APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

OTHER DOCUMENTS

APPENDIX TABLE OF CONTENTS (Cont.)

APPENDIX 1
PER CURIAM OPINION, U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT (OCTOBER 26, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRENT CLARK,

Plaintiff - Appellant,

v.

DR. VIBEKE DANKWA,
individually and in her official capacity,

Defendant - Appellee.

No. 23-1300

Appeal from the United States District Court
for the Northern District of West Virginia,
at Wheeling. John Preston Bailey, District Judge.
(5:23-cv-00009-JPB-JPM)

Submitted: August 25, 2023

Decided: October 26, 2023

Before: HARRIS, RUSHING, and HEYTENS,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

Brent Edward Clark, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Brent Clark appeals a district court order dismissing his claims alleging he received inadequate medical treatment while incarcerated at FCI Morgantown. Because those claims were barred by a federal statute, we affirm the district court's judgment on alternative grounds. See, *e.g.*, *Attkisson v. Holder*, 925 F.3d 606, 624 (4th Cir. 2019) (observing that this Court may affirm the dismissal of a suit "on any ground supported by the record," even if it is not the basis relied upon by the district court (quotation marks omitted)).

Under the Federal Tort Claim Act's aptly named "judgment bar," a judgment in an action brought under the FTCA bars *all* future actions that: (1) arise out of the same set of facts; and (2) are brought against the federal employees whose conduct was challenged in the original suit. 28 U.S.C. § 2676 ("The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.").

That bar applies here. In 2021, Clark filed an FTCA action against several federal defendants, including Dr. Dankwa, arising out of the same set of facts at issue here. See Complaint, *Clark v. United States*, No. 5:21-cv-00027, ECF 1 (N.D. W. Va. Feb. 19, 2021). That suit was resolved on the merits when the district court entered summary judgment against

Clark. See Order, *Clark v. United States*, No. 5:21-cv-00027, ECF 168 (N.D. W. Va. Nov. 28, 2022). Given that dismissal, any future claims arising out of those facts—whether brought under state or federal law—were barred. See *Unus v. Kane*, 565 F.3d 103, 121-22 (4th Cir. 2009) (discussing the FTCA's judgment bar).

Accordingly, we affirm the dismissal of Clark's claims. We also deny Clark's pending motion for a stay pending appeal and his motion to remand the case to state court. Finally, 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.

SO ORDERED.

APPENDIX 2
ORDER DISMISSING CASE,
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA WHEELING
(JANUARY 19, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA WHEELING

BRENT CLARK,

Plaintiff,

v.

DR. VIBEKE DANKWA,
individually and in her official capacity,

Defendant.

Civil Action No. 5:23-CV-9

Before: John Preston BAILEY,
United States District Judge.

ORDER DISMISSING CASE

Pending before this Court on initial review is Brent Clark's complaint against Dr. Vibeke Dankwa [Doc. 1-2]. For the reasons stated below, this case will be dismissed.

On December 27, 2022, plaintiff Brent Clark filed an Amended Complaint in the Circuit Court of

Monongalia County, West Virginia, alleging that Dr. Dankwa, a physician employed by the Bureau of Prisons, provided inadequate medical care in volation of the Eighth Amendment to plaintiff while he was an inmate at FCI Morgantown.

This case was removed to this Court on January 12, 2023. The Notice of Removal contains the following language:

> 3. Plaintiff brought the underlying state court civil action against the Defendant, an employee or officers of the United States and the Federal Bureau of Prisons, in official and/or individual capacity, for or relating to acts under color of such office. Specifically, Plaintiff alleges that the Defendant violated his Eighth Amendment right to be free from cruel and unusual punishment by, inter alia, providing inadequate medical care in or about December 2018 while he was designated to FCI Morgantown.
>
> 4. Pursuant to 28 U. S. C. § 1442(a)(1), a civil action that is commenced in a state court and that is against or directed to the United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending.

[Doc. 1 at 2].

Inasmuch as this case is a suit for damages against a federal actor acting in violation of the Constitution, it is a *Bivens* type action. *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

At the outset, this Court notes that the recent Supreme Court case of *Egbert v. Boule*, 142 S.Ct. 1793 (2022) "all but closed the door on *Bivens* remedies." *Dyer v. Smith*, 2022 WL 17982796, at *3 (4th Cir. Dec. 29, 2022).

> In *Bivens*, the Court held that it had authority to create "a cause of action under the Fourth Amendment" against federal agents who allegedly manacled the plaintiff and threatened his family while arresting him for narcotics violations. 403 U.S. at 397. Although "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages," *id.*, at 396, 91 S.Ct. 1999, the Court "held that it could authorize a remedy under general principles of federal jurisdiction," *Ziglar*, 582 U.S., at ___; 137 S.Ct., at 1854 (citing *Bivens*, 403 U.S. at 392, 91 S.Ct. 1999). Over the following decade, the Court twice again fashioned new causes of action under the Constitution—first, for a former congressional staffer's Fifth Amendment sex-discrimination claim, *see Davis v. Passman*, 442 U.S. 228 (1979); and second, fora federal prisoner's inadequate-care claim under the Eighth Amendment, *see Carlson v. Green*, 446 U.S. 14 (1980).

Egbert v. Boule, 142 S.Ct. 1793, 1802 (2022).

Over the past 42 years, however, the Supreme Court has declined twelve (12) times to imply a similar cause of action for other alleged constitutional violations. *See Chappell v. Wallace*, 462 U.S. 296 (1983); *Bush v. Lucas*, 462 U.S. 367 (1983); *United States v. Stanley*, 483 U.S. 669 (1987); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *FDIC v. Meyer*, 510 U.S. 471; *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001); *Wilkie v. Robbins*, 551 U.S. 537 (2007); *Hui v. Castaneda*, 559 U.S. 799 (2010); *Minneci v. Pollard*, 565 U.S. 118 (2012); *Ziglar v, Abbasi*, 582 U.S. ___, 137 S.Ct. 1843 (2017); *Hernandez v. Mesa*, 589 U.S. ___, 140 S.Ct. 735 (2020); and *Egbert v. Boule*, 142 S.Ct. 1793, 1799-800 (2022).

The Court, rather that dispensing with *Bivens* and its progeny altogether, has emphasized that a cause of action under *Bivens* is a "disfavored judicial activity." *Egbert*, 142 S.Ct. at 1803 (citing *Ziglar*, 582 U.S., at ____, 137 S.Ct., at 1856-1857 (internal quotation marks omitted); *Hernandez*, 589 U.S., at ___, 140 S.Ct., at 742-743 (internal quotation marks omitted)).

