/s/ Patricia S. Connor, Clerk

BRYAN P. STIRLING, SCDC Director of South Carolina Department of Corrections; WEST PRICE; EMILY A. FARR; ELIZABETH SIMMONS; DR. STACY SMITH; DR. RICK TOOMEY, Director of DHEC

Defendants - Appellees

JUDGMENT

In accordance with the decision of this court, the judgments of the district court are affirmed.

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

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