In *Egbert*, the Supreme Court once again tiptoed around the ultimate issue — whether there is any remaining validity in the *Bivens* doctrine, while fashioning a standard which indicates that the *Bivens* action no longer exists.

In *Egbert*, the Court referenced the two part test for determining whether a *Bivens* type cause of action exists:

> To inform a court's analysis of a proposed *Bivens* claim, our cases have framed the inquiry as proceeding in two steps. *See*

> *Hernandez*, 589 U.S., at ___, 140 S.Ct., at 742-743. First, we ask whether the case presents "a new *Bivens* context"—i.e., is it "meaningful[ly]" different from the three cases in which the Court has implied a damages action. *Ziglar*, 582 U.S., at——, 137 S.Ct., at 1859-1860. Second, if a claim arises in a new context, a *Bivens* remedy is unavailable if there are "special factors" indicating that the Judiciary is at least arguably less equipped than Congress to "weigh the costs and benefits of allowing a damages action to proceed." *Ziglar*, 582 U.S., at ___, 137 S.Ct., at 1858 (internal quotation marks omitted). If there is even a single "reason to pause before applying *Bivens* in a new context," a court may not recognize a *Bivens* remedy. *Hernandez*, 589 U.S., at ___, 140 S.Ct., at 743.

Egbert, 142 S.Ct. at 1803.

In *Egbert*, the Supreme Court, without saying as much, appears to have significantly modified the two-step *Ziglar test*:

> While our cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy. For example, we have explained that a new context arises when there are "potential special factors that previous *Bivens* cases did not consider." *Ziglar*, 582 U.S., at ___ , 137 S.Ct., at 1860. And we have identified several examples of new contexts—e.g., a case that involves a

> "new category of defendants," *Malesko*, 534 U.S. at 68, 122 S.Ct. 515; *see also Ziglar*, 582 U.S., at ___,137 S.Ct., at 1876—largely because they represent situations in which a court is not undoubtedly better positioned than Congress to create a damages action. We have never offered an "exhaustive" accounting of such scenarios, however, because no court could forecast every factor that might "counse[l] hesitation." *Id.*, at ___, 137 S.Ct., at 1880. Even in a particular case, a court likely cannot predict the "systemwide" consequences of recognizing a cause of action under *Bivens*. *Zigtar*, 582 U.S., at ___, 137 S.Ct., at 1858. That uncertainty alone is a special factor that forecloses relief. *See Hernandez v. Mesa*, 885 F.3d 811, 818 (C.A.5 2018) (en Banc) ("The newness of this 'new context' should alone require dismissal").

Egbert, 142 S.Ct. at 1803-04.

The question left unanswered is whether the "single question" test removes the issue of whether the cause of action is a new context. This Court believes that it does for several reasons.

First, the *Egbert* decision notes that the Court has "come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power,' *Hernandez*, 589 U.S., at ___, 140 S.Ct., at 741. At bottom, creating a cause of action is a legislative endeavor. Courts engaged in that unenviable task must evaluate a 'range of policy considerations . . . at least as broad as the range . . . a legislature would consider.' *Bivens*, 403 U.S. at 407 (Harlan, J., concurring

in judgment); see also *post*, at 1809 - 1810 (GORSUCH, J., concurring in judgment)." *Egbert*, 142 S.Ct. at 1802.

Second, the Court states that "a plaintiff cannot justify a *Bivens* extension based on 'parallel circumstances' with *Bivens, Passman*, or *Carlson* unless he also satisfies the 'analytic framework' prescribed by the last four decades of intervening case law." *Id.*, at 1809.

Third, the *Egbert* Court notes that it has indicated that if it were called to decide *Bivens* today, it would decline to discover any implied causes of action in the Constitution. *Id.* (citing *Ziglar*, 582 U.S., at ___, 137 S.Ct., at 1855).

Finally, and most importantly, Justice Gorsuch's concurring opinion indicates such.

In his concurrence, Justice Gorsuch starts with the statement that "Our Constitution's separation of powers prohibits federal courts from assuming legislative authority. As the Court today acknowledges, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), crossed that line by 'impl[ying]' a new set of private rights and liabilities Congress never ordained. *Ante*, at 1802 - 1803; see *also Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Nestle USA, Inc. v. Doe*, 593 U.S. ___, 141 S.Ct. 1931, 1942-1943 (2021) (GORSUCH, J., concurring)." *Egbert*, 142 S.Ct. at 1809 (Gorsuch, J., concurring).

Justice Gorsuch adds:

> Recognizing its misstep, this Court has struggled for decades to find its way back. Initially, the Court told lower courts to follow

a "two ste[p]" inquiry before applying *Bivens* to any new situation . . . At the first step, a court had to ask whether the case before it presented a "new context" meaningfully different from *Bivens* . . . At the second, a court had to consider whether 'special factors' " counseled hesitation before recognizing a new cause of action . . . But these tests soon produced their own set of questions: What distinguishes the first step from the second? What makes a context "new" or a factor "special"? And, most fundamentally, on what authority may courts recognize new causes of action even under these standards?

Today, the Court helpfully answers some of these lingering questions. It recognizes that our two-step inquiry really boils down to a "single question": Is there "any reason to think Congress might be better equipped" than a court to "'weigh the costs and benefits of allowing a damages action to proceed'"?; *see Ziglar v. Abbasi*, 582 U.S. 120, 137 S.Ct. 1843, 1858. But, respectfully, resolving that much only serves to highlight the larger remaining question: When might a court *ever* be "better equipped" than the people's elected representatives to weigh the "costs and benefits" of creating a cause of action?

It seems to me that to ask the question is to answer it. To create a new cause of action is to assign new private rights and liabilities—a power that is in every meaningful sense an act of legislation. *See Sandoval*, 532 U.S. at 286-287; *Nestle*, 593 U.S., at ___, 141 S.Ct.,

at 1942-1943 (GORSUCH, J., concurring); *Jesner v. Arab Bank, PLC*, 584 U.S. ___–,—— —, 138 S.Ct. 1386,1392 (2018) (GORSUCH, J., concurring in part and concurring in judgment). If exercising that sort of authority may once have been a " 'proper function for common-law courts' " in England, it is no longer generally appropriate" 'for federal tribunals' " in a republic where the people elect representatives to make the rules that govern them. *Sandoval*, 532 U.S. at 287. Weighing the costs and benefits of new laws is the bread and butter of legislative committees. It has no place in federal courts charged with deciding cases and controversies under existing law.

Instead of saying as much explicitly, however, the Court proceeds on to conduct a case-specific analysis. And there I confess difficulties. The plaintiff is an American citizen who argues that a federal law enforcement officer violated the Fourth Amendment in searching the curtilage of his home. Candidly, I struggle to see how this set of facts differs meaningfully from those in *Bivens* itself. To be sure, as the Court emphasizes, the episode here took place near an international border and the officer's search focused on violations of the immigration laws. But why does that matter? The Court suggests that Fourth Amendment violations matter less in this context because of "likely" national-security risks . . . So once more, we tote up for ourselves the costs and benefits of a private right of

action in this or that setting and reach a legislative judgment. To atone for *Bivens*, it seems we continue repeating its most basic mistake.

Of course, the Court's real messages run deeper than its case-specific analysis. If the costs and benefits do not justify a new *Bivens* action on facts so analogous to *Bivens* itself, it's hard to see how they ever could. And if the only question is whether a court is "better equipped" than Congress to weigh the value of a new cause of action, surely the right answer will always be no. Doubtless, these are the lessons the Court seeks to convey. I would only take the next step and acknowledge explicitly what the Court leaves barely implicit. Sometimes, it seems, "this Court leaves a door ajar and holds out the possibility that someone, someday might walk through it" even as it devises a rule that ensures "no one . . . ever will." *Edwards v. Vannoy*, 593 U.S. ___, ___, 141 S.Ct. 1547, 1566 (2021) (GORSUCH, J., concurring). In fairness to future litigants and our lower court colleagues, we should not hold out that kind of false hope, and in the process invite still more "protracted litigation destined to yield nothing." *Nestle*, 593 U.S., at ___, 141 S.Ct., at 1943 (GORSUCH, J., concurring). Instead, we should exercise "the truer modesty of ceding an ill-gotten grin," *ibid.*, and forthrightly return the power to create new causes of action to the people's representatives in Congress.

142 S.Ct. 1809-1810 (Gorsuch, J., concurring).

Based upon the foregoing, this Court believes that the *Bivens* type of action is no longer viable, whether a new context or not. It is clear, however, that those on the Fourth Circuit do not agree. In the two Fourth Circuit cases decided since *Egbert*, the Fourth Circuit has applied the "two-step new context test." *See Tate v. Harmon*, 54 F.4th 839 (4th Cir. 2022) and *Dyer v. Smith*, 2022 WL 17982796 (4th Cir. Dec. 29, 2022). Accordingly, this Court will address the two *Ziglar* factors.

The first factor is whether the proffered cause of action constitutes a new context under *Bivens*. "In determining whether a case presents a new *Bivens* claim, 'a radical difference is not required' to make a case meaningfully different from the three cases in which the Court has recognized a *Bivens* remedy. *Tun-Cos* [*v. Perrotte*], 922 F.3d [514,] at 523 [(4th Cir. 2019)]. The Supreme Court has explained:

> A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Ziglar, 137 S.Ct. at 1860." *Dyer*, 2022 WL 17982796, at *3.

This Court joins two other district court cases from the Fourth Circuit which found that a case involving chronic, non-emergent, non fatal medical treatment is a different context than that found in *Carlson*, which involved an emergency resulting in death. *See Washington v. Federal Bureau of Prisons*, 2022 WL 3701577 (D.S.C. Aug. 26, 2022) (Hendricks, J.) and *McNeal v. Hutchinson*, 2022 WL 17418060 (D.S.C. Sept. 19, 2022) (Baker, M.J.), *report and recommendation adopted*, 2022 WL 16631042 (D.S.C. Nov. 2, 2022) (Anderson, J.).

Inasmuch as this case presents a new context, this Court "must proceed to the 'second step and ask whether there are any special factors that counsel hesitation about granting the extension' of *Bivens*. *Hernandez*, 140 S.Ct. at 743 (cleaned up). And if there is 'reason to pause before applying *Bivens* in a new context or to a new class of defendants,' the request to extend *Bivens* should be rejected. *Id.* Moreover, the Court has directed that the 'special factors' inquiry must center on 'separation-of-powers principles.' *Id.* (quoting *Ziglar*, 137 S.Ct. at 1857). As the Court explained:

> We thus consider the risk of interfering with the authority of other branches, and we ask whether 'there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy,' and 'whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.'"

Tate v. Harmon, 54 F.4th 839, 844-45 (4th Cir. 2022).

"As the *Egbert* Court noted:

> The *Bivens* inquiry does not invite federal courts to independently assess the costs and benefits of implying a cause of action. A court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to weigh the costs and benefits of allowing a damages action to proceed."

Id. at 848 (emphasis in original) (quoting *Egbert*, 142 S.Ct. at 1805 (cleaned up)).

"In considering the special factors, we evaluate 'whether Congress *might doubtthe* need for an implied damages remedy,' *Tun-Cos*, 922 F.3d at 525 (emphasis in original), or if there is 'reason to pause' before extending *Bivens* to new contexts, *Hernandez v. Mesa*, —— U.S. ___, 140 S.Ct. 735, 743 (2020). '"A single sound reason to defer to Congress" is enough to require a court to refrain from creating [a damages] remedy.' *Egbert*, 142 S.Ct. at 1803 (quoting *Nestle USA, Inc. v. Doe*,—— U.S. ___, 141 S.Ct. 1931, 1937 (2021) (plurality opinion)). Put another way, "the most important question is who should decide whether to provide for a damages remedy, Congress or the courts?"' *Egbert*, 142 S.Ct. at 1803 (quoting *Hernandez*, 140 S.Ct. at 750). 'If there is a rational reason to think that the answer is Congress - as it will be in most every case . . . —no *Bivens* action may lie,' *Egbert*, 142 S.Ct. at 1803 (internal citation omitted)." *Dyer*, 2022 WL 17982796, at *4.

"While the Supreme Court has not provided a comprehensive list of special factors, courts are

instructed to consider `whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.' *Ziglar*, 137 S.Ct. at 1858. Courts are also instructed to look to whether 'there is an alternative remedial structure present in a certain case.' *Id.* An alternative remedy weighs against recognizing a new *Bivens* claim even if it is less effective than the damages that would be available under *Bivens* and is not expressly identified by Congress as an alternative remedy. *Id.*; *Egbert*, 142 S.Ct. at 1804, 1807." *Id.*

Other factors to be considered include "'economic and governmental concerns,' 'administrative costs,' and the 'impact on governmental operations systemwide.' *Ziglar*, 582 U.S., at——, 137 S.Ct., at 1856, 1858. Unsurprisingly, Congress is 'far more competent than the Judiciary' to weigh such policy considerations. *Schweiker*, 487 U.S. at 423. And the Judiciary's authority to do so at all is, at best, uncertain. *See, e.g., Hernandez*, 589 U.S., at ——, 140 S.Ct., at 742." *Egbert*, 142 S.Ct. at 1802-03.

The *Egbert* Court made it clear that "a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, 'an alternative remedial structure.' *Ziglar*, 582 U.S., at——, 137 S.Ct., at 1858; *see also Schweiker*, 487 U.S. at 425. If there are alternative remedial structures in place, 'that alone,' like any special factor, is reason enough to 'limit the power of the Judiciary to infer a new *Bivens* cause of action.' *Ziglar*, 582 U.S., at ——, 137 S.Ct., at 1858." *Id.* at 1804.

In *Correctional Services Corp. v. Malesko*, 534 U.S. at 74, the Court held that *Bivens* type relief is

unavailable to federal prisoners because they could, among other options, file grievances through the Administrative Remedy Program. *See also Egbert*, 142 S.Ct. at 1806. This holding alone would appear to bar any *Bivens* type action brought by a federal prisoner.

A further reason not to find a *Bivens* type remedy is that it "risks transforming the courts into an *ad hoc* medical review board tasked with deciding, with little to no judicial guidance, which medical errors, if any, cross the threshold into constitutional injury." *See Washington v. Fed. Bureau of Prisons*, 2022 WL 3701577, at *5 (D.S.C. Aug. 26, 2022) (Hendricks, J.).

The above factors provide a myriad of reasons to hesitate extending *Bivens* to this case. Accordingly, this Court finds that there is no viable cause of action under *Bivens* and its progeny, requiring dismissal.

Even if this type of claim were still valid, Mr. Clark's claims against Dr. Dankwa are clearly barred by the applicable statute of limitations, which in West Virginia is two (2) years. Inasmuch as Mr. Clark left FCI Morgantown in February of 2019, his claims are clearly barred.

For the foregoing reasons, this action is DISMISSED.

The Clerk is hereby DIRECTED to STRIKE the above-styled case from the active docket of this Court.

It is so ORDERED.

The Clerk is directed to transmit copies of this Order to all counsel of record herein and to mail a copy to the *pro* se plaintiff.

DATED: January 19, 2023.

/s/ John Preston Bailey
United States District Judge

APPENDIX 3
ORDER STRIKING EXPERT, GRANTING SUMMARY JUDGMENT AND IMPOSING SANCTIONS
(NOVEMBER 28, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA WHEELING

BRENT CLARK,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 5:21-CV-27

Before: John Preston BAILEY,
United States District Judge.

ORDER STRIKING EXPERT, GRANTING SUMMARY JUDGMENT AND IMPOSING SANCTIONS

Pending before this Court are Plaintiff's *pro se* Motion for Summary Judgment to Determine Liability [Doc. 125], filed September 19, 2022, Defendant's Motion for Summary Judgment [Doc. 126], filed September 22, 2022, Defendant's Motion to Strike

Plaintiff's Expert Disclosure and Motion for Summary Judgment and Sanctions [Doc. 149], Plaintiff's *pro se* Motion for Leave to Supplement Pursuant to Rule 26(e) [Doc. 155], filed November 14, 2022, and Defendant's Motions *in Limine* [Doc. 163], filed November 21, 2022.

This Court will first turn its attention to the issues surrounding the expert witness. The Government previously filed Defendant's Motion to Strike Plaintiff's Expert Disclosure and Motion for Summary Judgment [Doc. 101] based upon insufficiencies in plaintiff's expert report. Thereafter, plaintiff filed a Supplemental Medical Expert Disclosure [Doc. 105] and a Motion for Leave to Supplement Medical Expert Disclosure [Doc. 107]. Over the Government's objections, this Court granted the plaintiff's Motion for Leave to to Supplement Medical Expert Disclosure and denied the Government's Motion to Strike Plaintiff's Expert Disclosure and Motion for Summary Judgment [Doc. 114].

The Government now seeks to exclude the plaintiff's expert report based upon later gained information — primarily obtained during the deposition of plaintiffs expert, Dr. Wong, and from documents obtained after the deposition.

Based upon the information obtained, the following is clear:

1. This is a medical malpractice action brought under the Federal Tort Claims Act by Brent Clark, a former medical doctor and federal inmate, based upon treatment received at FCI Morgantown.

2. The Supplemental Medical Expert Disclosure [Doc. 105] was wholly written by Mr. Clark and

submitted to Dr. Wong on July 13. Dr. Wong merely signed the report and returned it to Mr. Clark for mailing to the Clerk's office on July 16, 2022. Dr. Wong did not change a word of what was sent to him.

3. Despite the foregoing, Dr. Wong testified at his deposition, under oath, that he created the Supplemental Medical Expert Disclosure. [Doc. 150-5 at 4].

4. When asked if he "ma[d]e the first draft of [the Supplemental Medical Expert Report]," Dr. Wong responded, "I did not produce the draft, no." [Id.].

5. When asked to clarify why he said he "created" the draft, Dr. Wong responded, "I made additions and changes to it and made sure that the final one reflected what I truly thought." [Id.].

6. When asked how much of the draft he changed, Dr. Wong responded, "60%, 70%." [Id.].

7. When asked as to the difference, Dr. Wong responded, "In terms of words were changed, things were taken out, that kind of thing." [Id. at 5].

8. It was evident during the deposition that Dr. Wong had little command of the facts of the instant case or the relevant medical records. Dr. Wong frequently could not identify with specificity which records he relied upon in forming his opinions or which records were provided to him. Given his clear lack of knowledge of the case and his disclosed opinions, he made a number of admissions fatal to plaintiff's case, only to later immediately yield to plaintiff's prompting during re-direct.

9. The email which sent the final supplemental report includes the following: "The only new information

that you have not already reviewed for the above past statements is the enclosed pdf of 5 pages. It is the New Orleans Criteria and CDC guidelines for CT scan eligibility for traumatic brain injury and a journal publication from the NIH with mortality rates for treated versus untreated subarachnoid hemorrhage patients that I've incorporated into this combined report." [Doc. 150-14].

10. Despite the fact that Dr. Wong had not seen the referenced material, the same was included as his opinions in the final supplemental report.

The facts of this case are hauntingly similar to the facts in the case of *In re Jackson Nat'l. Life Ins. Co. Premium Litigation*, 1999 WL 33510008 (W.D. Mich. Sept. 29, 1999) (Scoville, M.J.), *affirmed by* 2000 WL 33654070 (W.D. Mich. Feb. 8, 2000) (McKeague, J.), in which the purported expert witness had not prepared the expert witness report in violation of Fed. R. Civ. P. 26(a)(2) and the expert testified untruthfully concerning the authorship of the report, and the attempts by defense counsel were unjustifiably impeded. The court in that case precluded the plaintiffs from presenting the purported expert's testimony at trial.[1]

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[1] Other courts have discounted expert testimony when experts merely express the opinions of the lawyers who hired them. *See, e.g., C. Baxter Intl. Inc. v. McGaw, Inc.*, 1996 WL 145778, at *4 (N.D. III. 1996), *aff'd in part and rev'd in part on other grounds*, 149 F.3d 1321 (Fed. Cir. 1998) (Court disregarded an expert report because the expert did not independently prepare his report); *Marbled Murrelet v. Pacific Lumber Co.*, 880 F.Supp. 1343, 1365 (N.D. Cal. 1995), *aff'd*, 83 F.3d 1060 (9th Cir.1996) (Finding that the expert's testimony lacked objectivity and credibility where it appeared to have been crafted by attorneys);

In this case, based upon the fact that the report contains the plaintiff's own opinions rather than Dr. Wong's, as evidenced by the reference to articles that Dr. Wong had not even seen and Dr. Wong's blatant falsifications under oath, this Court will exclude Dr. Wong and his opinions as tainted.

In response, the plaintiff argues that the plaintiff's 6/5/2022 expert disclosure is sufficient. This argument overlooks the fact that Dr. Wong and all of his opinions are excluded due to the taint.

The Federal Tort Claims Act ("FTCA"), 28 U. S. C. §§ 2671-2680, is the exclusive money damages remedy for negligent acts or omissions of federal government employees acting within the scope of their employment. *See* 28 U. S. C. § 2679. The FTCA operates as a limited waiver of sovereign immunity. *See Medina v. United States*, 259 F.3d 220, 223 (4th Cir. 2001). It does not create new causes of action, but merely allows the United States to be sued and held liable in tort in the same respect as a private person under the law of the place where the act occurred." *id.* at 223; 28 U.S.C. § 1346(b)(1). Because the alleged negligent acts occurred in West Virginia, the substantive law of West Virginia controls. *See Eichelberger v. United States*, 2006 WL 533399 (N.D. W.Va. Mar. 3, 2006) (Keeley, J.).

Occulto v. Adamar of N.J., Inc., 125 F.R.D. 611, 616 (D. N.J. 1989) (Noting that an expert cannot simply be an alter ego of the attorney who will be trying the case); *Manning v. Crockett*, 1999 WL 342715, at *3 (N.D. III. May 18, 1999) ("Allowing an expert to sign a report drafted entirely by counsel without prior substantive input from an expert would read the word 'prepared' completely out of the rule.").

In West Virginia, medical malpractice litigation is controlled by the Medical Professional Liability Act ("MPLA"), W.Va. Code § 55-7B-1 et seq. (2015 Repl. Vol.). Section 3 of the MPLA establishes the elements of proof necessary to sustain a medical malpractice claim: (1) the health care provider failed to meet the standard of care; and (2) such failure was a proximate cause of the injury or death. *See* W.Va. Code § 55-7B-3(a). Proximate cause is generally understood to be the last negligent act contributing to the injury and without which the injury would not have occurred. *See Sexton v. Grieco*, 216 W.Va. 714, 613 S.E.2d 81 (2005).

The MPLA also establishes the proof required fora "loss of chance" claim. Under such a theory, a plaintiff must establish, to a reasonable degree of medical probability, that had the accepted standard of care been afforded the patient, there was greater than a 25 percent chance of improvement, recovery, or survival. *See* W.Va. Code. § 55-7B-3(b).

Plaintiffs in a medical malpractice case bear the burden of proving that negligence and lack of skill on the part of the medical provider proximately caused the injury suffered. *See Farley v. Shook*, 218 W.Va. 680, 629 S.E.2d 739 (2006). Expert testimony is usually required to meet that burden. See *Bellomy v. United States*, 888 F.Supp. 760, 763-64 (S.D. W.Va. 1995) (Haden, C.J.). Where a plaintiff does not produce expert testimony to show that a medical provider deviated from the standard of care, and the deviation caused the injury complained of, the defending party is entitled to summary judgment. *Harrison v. United States*, 2009 WL 36545 (S.D. W.Va. Jan. 6, 2009) (Copenhaver, J.); *Sharpe v. United States*, 230 F.R.D. 452 (E.D. Va. 2005) (Freidman, J.).

With few exceptions not applicable here, the MPLA also requires expert testimony. It provides that the applicable standard of care and a defendant's failure to meet the standard of care, if at issue, "shall be established . . . by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court." W.Va. Code § 55-7B-7(a); see *also Neary v. Charleston Area Med. Ctr.*, 194 W.Va. 329, 460 S.E.2d 464 (1995) (per curiam) (General rule in medical malpractice cases is that negligence can be proved only by expert witnesses).

The exclusion of Dr. Wong as an expert witness leaves the plaintiff with no expert to validate his claims. And it is far too late to allow the plaintiff to obtain a substitute. Expert disclosures were due June 24, 2022; discovery was completed September 9; the pretrial order is due December 5; the pretrial is set for December 19 with the trial set for January 10. Due to the plaintiff's involvement in this sham expert, this Court is loath to continue the matter.

Accordingly, the Government is entitled to summary judgment on the plaintiff's claims.

With regard to the issue of sanctions, Rule 15 of the Local Rules of Prisoner Litigation states that "pro se prisoner litigants are subject to sanctions that include, but are not limited to, those available to the Court under Rule 11 of the Federal Rules of Civil Procedure for the submission of false, improper or frivolous filings in the Court." Here, as shown above, the plaintiff, in multiple signed pleadings, violated Fed. R. Civ. P. 11(b) by misrepresenting to the Court his own conduct and his retained expert's conduct regarding preparation and transmission of the Supple-

mental Report. Further, the plaintiff's conduct is sanctionable under Fed. R. Civ. P. 37(c) because he failed to provide information as required by Fed. R. Civ. P. 26(a), necessitating the United States' deposition of his retained expert and subsequent Motion to Compel Discovery. An appropriate sanction in this case, notwithstanding exclusion of the retained expert, is payment of the reasonable expenses caused by the plaintiff's failure to disclose the draft report.

Dr. Wong's deposition occurred on September 7, 2022, and Dr. Wong provided the undersigned with an invoice in the amount of $5,000.04 ($833.34/hour) for his deposition testimony. During the deposition, the United States obviously discovered that Dr. Wong did not prepare the supplemental report, thus necessitating the pending motion, as well as the Motion to Compel Discovery. In addition to taking Dr. Wong's deposition, the plaintiff's deceitful conduct caused the United States to incur $1,500.00 in costs for further review of the supplemental report by its expert neurologist, Dr. Matthew Smith.

Accordingly, this Court will impose sanctions in the amount of $6,500.04 for violating Fed. R. Civ. P. 11 and Fed. R. Civ. P. 37 and causing the United States to sustain unnecessary litigation costs.

For the reasons stated above:

1. Defendant's Motion to Strike Plaintiff's Expert Disclosure and Motion for Summary Judgment and Sanctions [Doc. 149] is GRANTED;

2. Plaintiff is precluded from offering any testimony or exhibits authored by Dr. Wong;

3. The defendant is GRANTED summary judgment and the case will be DISMISSED WITH PREJUDICE and STRICKEN from the active docket of this Court;

4. Sanctions are hereby imposed upon the plaintiff in the amount of $6,500.04;

5. Plaintiff's *pro se* Motion for Leave to Supplement Pursuant to Ruler 26(e) [Doc. 155] is DENIED;

6. Plaintiff's *pro se* Motion for Summary Judgment to Determine Liability [Doc. 125], Defendant's Motion for Summary Judgment [Doc.126], and Defendant's Motions *in Limine* [Doc. 163] are DENIED AS MOOT.

It is so ORDERED.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: November 28, 2022.

/s/ John Preston Bailey
United States District Judge

APPENDIX 4
ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT (JANUARY 17, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRENT CLARK,

Plaintiff - Appellant,

v.

DR. VIBEKE DANKWA,
individually and in her official capacity,

Defendant - Appellee.

No. 23-1300
(5:23-cv-00009-JPB-JPM)

Before: Nwamaka ANOWI, Clerk.

ORDER

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

Entered at the direction of the panel: Judge Harris, Judge Rushing, and Judge Heytens.

For the Court

/s/ Nwamaka Anowi
Clerk

APPENDIX 5
28 U.S. CODE § 2680 - EXCEPTIONS

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence

imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[1]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.[2]

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative

or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(J) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

APPENDIX 6
FEDERAL TORTS CLAIM ACT COMPLAINT, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA (FEBRUARY 19, 2021)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

BRENT CLARK,

v.

UNITED STATES OF AMERICA.

Civil Action No.: 5:21cv27

FEDERAL TORTS CLAIM ACT COMPLAINT

I. Jurisdiction

The Court has jurisdiction over this action pursuant to: Title 28 U.S.C. Section 2671, et seq. (FICA) and Title 28 U.S.C. Section 1346(b)(1).

II. Plaintiff

In Item A below, place your full name, inmate number, place of detention, and complete mailing address in the space provided.

A. Your full name: Brent Clark

Inmate No.: 38405068

Address: 946 William Penn Court

Pittsburgh, PA. 15221

III. Place of Present Confinement

Name of Prison/Institution: Home confinement via The Renewal Center

A. Is this where the events concerning your complaint took place?

No

If you answered "NO," where did the events occur?

FCI Morgantown

Post office box 1000

Morgantowk, West Virginia 26507

IV. Previous Lawsuits

A. Have you filed other lawsuits in state or federal court dealing with the same facts involved in this action?

No

B. If your answer is "YES", describe each lawsuit in the space below. If there is more than one lawsuit, describe additional lawsuits using the same format on a separate piece of paper which you should attach and label: "IV PREVIOUS LAWSUITS"

1. Parties to this previous lawsuit:

   Plaintiff(s): N/A

   Defendant(s): N/A

2. Court: N/A

(If federal court, name the district; if state court, name the county)

3. Case Number: N/A
4. Basic Claim Made/Issues Raised: N/A
5. Name of Judge(s) to whom case was assigned: N/A
6. Disposition: N/A

   (For example, was the case dismissed? Appealed? Pending?)

7. Approximate date of filing lawsuit: N/A
8. Approximate date of disposition. Attach copies: N/A

C. Did you seek informal or formal relief from the appropriate administrative officials regarding the acts complained of in Part B? N/A

Yes

No

D. If your answer is "YES," briefly describe how relief was sought and the result. If your answer is "NO," explain why administrative relief was not sought.

N/A

E. Did you exhaust ALL available administrative remedies?

Yes

No

N/A

F. If your answer is "YES,", briefly explain the steps taken and attach proof of exhaustion. If your answer is "NO," briefly explain why administrative remedies were not exhausted.

N/A

G. If you are requesting to proceed in this action *in forma pauperis* under 28 U.S.C. § 1915, list each civil action or appeal you filed in any court of the United States while you were incarcerated or detained in any facility that was dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. Describe each civil action or appeal. If there is more than one civil action or appeal, describe the additional civil actions or appeals using the same format on a separate sheet of paper which you should attach and label "G. PREVIOUSLY DISMISSED ACTIONS OR APPEALS"

1. Parties to previous lawsuit: N/A

   Plaintiff(s):

   Defendant(s):

2. Name and location of court and case number: N/A

3. Grounds for dismissal:

   frivolous

   malicious

   failure to state a claim upon which relief may be granted N/A

4. Approximate date of filing lawsuit: N/A

5. Approximate date of disposition: N/A

V. Administrative Remedies Pursuant to the FTCA

A. Did you file an FTCA Claim Form (SF-95), or any other type of written notice of your claim, with the appropriate BOP Regional Office?

Yes

No

B. If your answer is "YES," answer the questions below:

1. Identify the type of written claim you filed: SF-95
2. Date your claim was filed: 12/9/2019
3. Amount of monetary damages you requested in your claim: $ 14,540,000
4. If you received a written Acknowledgment of receipt of your claim from the BOP, state the:
   I. Date of the written acknowledgment: 12/11/2019
   II. Claim Number assigned to your claim: TRT-MXR-2020-01789

C. If your claim involves individuals who are employed by government agencies other than the BOP, did you file an FTCA Claim Form (SF-95), or any other type of written notice of your claim with the appropriate government agencies?

Yes

No

N/A

D. If your answer is "YES," answer the questions below:

1. Identify the specific government agency or agencies, including the addresses, where you filed notice of your claim: N/A
2. Identify the type of written claim(s) you filed: N/A
3. Date your claim(s) were filed: N/A
4. Amount of monetary damages you requested in your claim(s): N/A
5. If you received a written Acknowledgment of receipt of your claim(s), state the:
   I. Date of the written Acknowledgment: N/A
   II. Claim Number assigned to your claim: N/A

E. If the BOP (or other government agency that received notice of your claim) either denied your claim or offered you a settlement that you did not accept, please state whether you requested reconsideration of your claim.

Yes

No

1. If you answered "YES," state the:
   I. Date you requested reconsideration: 7/20/2020
   II. Date the agency acknowledged receipt of your request for reconsideration: 7/30/2020

VI. Statement of Claim

State here, as BRIEFLY as possible, the facts of your case. You must include allegations of specific wrongful conduct as to EACH and EVERY federal employee about whom you are complaining. Describe exactly what each federal employee did. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number• of related claims, you must number and set forth each claim in a separate paragraph. UNRELATED CLAIMS _MUST BE RAISED IN A SEPARATE CIVIL ACTION NO MORE THAN FIVE (5) TYPED OR TEN (10) LEGIBLY PRINTED PAGES MAY BE ATTACHED TO THIS COMPLAINT. (LR PL 3.4.4)

CLAIM 1: Medical negligence due to the deviation from the standard of care for head injury.

Supporting Facts: The federal employees named below failed to provide any medically necessary, standard of care, medical treatment, follow-up care and supervision of subordinates whatsoever, 12/18/2018 thru 2/26/2019 for the plaintiff's head injuries that occurred 12/17/2018 and 2/19/2018 while housed in the Special Housing Unit at FCI Morgantown. according to the medical record.

Identify each federal employee whose actions form a basis for this claim, and state the name of the federal agency that employs each such individual:

Doctor Vibeke Dankwa - Bureau of Prisons

Physician Assistant Patricia Corbin - Bureau of Prisons

With respect to each employee you have named above, state whether this individual was acting within the scope of his or her official duties at the time these claims occurred?

Yes

No

If your answer is "YES," please explain: Each of the above were performing official duties as federal employees at FCI Morgantown in the roles of physician and physician's assistant.

CLAIM 2: Tort claim of patient abandonment. The plaintiff's medical care was unilaterally terminated by Doctor Dankwa and Physician Assistant Corbin when there was still a need of care without proper notice to the plaintiff.

Supporting Facts: The plaintiffs medical records, 12/18/2018 thru 2/26/2019 reveal no treatment whatsoever by Doctor Dankwa or Physician Assistant Corbin for the plaintiff's head injuries that occurred 12/17/2018 and 12/19/2018. The above defendants failed to arrange for the plaintiff's continuing need of care by another appropriately skilled provider.

Identify each federal employee whose actions form a basis for this claim, and state the name of the federal agency that employs each such individual:

Doctor Vibeke Dankwa - Bureau of Prisons

Physician Assistant Patricia Corbin - Bureau of Prisons

With respect to each employee you have named above, state whether this individual was acting within

the scope of his or her official duties at the time these claims occurred?

Yes

No

If your answer is "YES," please explain: At the time of abandonment the defendants were acting as attending physician and physician assistant to the plaintiff at FCI Morgantown.

CLAIM 3: Loss of chance theory of liability.

Supporting Facts: The health care providers failed to follow the accepted standard of care for the treatment of head injury which deprived the plaintiff of a greater than 25% chance of an improved recovery and increased the risk of harm to the plaintiff.

Identify each federal employee whose actions form a basis for this claim, and state the name of the federal agency that employs each such individual:

Doctor Vibeke Dankwa-Bureau of Prisons

Physician Assistant Patricia Corbin-Bureau of Prisons

With respect to each employee you have named above, state whether this individual was acting within the scope of his or her official duties at the time these claims occurred?

Yes

No

If your answer is "YES," please explain:

Each of the above were performing official duties as federal employees at FCI Morgantown in the roles as physician and physician assistant.

CLAIM 4: N/A

Supporting Facts: N/A

Identify each federal employee whose actions form a basis for this claim, and state the name of the federal agency that employs each such individual: N/A

With respect to each employee you have named above, state whether this individual was acting within the scope of his or her official duties at the time these claims occurred?

Yes

No

If your answer is "YES," please explain: N/A

CLAIM 5: N/A

Supporting Facts: N/A

Identify each federal employee whose actions form a basis for this claim, and state the name of the federal agency that employs each such individual: N/A

With respect to each employee you have named above, state whether this individual was acting within the scope of his or her official duties at the time these claims occurred?

Yes

No

If your answer is "YES," please explain: N/A

VII. Injury

Describe BRIEFLY and SPECIFICALLY how you have been injured or your property damaged and the exact nature of your damages. The plaintiff has sustained the injuries of cognitive memory loss and seizure due to the defendant's failure to adhere to the standard of care for head injury. The above led to no detection and thus no treatment of brain injuring bleeding in the brain of the plaintiff. The plaintiff sustained the psychiatric injury of post-traumatic stress disorder when he received no treatment whatsoever for life threatening sequela of head injuries 12/17/201 and 12/19/2018.The plaintiff has left shoulder dysfunction as a result of inadequate medical care.

VIII. Relief

State BRIEFLY and EXACTLY what you want the Court to do for you. *Make no legal arguments. Cite no cases or statutes.*

The plaintiff desires the Court to make the plaintiff whole for the omissions of governmental employees to the same extent a private individual would be in like circumstances. Because the plaintiff has sustained permanent harm and is unable to return to his trained professions as a medical doctor and professor of medicine, the plaintiff desires to recover compensatory economic and non-economic damages, future cost of custodial care and health care.

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he/she is the plaintiff in the above action, that he/she has read the above complaint and that the information contained in the complaint is true and accurate. Title 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Executed at Pittsburgh, Pennsylvania on 12/22/2020

(Location)

(Date)

Illegible
Your Signature

APPENDIX 7
BUREAU OF PRISONS HEALTH SERVICES
CLINICAL ENCOUNTER
(OCTOBER 5, 2023)

Inmate Name: CLARK, BRENT

Reg #: 38405-068

Date of Birth: 04/05/1962

Sex: M

Race: BLACK

Facility: MRG

Encounter Date: 12/18/2018 08:18

Provider: Dennison, Richard RN

Unit: Z01

Injury Assessment - Non-work related encounter performed at Special Housing Unit.

SUBJECTIVE:

INJURY 1 Provider: Dennison, Richard RN

Date of Injury: 12/16/2018 22:00

Date Reported for Treatment: 12/18/2018 08:20

Work Related: No

Work Assignment: SHU

Pain Location: Shoulder-Left

Pain Scale: 4

Pain Qualities: Aching

Where Did Injury Happen (Be specific as to location):

SHU range 1 cell 110.

Cause of Injury (Inmate's Statement of how injury occurred):

Tripped over mattress on the cell floor and hit shoulder and head against the wall.

Symptoms (as reported by inmate):

Decrease ROM to left shoulder.

OBJECTIVE:

Temperature:

Date

12/18/2018

Time

08:24 MRG

Fahrenheit

98.1

Celsius

36.7

Location

Oral

Provider

Dennison, Richard RN

Pulse:

Date

12/18/2018

Time

08:24

Rate Per Minute

76

Location

Rhythm

Provider

Dennison, Richard RN

Respirations:

Date

12/18/2018

Time

08:24 MRG

Rate Per Minute

14

Provider

Dennison, Richard RN

Blood Pressure:

Date

12/18/2018

Time

08:24 MRG

Value

136/92

Location

Left Arm

Position

Sitting

Cuff Size

Adult-large

Provider

Dennison, Richard RN

Sa02:

Date

12/18/2018

Time

08:24 MRG

Value(%)

94

Air

Room Air

Provider

Dennison, Richard RN

Exam:

Musculoskeletal

Shoulder ROM and Tests

Yes: Adduction (Thoracohumeral Group)

No. Abduction (Supraspinatus), Abduction and External Rotation

ASSESSMENT:

Generated 12/18/2018 06:40 by Dennison, Richard RN

Bureau of Prisons-MRG

Initial assessment

Inmate A&Ox3, pupils equal and reactive. Has decrease in ROM (abduction) left shoulder. No other injuries noted. Discussed issue with MLP#1 . V.O. X-ray left shoulder.

PLAN:

New Radiology Request Orders:

Details

General Radiology-Shoulder-General [Left]

Frequency

One Time

End Date

Due Date

12/21/2018

Priority

Routine

Specific reason(s) for request (Complaints and findings):

Decrease ROM (abduction).

Disposition:

To be Evaluated by Provider

Will Be Placed on Callout

Patient Education Topics:

Date Initiated

12/18/2018

Format

Counseling

Handout/Topic

Plan of Care

Provider

Dennison, Richard

Outcome

Verbalizes

Understanding

Copay Required: No

Cosign Required: Yes

Telephone/Verbal Order: No

Completed by Dennison, Richard RN on 12/18/2018 08:40

Requested to be cosigned by Dankwa, Vibeke MD.

Cosign documentation will be displayed on the following page.

Requested to be reviewed by Corbin, Patricia PA-C.

Review documentation will be displayed on the following page.

APPENDIX 8
DR. DANKWA TESTIMONY, TRANSCRIPT EXCERPT (DECEMBER 18, 2022)

Q WOULD YOU AGREE, DR. DANKWA, THAT THE PATIENT'S MEDICAL — THE PLAINTIFF'S MEDICAL RECORD FROM FCI MORGANTOWN, 12-18-2018 THROUGH 2-26-2019, DEMONSTRATES AFTER TRIAGE BY NURSE DENNISON 12-18-2018, THAT PLAINTIFF DID NOT RECEIVE A PROBLEM FOCUSED HISTORY AND PHYSICAL EXAM BY THE PROVIDER?

A YOU WANT ME TO GO THROUGH AND REVIEW THE RECORDS NOW?

Q YES.

A YOU HAVE THEM?

Q NO. YOU WERE SUPPLIED WITH THOSE RECORDS.

A ALL RIGHT. LET ME JUST LOOK. GIVE ME JUST A BIT. OKAY. WHAT DATE WOULD YOU LIKE FOR ME TO START?

Q STARTING AT 12-18-2018.

A 12-18, OKAY.

Q THROUGH 2-26-2019.

A THROUGH 2-26-2019. OKAY. OKAY. BASED ON THE NOTES THAT I HAVE REVIEWED, NO, I DO NOT SEE THAT.

Q WOULD YOU AGREE BECAUSE THE PLAINTIFF DID NOT RECEIVE A NECESSARY AND STANDARD OF CARE PROBLEM FOCUSED HISTORY AND PHYSICAL BY PHYSICIAN ASSISTANT CORBIN OR THE PROVIDER, THE PLAINTIFF WAS NOT ASSESSED FOR MEMORY PROBLEMS, AMNESIA OR OTHER SYMPTOMS DEMONSTRATED HE SUFFERED CONCUSSION?

APPENDIX 9
BROWNBACK v. KING, 592 U.S. ___ (2021), FOOTNOTE 8

In cases such as this one where a plaintiff fails to plausibly allege an element that is both a merit element of a claim and a jurisdictional element, the district court may dismiss the claim under Rule 12(b)(1) or Rule 12(b)(6). Or both. The label does not change the lack of subject matter jurisdiction, and the claim fails on the merits because it does not state a claim upon which relief can be granted. However, in other cases that overlap between merits and jurisdiction may not exist. In those cases, the court might lack subject-matter jurisdiction for non-merits reasons, in which case it must dismiss the case under just Rule 12(b)(1).

APPENDIX 10
DOCKET HISTORY

5:23-cv-00009-JPB-JPM
Clark v. Dankwa
John Preston Bailey, presiding
James P. Mazzone, referral
Date filed: 01/13/2023
Date terminated: 01/19/2023
Date of last filing: 01/25/2024

Doc. No.	Dates	Description
1	Filed: 01/12/2023 Entered: 01/13/2023	Notice of Removal
2	Filed & Entered: 01/13/2023	Notice (Other)
3	Filed & Entered: 01/13/2023	Notice (Other)
4	Filed & Entered: 01/17/2023	Return Receipt
5	Filed & Entered: 01/19/2023	Order Dismissing Case
6	Filed & Entered: 01/23/2023	State Court Papers
7	Filed & Entered: 01/24/2023	Return Receipt
8	Filed: 03/17/2023 Entered: 03/20/2023 Terminated: 01/25/2024	Notice of Appeal

9	Filed & Entered: 03/20/2023 Terminated: 01/25/2024	USCA Appeal Fees
10	Filed & Entered: 03/20/2023 Terminated: 01/25/2024	Transmission of Notice of Appeal and Docket Sheet to USCA
11	Filed & Entered: 03/21/2023 Terminated: 01/25/2024	USCA Notice of Appellate Case Opening
12	Filed & Entered: 03/21/2023 Terminated: 01/25/2024	USCA Records Request
13	Filed & Entered: 10/26/2023 Terminated: 01/25/2024	USCA Per Curiam
14	Filed & Entered: 10/26/2023 Terminated: 01/25/2024	USCA Judgment
15	Filed & Entered: 12/11/2023 Terminated: 01/25/2024	Stay of Mandate

16	Filed & Entered: 01/17/2024 Terminated: 01/25/2024	USCA Order
17	Filed & Entered: 01/25/2024	USCA Mandate

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SUPREME COURT
PRESS